

“CONSCIENCE AS THE ORGANISING CONCEPT OF EQUITY”

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Abstract

Equity is based on a methodology identified by Aristotle in his *Ethics* of mitigating the rigour of abstract rules and on the idea of conscience. Contrary to most of the assumptions made in the academic commentary on equity, a conscience is an objectively constituted phenomenon. This understanding of a conscience is a common place in the work of Freud and Kant, and in *King Lear* and Walt Disney’s *Pinocchio*. It is the internal policeman which family and society plant in our minds. Consequently, when a court judges in the name of conscience, that court is holding up the individual’s behaviour to an objective standard. This conceptualisation of conscience and of “unconscionability” is the common thread running through the law on dishonest assistance, secret trusts, bribery, proprietary estoppel, ownership of the home and so on. The centuries-old arguments about the efficacy of equity turn on this understanding of a conscience.

INTRODUCTION

There has only ever been one real argument about equity. It was running in the sixteenth century and it is still running today. Either one considers equity to be open-textured and just, ideally suited to a world of constant change and unexpected challenges; or one sees it as an enemy of order in the law, especially at a time when society needs certainty in its rules. That argument might have begun as a jurisdictional dispute between medieval courts, it might then have morphed into a dispute about whether courts of equity should have open discretion or operate a system of precedent, and it might then have refocused on the viability of the idea of “conscience” for the last four hundred years, but the modern arguments about constructive trusts, restitution and so forth are in essence that same argument in different clothing.

This argument is said to have begun in the reign of Henry II when the Lord Chancellor acquired a jurisdiction beyond the Council to dispense judgments which began

increasingly to disagree with the common law.¹ This fight for territory reached its peak when Lord Chief Justice Coke argued with Lord Chancellor Ellesmere about whether the judgments of equity should take priority over the common law. This resulted in the judgment in the *Earl of Oxford's Case* which set the foundations of an English equity which combined Aristotle's model of equity with the idea of conscience, both of which are set out below.² Subsequently, the argument shifted to a suspicion of the discretion which the numerous courts of equity³ deployed in the name of conscience. It was argued that the courts of equity were not bound by precedent at one time.⁴ Richard Francis began his *Maxims of Equity*, published in 1739,⁵ by confronting the assertion that decisions of courts of equity were "uncertain and precarious" because they were "not ... bound by any established Rules or Orders". His answer to this charge was that conscience would not cause judges to act arbitrarily but rather that each of those judges would "be guided by that infallible Monitor within his own Breast": that is, his conscience. Of course, to modern eyes this reads like the judges would be acting on the basis of their own, subjective consciences. In time, the argument shifted from this debate about unfettered discretion, which began to be resolved when Lord Chancellors like Ellesmere and Bacon began to consult precedents,⁶ to a debate about the open-textured nature of the idea of "conscience".

This essay considers the meaning of the term "conscience" in the context of equity. Most of the discussions of the law in this area have focused on a consequentialist examination of the cases in which the words "conscience" or "unconscionable" have been mentioned. They conclude correctly, that no clear definition of "conscience" is ever given by the judges in the cases.⁷ However, this leaves two stones unturned. First, a conscience is something that is "objectively constituted" and not entirely subjective, as most of the juristic discussions of conscience assume. Understanding that a conscience is something that is objective helps us to understand in turn that what the courts of equity are doing is to measure the defendant against an objective standard of acceptable behaviour. Second, the term "conscience" (and its technical corollary "unconscionable") does not need an *a priori* definition from the courts any more than the word "reasonable" requires such a dictionary-style definition from the common law courts. Rather, its meaning is to be derived from an analysis of the cases in which it has been used and by juristic discussion about what it should mean in the future.

¹ See G. Spence, *The Equitable Jurisdiction of the Court of Chancery* (London: Stevens and Norton, 1846), 117 *et seq.*

² (1615) 1 Rep. Ch. 1.

³ There were several courts of equity: the Court of Chancery, the Court of Requests, the Court of Star Chamber and several other courts which dispensed equity.

⁴ As Chief Justice Fortescue declared in 1452, "We are to argue conscience here, not the law": Mitch 31 Hen. VI, Fitz. Abr., *Subpena*, pl 23.

⁵ R. Francis, *Maxims of Equity* (2nd ed., London: Lintot, 1739).

⁶ See, for example, the cases cited by Spence, *op cit.*, 416.

⁷ See for example the excellent surveys of the case law and the lack of any clear definitions in M. Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability', (2010) 30 *Legal Studies* 408; N. Hopkins, 'Conscience, discretion and the creation of property rights' (2006) 26 *Legal Studies* 475; D. Klinck, 'The Unexamined "Conscience" of Contemporary Canadian Equity' (2001) 46 *McGill L.J.* 571; and M. Halliwell, *Equity and Good Conscience*, Old Bailey Press, 2004.

This essay advances an understanding of an objective conscience and demonstrates how that is viable in modern equity. We lawyers like to tell our stories and we like to build our models. This is the story of equity, the unmerited aggression it has attracted and the way in which a little wooden boy chose whether to grow up straight like the golden metwand his conscience required, or crooked like the timber that makes up most of humanity.

Roots

All that glitters is not golden

Lord Coke expressed a typical desire for order in the law when he said that:

“all causes should be measured by the golden and straight metwand of the law, and not to the incertain and crooked cord of discretion”.⁸

In other words, English law in the 17th century should prefer the golden metwand of the common law to the crooked cord of uncertainty that was offered by equity.⁹

A metwand is a measuring rod. Straight. Stiff. Accurate. Of course, it is useless at measuring anything which is not straight. There will always be a need for measuring things which are made in more intricate shapes. So, what sort of measure should we use if the metwand will not help us? Aristotle had an answer:¹⁰

‘An irregular object has a rule of irregular shape, like the leaden rule of Lesbian architecture: just as this rule is not rigid but is adapted to the shape of the stone ...’

Aristotle used this example of the Lesbian rule to explain how equity and formal legal rules interact. The Lesbian architects’ rule was made of a malleable lead which would enable stonemasons to measure the intricate coppice work for which the island’s workers were famous. This leaden rule was more useful in particular circumstances than straight rules, just as equitable principles can be more useful than common law rules in specific circumstances. Aristotle used this metaphor as an explanation of why equity would sometimes be “superior” to formal codes of justice:¹¹

⁸ Coke, 4 Inst. 41. Elsewhere he referred to “the crooked cord of private opinion, which the vulgar call discretion”: Co. Litt. 227b. Again, the invective in calling equity enthusiasts “vulgar”. In *Keighley’s Case* (1609) 10 Co. Rep. 139a he suggested that discretion should be “limited and bound with the rule of reason and law”.

⁹ Lord Hodson echoed that sentiment in *Pettitt v Pettitt* [1970] A.C. 777, 808, the case which ironically spawned so many different approaches to the ownership of the home in England and Wales based on common intention.

¹⁰ Aristotle’s *Nicomachean Ethics* (trans. JAK Thomson, Penguin Classics, 1955), p.198.

¹¹ *Ibid.*

‘... equity, although just, is better than a kind of justice ... it is a rectification of law in so far as law is defective on account of its generality. This in fact is also the reason why everything is not regulated by law [as opposed to equity]: it is because there are some cases that no law can be framed to cover, so that they require a special ordinance [or judgment]. An irregular object has a rule of irregular shape, like the leaden rule of Lesbian architecture: just as this rule is not rigid but is adapted to the shape of the stone, so the ordinance [or judgment] is framed to fit the circumstances’

Aristotle argued for a qualified superiority of equity over strict systems of formal justice because equity can tailor a remedy to meet the needs of a particular case whereas formal rules can only legislate for the universal case. It is important to note that Aristotle was aware of the tension between an equity which could overrule legislation and the need for formal justice. I have argued that this should not be an argument for the eradication of equity¹² or of rigid rule-making, but rather have argued for a synthesis of these different types of law to be used where appropriate in different circumstances, as discussed below.¹³ For Aristotle, the two systems should work together to ensure that justice is achieved for the individual. If the legal system is predicated on the need for justice, then there does not need to be conflict between these two systems of law.¹⁴

Equity specialists simply have a different perspective from legal positivists on humanity and on the need to treat individuals (on some occasions) as being ends in themselves. Immanuel Kant said that “from the crooked timber of humanity no straight thing was ever made”.¹⁵ Human beings are quixotic, irrational creatures for all their supposed rationality and need for order. Consequently nothing entirely ordered comes from them. Anyone who has practised law would acknowledge this: clients can be tearful, angry, deceitful, fragile, irrational and indeed sometimes crooked. Family lawyers have long recognised that they must use high-level principles to evaluate the needs of the human beings who come in front of them, and then frame the remedy to fit the circumstances.¹⁶ Financial regulation has long since abandoned the hope that rigid rulebooks would deal with the non-stop movement in financial markets and instead have based their rulebooks on high-level principles which act as aids to interpretation for the more detailed regulations.¹⁷

¹² See, however, P. Birks, ‘Trusts raised to avoid unjust enrichment: the *Westdeutsche* case’ [1996] RLR 3; J. Beatson, *Use and Abuse of Unjust Enrichment*, Clarendon, 1991; and P. Jaffey, *The Nature and Scope of Restitution*, Hart, 2000 who have argued for the extinguishment of equity in favour of the emerging confusions of English unjust enrichment thinking.

¹³ A.S. Hudson, *Great Debates in Equity & Trusts* (Basingstoke: Palgrave, 2014), 250.

¹⁴ In *Cowper v Cowper* 2 P.W. 752 Sir Joseph Jekyll explained this mutual support between these areas of law when he held that: “The discretion which is exercised here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy, in others again, it relieves against the abuse, or allays the rigour of it”.

¹⁵ I. Kant, *Idea for a General History with a Cosmopolitan Purpose*, 1784, proposition 6.

¹⁶ *Miller v. Miller, Macfarlane v. Macfarlane* [2006] UKHL 24, [2006] 2 A.C. 618.

¹⁷ *R (British Bankers Association) v. Financial Services Authority* [2011] EWHC 999 (Admin), [2011] Bus L.R. 1531. See A.S. Hudson, *The Law of Finance*, 2nd ed., Sweet & Maxwell, 2013, 9-33 *et seq.*,

(Those two contexts are considered in greater detail below.) Different types of rule-making and dispute resolution are necessary in the modern world.

This is not to argue that orderly rule-making is unimportant; rather, it is to argue that a different form of dispute resolution will be appropriate in some circumstances. Consequently, Aristotle identified that no formal system of rules can hope to deal fairly with all of the issues which may be raised. The question is how well equity can fill that gap.

For this limited and entirely moral Aristotelian ambition, the existence of equity as a distinct stream of law in England has always enraged those common lawyers who see it as being subversive of the need for good order in legal rules. Its incremental development of principles and the supposed discretion of its judges was said to threaten the order which the common law sought to create. In giving judgment, Chief Justice Hale said that “By the growth of equity on equity the heart of the common law is eaten out”.¹⁸ That is quite a charge. Indeed that sort of unnecessarily bitter invective continues in the modern discussion. Birks infamously described people who were prepared to allow conscience to underpin an area of law as being akin to the vile Nazi Heydrich, architect of the final solution and thereby the holocaust, who expressed himself as being able to reconcile his evil with his conscience. While Birks may have claimed he was merely showing that all involved were falling into the same mistake as Heydrich, the metaphor is deeply unpleasant.¹⁹ All of this invective is all the more remarkable given that the principal goal of equity specialists is to work sensitively so as to prevent unconscionable advantage being taken of claimants and so as to achieve just results in particular cases.

It has been suggested that judges like Lord Browne-Wilkinson have “discovered” the idea of conscience in England and Wales only in the mid-1990s. The response to that suggestion is threefold. First, those commentators simply failed to notice that judges like Megarry VC in *Re Montagu’s ST*,²⁰ Scott J in *Spycatcher*²¹ and others always used the idea of “conscience” in their judgments. Second, English law was turned on its head by the open-textured juristic imagination of Lord Denning which brought so many equitable ideas with it. In the 1980s, the courts determinedly dismantled many of his ideas like estoppel licences, the new model constructive trust and the married woman’s equity.²² Consequently, that sort of discretionary talk became

especially the discussion of the Financial Conduct Authority’s *Principles for Businesses Rulebook* which underpins the entire regulatory structure in the UK.

¹⁸ *Rosecarrick v. Barton* (1672) 1 Ch. Cas. 217, 219.

¹⁹ P. Birks, ‘Trusts raised to avoid unjust enrichment: the *Westdeutsche* case’ [1996] R.L.R. 3, 20. For a counter-blast to this unpleasant line of argument see A.S. Hudson, *Great Debates in Equity & Trusts*, (Basingstoke: Palgrave, 2014), 64 and S. Hedley, ‘The taxonomy of restitution’, in Hudson, A.S. (ed), *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish, 2004), 151. Both marvel at the use of the holocaust to cause such a weak debating point, as though arguing for a constructive trust were equivalent to arguing for genocide.

²⁰ [1987] Ch. 264.

²¹ [1990] A.C. 109.

²² For the attitude underpinning the former see e.g. *Eves v. Eves* [1975] 3 All E.R. 768, 771 where Lord Denning warned us that “Equity is not past the age of child-bearing”; and for an example of the latter see cases like *Ashburn Anstalt v. Arnold* [1989] 1 Ch. 1 which took those developments apart.

unfashionable.²³ When this demolition work was finished, it became possible for the conscionable brickwork of equity to be seen again. Third, in an increasingly complex world, we retreat into examinations of our values and of our principles. In essence, we return to our roots.

The roots of equity

Two intellectual roots of equity

There are two intellectual roots to equity which are significant. The first is Aristotle's *Ethics*.²⁴ For Aristotle, equity is "superior to justice" in the sense that it allows decisions to be reached in individual cases which correct "errors" made by legislators when creating general rules in legislation ("for all law is universal") which did not anticipate individual injustices which might result in their application. Importantly, however, Aristotle explained that equity is also supportive of formal justice (such as statute) in essence because both streams of law are intended to generate justice. Ashburner in his *Principles of Equity*²⁵ suggested that "Equity is a word which has been borrowed by law from morality, and which has acquired in law a strictly technical meaning"; and in the first footnote accompanying that opening remark that "Text writers and judges in the time of Elizabeth, when they are dealing with the jurisdiction of the Court of Chancery, often define equity in terms translated from Aristotle", which was an idea he took in turn from Spence and which is evident from judgments of the period.²⁶ Lord Ellesmere, the Lord Chancellor, held as follows in the *Earl of Oxford's Case*, in describing the purpose of the Court of Chancery:²⁷

'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.

Self-evidently, his lordship was echoing Aristotle's ideas very closely in that equity exists in part to meet circumstances in which the general rules of common law fail to provide just outcomes.

The second root of equity is the specifically conscience-based equity which was developed in England. The concept of conscience was established in this area by the time of the judgment of Lord Ellesmere in that same case when he explained that:²⁸

²³ The Australian courts were equally suspicious of it, considering that Denning's equitable developments were to be considered to be "a mutant from which further breeding should be discouraged": *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685, 701.

²⁴ Very similar accounts of equity as it related to Aristotle's four-tiered model of justice appear in the *Nicomachean Ethics* (Aristotle, *Nicomachean Ethics* (trans. JAK Thomson, Penguin Classics, 1955), 198) and in the *Eudemian Ethics* (Aristotle, *Eudemian Ethics* (trans. A Kenny, Oxford, 2011), 71).

²⁵ D. Browne, *Ashburner's Principles of Equity* (2nd ed., William Clowes and Sons, 1933), 3.

²⁶ Citing, *inter alia*, Spence, *op cit.*, 412n.

²⁷ (1615) 1 Rep. Ch. 1.

²⁸ *Ibid.*

‘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...’

Thus conscience is already considered to be at the heart of English equity. We shall consider the idea of conscience in greater detail below. We shall identify the significance of its use by Lord Chancellors who were clerics tending the monarch’s conscience, the significance of these clerics addressing the impure consciences of people who had committed frauds, the significance of the court “correcting” someone’s conscience according to an objective idea of what that conscience ought to contain, and the significance of the Court of Chancery interfering only when there have been unconscionable wrongs committed which the common law cannot prevent.

The sublime conscience

The Lord Chancellors (until the appointment of Lord Keeper Williams at the beginning of the 17th century) had all been ecclesiastics.²⁹ Therefore, the language of a sublime conscience in which they spoke, as bishops in the Christian church, who ministered and administered the monarch’s Conscience, came naturally to them when making judgment. They “ministered” in the sense of acting as priests and as de facto “prime minister” to the monarch. They “administered” in the sense of running the Chancery which issued writs on behalf of the Crown, and latterly running the Courts of Chancery and of Star Chamber.

Nevertheless, in all of this there remains a very important root for the modern, psychological notion of a conscience. The Lord Chancellor was often referred to as being the “Keeper” of the monarch’s conscience, which suggested that the conscience was something distinct from the monarch as a person.³⁰ As sovereign, the King or Queen had divinely-bestowed royal duties as well as a corporeal self. Therefore, the conscience that was activated through the Courts of Chancery was an expression of this monarchical power. When we consider the psychological understandings of a conscience today, we shall see that this separateness of the conscience from the conscious mind of the individual human being is central to its operation.

Fascinatingly, Ashburner explained the operation of conscience in the 16th century as involving the court helping the defendant to purge themselves of a bad conscience because the conscience was the voice of God singing in the individual’s head. So, it was said that “from the canon law equity derived its power of wringing a confession on oath from the conscience of the defendant”. Equity was not above using irons or whips at that time.

²⁹ G.W. Thomas, ‘James I, equity and Lord Keeper John Williams’ (1976) *English Historical Rev* 506.

³⁰ As Sir Christopher Hatton said, it is “the holy conscience of the Queen, for matter of equity”, quoted in Spence, *op cit*, 414.

So, we can identify the roots of equity in this ancient soil. What this does not do is to take us to the heart of what a modern conscience might involve. It is to that task which we turn next.

CONSCIENCE AND “UNCONSCIONABILITY”

The argument

Whenever I read an account of equity or of conscience written by a legal academic, I assume that they will turn to define the word “conscience” in its colloquial or psychological sense. Aside from the excellent Young, Croft and Smith’s *On Equity*³¹ or my own work,³² they never do. I am always surprised because it seems to me that many of their concerns about the term “conscience” being uncertain or amorphous could be resolved if they did so.

By way of an excellent example of a scholarly analysis of these concepts in the cases, Dixon³³ criticised the waxing and waning of the term “unconscionability” in the doctrine of proprietary estoppel in the wake of the decisions in *Cobbe v Yeoman’s Row Management*³⁴ (in which Lord Scott appeared to limit the doctrine greatly) and *Thorner v Major*³⁵ (in which Lord Walker and Lord Rodger opened it out again) by demonstrating that the doctrine of unconscionability was never clearly defined. He also identified Lord Walker’s odd abandonment of the idea of unconscionability in *Cobbe* after having advanced it so clearly in *Jennings v Rice*.³⁶ His focus is not on defining what is meant by conscience. The same is true of Hopkins³⁷ and Klinck³⁸ who both model the different approaches taken in different cases where judges have mentioned the concept of unconscionability.

What this commentary does not do is to define the meaning of conscience nor does it explain how such a concept underpins the important work that equity does. It is that project which is undertaken here.

In essence, the point which is advanced here is that a conscience is objectively constituted and that the courts are therefore judging what should have been in that conscience. As Chadwick LJ held:

³¹ P. Young, C. Croft and M. Smith, *On Equity* (Law Book Co, 2009), 105 *et seq.*

³² E.g. A.S. Hudson, *Equity & Trusts* (8th ed., Routledge, 2014), section 37.2.

³³ M. Dixon, ‘Confining and defining proprietary estoppel: the role of unconscionability’, (2010) 30 *Legal Studies* 408.

³⁴ [2008] 1 W.L.R. 1752.

³⁵ [2009] 1 W.L.R. 776.

³⁶ [2002] EWCA Civ. 159.

³⁷ N. Hopkins, ‘Conscience, discretion and the creation of property rights’ (2006) 26 *Legal Studies* 475.

³⁸ D. Klinck, ‘The Unexamined “Conscience” of Contemporary Canadian Equity’ (2001) 46 McGill L.J. 571.

‘The enquiry is not whether the conscience of the party who has obtained the benefit ... is affected in fact; the enquiry is whether, in the view of the court, it ought to be’.³⁹

This is the point: the courts are measuring what a person *ought to have* thought, what their conscience ought to have prompted them to do. And the court is able to do that because the court stands for an objective statement of the values which should have been input to a person’s conscience. Klinck argues that “conscience is not co-extensive with moral conscience”,⁴⁰ but one has to ask “why not?” If Klinck means that the legal model of conscience cannot be involved with every minor moral imperfection (such as untrue answers to the questions “have you washed your hands?” or “do you really love me?”), then that is sensible. Otherwise, equity has always been wrapped up with general questions of morality framed in legal terms.

From “unconscionability” to conscience

The term “unconscionability” is a term of art. If we want to know what unconscionability means in a particular sense then we have only to examine the most recent case in the applicable jurisdiction on the most relevant equitable principle. For example, the concept of “unconscionability” in relation to liability for knowing receipt is defined in part by the judgment of Nourse LJ who found in *BCCI v Akindele*⁴¹ that it did not include someone who could not have known that his financial advisors were breaching their fiduciary duties to their employers by overpaying him on his investments. Not investigating something which one could not have found out easily will not impose liability in the same way, as in *Re Montagu’s Settlement*,⁴² that forgetting the terms of a trust will not impose liability on a beneficiary who absent-mindedly puts the pick of the trust fund up for sale at auction. These cases help us to know what unconscionability means in this area. This may smack of casuistry; or, as moral philosophers would prefer to call it, consequentialism. Nevertheless, it stands for the way in which common law systems defines terms of this sort.

Sometimes these definitions are surprising. We know from the judgment of Lord Upjohn in *Boardman v Phipps* that a defendant may be required to hold profits on constructive trust for the beneficiaries of a trust he had been advising as the trust’s solicitor, even though he it was considered that he had a “conscience completely innocent in every way”.⁴³ His actions were nevertheless considered by the majority of the House of Lords to have infringed a central requirement of equity that a fiduciary must not benefit from a conflict of interest. This is not a general moral question, rather it is a legal question. A general moral analysis might lead us to the supposition that a person who risked their own money, as a result of their own

³⁹ *Jones v Morgan* [2001] EWCA Civ. 995, [35].

⁴⁰ D. Klinck, ‘The Nebulous Equitable Duty of Conscience’ (2005) 31 Queen’s L.J. 206, 212.

⁴¹ [2000] 4 All E.R. 221.

⁴² [1987] Ch. 264.

⁴³ [1967] 2 A.C. 46, 123.

extensive research and skill, so as to make profits for themselves and other people should be entitled to keep those profits. By contrast, English equity finds that because that person was a fiduciary at the time then they are required to hold those profits on constructive trust. The unconscionability in the technical sense of that term is based on a fiduciary permitting a conflict of interest to occur.⁴⁴ (Another approach to the moral question might be to say: the defendant was a solicitor who had studied English trusts law and who therefore ought to have known that he was not entitled to take profits for himself from a trust to which he was giving legal advice without authorisation to do so, and therefore a constructive trust was entirely appropriate.)

The point is that the concept of what constitutes unconscionable behaviour in legal terms is defined in part by a line of authority, just as a section of hedge helps to define the perimeter of a field. The field is defined by the accumulation of those sections of plant that grow into a complete hedge. The shape of the field can move by the addition or removal of hedging material. In the same way, what is meant by the technical concept of unconscionability is defined by the passage of time and the shifting topography of case law and commentary.

So, if we want to know what unconscionability means in general terms then we have only to conduct a survey of the most recent binding precedents across that field covered by the equity textbooks.⁴⁵ It is not unknowable simply because the field is large. It is very knowable indeed. In many circumstances, it is possible to use external statements of appropriate behaviour (especially where there is a regulatory code binding on the defendant) to provide a yardstick for unconscionable behaviour in that context.⁴⁶

Defining “conscience”

By contrast, the idea of a conscience is a different question. Many commentators choose not to think about a conscience at all or they fail to answer their own question. The answer to the question “what is a conscience?” is not to be found by addressing the different question “what does unconscionability mean to equity?” The assumption that is made is that a “conscience” is something entirely subjective and consequently inappropriate as the foundation of a system of private law. However, the conscience is not something which is entirely subjective. Rather, as a

⁴⁴ *Bray v. Ford* [1896] A.C. 44, 50, *per* Lord Herschell: “It is an inflexible rule of the court of equity that a person in a fiduciary position ... is not allowed to put himself in a position where his interest and duty conflict”.

⁴⁵ This is a field in which there are many colossal textbooks (intended for practitioners and for students). Professor Klinck’s encyclopaedic articles in the area illustrate quite how many cases there are in English and in Canadian law which have used the terms “conscience” and its derivatives (D. Klinck, ‘The Unexamined “Conscience” of Contemporary Canadian Equity’ (2001) 46 McGill L.J. 571; D. Klinck, ‘The Nebulous Equitable Duty of Conscience’ (2005) 31 Queen’s L.J. 206).

⁴⁶ A.S. Hudson, ‘The synthesis of public and private in finance law’ in *Private Law: Key Encounters with Public Law*, K. Barker and D. Jansen (eds) (Cambridge University Press, 2013), p.231-264.

psychological phenomenon, it is experienced subjectively by the individual but in truth it is formulated from objective elements.

The etymology of the English word “conscience” is a combination of the word “con”, meaning “with”, and the word “science”, meaning “knowledge”. This idea of “knowledge with” comes from the ancient Greek “suneidenai” and refers to a person having “knowledge of oneself with oneself”. In particular, the root of the Greek word suggested specifically “sharing knowledge of a defect held with oneself”.⁴⁷ Here the individual has two separate components in their conscious mind: their conscious self and their conscience, which share knowledge of a defect together. Significantly, conscience is not simply subjective knowledge of oneself, but it recognises the existence of a conscious self and another self within one’s mind. It was also argued that a conscience at the time of the ancient Greeks pre-supposed the existence of a law which was being broken so that a defect would come to light.⁴⁸

The conscience as an objective phenomenon

The principal error into which most commentators fall when talking about conscience is in treating it as being an entirely subjective phenomenon which exists solely in the individual human’s mind (so that there are seven billion entirely unique consciences in the world). In truth, the conscience exists outside the conscious mind in that there is no possibility of conscious control over it by the rational mind, as was suggested by the etymology of the word “conscience” above. Sigmund Freud explained the creation of the conscience as a psychological phenomenon in *Civilisation and Its Discontents* in the following way:⁴⁹

‘... a portion of the ego [sets] itself up as the super-ego in opposition to the rest [of the psyche], and is now prepared, as “conscience”, to exercise the same severe aggression against the ego that the latter would have liked to direct towards other individuals. The tension between the stern super-ego and the ego that is subject to it is what we call a “sense of guilt”; this manifests itself as a need for punishment. In this way civilisation overcomes the dangerous aggressivity of the individual, by weakening him, disarming him and setting up an internal authority to watch over him, like a garrison in a conquered town.’

Thus, the conscience is assembled inside the mind with inputs from outside that individual mind. During infancy those messages come from parents and other family members; during childhood they also come from schoolteachers and others; and then during adulthood there is the legal system, the media and so forth all directing

⁴⁷ R. Sorabji, *Moral Conscience Through The Ages* (Oxford University Press, 2014), 12.

⁴⁸ *Ibid.*

⁴⁹ S. Freud, *Civilisation and its Discontents*, (Harmondsworth: Penguin, 1930), 77.

different inputs to the individual's mind.⁵⁰ Kant explains conscience in the following way:⁵¹

'Every human being has a conscience and finds himself observed, threatened, and, in general, kept in awe by an internal judge; and this authority watching over the law in him is not something that he himself makes, but something incorporated into his being. It follows him like his shadow ...'

The Kantian model captures the same aggression that Freud identified: the conscience bites and it threatens.⁵² The result is a conscience which contains an aggregation of individual responses to those social messages. The upshot is that our culture frequently presents the conscience as being something that is not only objectively constituted but which also exists entirely outside the conscious human mind.

The ubiquity of the externalised conscience in our culture

Our literature and popular culture teem with examples of this sort of externalised conscience. In Shakespeare's *King Lear*, the Fool acts as conscience to the King both as a capering amusement but more significantly as someone who tells inconvenient truths to the King and who points out his folly. The King's descent into madness comes when, importantly, he banishes his Fool. This was a frequent trope of European theatre: the capering fool as conscience, idiot savant and truth-teller.

Perhaps the clearest explanation of the external conscience comes from Walt Disney's *Pinocchio*. You may be familiar with the story but you may have forgotten how important the idea of conscience was to the Disney version of the story.⁵³ Pinocchio was a little wooden boy crafted by Geppetto who came magically to life thanks to a visiting Blue Fairy who wanted to reward Geppetto for his good works. However, the Blue Fairy realised that Pinocchio would lack a conscience and therefore could not be a real boy. Consequently, Jiminy Cricket is elevated by the Blue Fairy specifically to act as Pinocchio's conscience. It was the addition of Jiminy Cricket to his psyche that was essential in making Pinocchio into "a real boy". Jiminy Cricket is a literal, external conscience.

Fascinatingly, the Fairy explains to Pinocchio at the outset that having a conscience, and thus proving himself to be worthy of becoming a real boy, requires that he be "brave, truthful and unselfish". The point is that the Fairy stipulates from the outset

⁵⁰ N. Elias, *The Society of Individuals*, (London: Continuum, 2001).

⁵¹ I. Kant, *Metaphysics of Morals* (1797), Cambridge University Press, 1996, 189.

⁵² The Anglo-Saxon expression the "Agonybite of Inwyt" captures this: literally, the agonising bite of internal wit; or, a pang of conscience. The original metaphor of a "bite" is more visceral than the modern "pang" which suggests something slight.

⁵³ The story of Pinocchio is based on Carlo Collodi's *Le Avventure di Pinocchio* first published in 1881 which was intended to be a warning to children. The character of Jiminy Cricket was a characteristic anthropomorphic development in the Disney version of the story which enlarged a cricket into a talking conscience, complete with top hat, umbrella and spats.

what the contents of Pinocchio's conscience should be. The contents of his conscience are dictated from outside himself, just like the psychological model of a conscience. Pinocchio does not decide for himself subjectively what is in good and bad conscience. Instead, Pinocchio misbehaves and his conscience (in the form of Jiminy Cricket) reproves him for it, and ultimately saves him from being transformed into a "jackass". As Pinocchio puts it: "He's my conscience. He tells me what's right and wrong."⁵⁴

The point is that the conscience in equity is an objectively constituted conscience: the question for the court is what a person's conscience *ought* to have told them to do.⁵⁵ The court is not asking the defendant what they personally claim to think is right or wrong. Instead, the court is asking what that person's conscience, formed by inter-action with that society, ought to have prompted them to do.

The objective conscience at work: dishonest assistance

A good example of an objective form of unconscionability at work is the concept of "dishonesty" established in the Privy Council in *Royal Brunei Airlines v Tan*.⁵⁶ Lord Nicholls held that the concept of dishonesty was not a subjective one but rather that the task which faced the judge was an assessment of what an honest person would have done in the circumstances:⁵⁷

'... acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstance. This is an objective standard.'

So, a defendant was not dishonest because subjectively they believed themselves to be dishonest but rather because that person had failed to do what an objectively honest person would have done in the circumstances. As with conscience, society through the agency of the judge is deciding what an honest person should do.

The criminal law specialist, Lord Hutton, could not let go of the criminal standard of dishonesty in *Twinsectra v Yardley* in the House of Lords.⁵⁸ Consequently, he held that dishonesty must involve both a failure to act as an honest person would have acted in the circumstances and also an appreciation on the defendant's part that honest people would have considered their behaviour to have been dishonest. It is this latter subjective element which characterises the criminal law approach. It is also this latter element which was disavowed by the Privy Council in *Barlow Clowes v*

⁵⁴ This causes Lampwick to ask: "What? You mean you take orders from a grasshopper?"

⁵⁵ The same point can be made by reference to the philosophy of aesthetics presented by Adorno whereby the appreciation of art is said to be objectively constituted (by the receipt of messages about what constitutes real art) and yet to be subjectively situated (in that one appreciated art within one's own mind): see A.S. Hudson, *Great Debates in Equity & Trusts* (Basingstoke: Palgrave, 2014), 17.

⁵⁶ [1995] 2 A.C. 378.

⁵⁷ [1995] 2 A.C. 378, at 381.

⁵⁸ [2002] 2 All E.R. 377.

*Eurotrust*⁵⁹ because it made it too easy for a defendant to argue that his personal moral code permitted him to do the thing which the common morality would have considered dishonest – in that case, the defendant turning a blind eye to the source of the funds which he was being asked to pay through his small fund in the Isle of Man while claiming that his personal moral code prevented him from cross-questioning a client as to the source of his funds. So, equity here does not allow subjective moral relativism. Rather it deals in objective standards.

This objective approach in the case law has not been without its problems. Most of those problems have come from a determination among the judges to see dishonesty as involving some level of subjectivity. Lord Nicholls held that “The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.”⁶⁰ This single sentence in a twelve page judgment which otherwise advances purely objective tests has been relied upon by numerous judges to justify taking into account a range of subjective factors about the defendant⁶¹ ranging from their educational lack of attainment,⁶² their lack of experience⁶³ through to the stigma that would attach to their professional reputation if they were found to be dishonest.⁶⁴ By way of example, in *Markel International Insurance Co Ltd v Surety Guarantee Consultants Ltd*⁶⁵ Toulson J spent several pages of his judgment examining the subjective situation of the defendant when supposedly applying an objective test. If the test had been entirely objective then his lordship would have been better directed to ignore those dozen pages of the defendant’s personal history in favour of an assessment of what an honest person would have done in those circumstances.

The model suggested by Lord Nicholls demonstrates how an objective concept can work. The court has no interest in the defendant’s personal beliefs, except to the extent that the circumstances in which the defendant found themselves shed light on the way in which an objectively honest person might behave. There is an issue about whether or not this concept of dishonesty actually equates to unconscionability at all. Lord Nicholls was at pains to point out that his test drew on the decision of Lord Selborne in *Barnes v Addy*⁶⁶ to the effect that the defendant must be dishonest and that it did not involve a general concept of unconscionability. And yet, this approach puts this area of law generally in line with other equitable doctrines which are concerned with the conscience of the defendant, whether that be as a result of theft, fraud, breach of fiduciary duty or, in this instance, dishonesty.

Equity as a methodology

⁵⁹ [2005] UKPC 37.

⁶⁰ [1995] 2 A.C. 378, at 391.

⁶¹ *Starglade v. Nash* [2010] EWCA Civ. 1314.

⁶² *Ibid.*

⁶³ *Manolakaki v. Constantinides* [2004] EWHC 749; *Markel International Insurance Co Ltd v. Surety Guarantee Consultants Ltd* [2008] EWHC 1135 (Comm).

⁶⁴ *Twinsectra Ltd v. Yardley* [2002] 2 All E.R. 377, 387, *per* Lord Hutton.

⁶⁵ [2008] EWHC 1135 (Comm).

⁶⁶ (1874) 9 Ch. App. 244.

Equity is a way of thinking as much as anything. For Aristotle it was a means of creating just outcomes from the application of limited formal rules. More generally, equity is one of those areas of law which uses high-level principles as moral precepts and aids to interpretation of more detailed rules. Thus, the idea of conscience supports the imposition of constructive trusts over people who acquire property from a trust by fraud both by reference to the general moral question of good conscience and as to the detailed case law, for example, on tracing property rights or the imposition of proprietary constructive trusts.⁶⁷ However, if we think of equity as being a methodology – using both general principles to guide decision-making and detailed rules developed as part of a doctrine of precedent – then we can identify different (even purer) forms of equity in other legal fields. Two examples are family law and finance law.

In UK finance law⁶⁸ there is a combination of financial regulation (created further to EU and UK statute by statutory regulatory bodies) and of ordinary substantive law (both case law and statutory principles relating to contract, tort, property, trust and so forth).⁶⁹ UK financial regulation is predicated on the Principles for Businesses Rulebook (“PRIN”) which is used as a means of interpreting all of the thousands of more detailed regulations in the Financial Conduct Authority and Prudential Regulation Authority “Handbooks”.⁷⁰ The first principle in PRIN is the requirement that every regulated person act with “integrity”. This requirement has been used by the regulatory authorities to impose fines on financial institutions where their behaviour has fallen below the standards expected of them. Interestingly, this general standard of integrity has been used as the justification for the fine and not more detailed regulations in other parts of the Handbook which had also been breached. This is form of equity: a general moral standard is being used to underpin and to apply detailed rules.

Similarly in family law there is a methodology of using high-level principles which are applied to individual cases in a way that is sensitive to context and which observes the rule of precedent after a fashion as a guide to the interpretation of those high-level principles. So, this equity-like methodology is a way of taking a high-level principle and applying it to the needs and circumstances of a particular family group in a way that is both principled and yet sensitive to context. By way of example,

⁶⁷ *Westdeutsche Landesbank v Islington* [1996] A.C. 669.

⁶⁸ It is appropriate to talk of UK finance law because so many of its regulations are created as part of EU law and therefore the UK is the appropriate jurisdiction. However, when one considers the general law of contract, property and so forth, then there are different jurisdictions within the UK: England and Wales, Scotland, and Northern Ireland. In dealing with academic colleagues in Australia and in Canada, the effect of the presence of the European Union (like that of an enormous orbiting moon with a strong gravitational pull) is something which is difficult to explain. For example, there are few cases on unit trusts in the UK on the basis of trusts law because unit trusts are now regulated by the Financial Conduct Authority with its cheap, efficient Financial Services Ombudsman scheme.

⁶⁹ See AS Hudson, *The Law of Finance* (2nd ed., Sweet & Maxwell, 2013), Chapter 3 generally for an explanation of the structure.

⁷⁰ The unfortunately named “Handbooks” contain both the regulatory “Rules” and the “Guidance” governing regulated persons.

Baroness Hale and Lord Nicholls held in *Miller v Miller, Macfarlane v Macfarlane*⁷¹ that applications for ancillary relief required the court to consider the needs of the family members, equal sharing of matrimonial property and family assets, and compensation. This decision (in turn following the earlier decision of the House of Lords in *White v White*⁷²) creates a means for lower courts to interpret the general principles applying to ancillary relief proceedings both by establishing general principles and by adding a gloss to earlier general principles. The fashion in which family law observes precedent is to see the law as being comprised of high-level principles with guidelines set out in the cases as to their application, as opposed to seeing the law as being comprised of hard-and-fast rules.

The purest form of the use of equitable technique in English law may be family law. Section 1 of the Children Act 1989, for example, provides that the welfare of the child is paramount. This statutory principle creates a high-level, central principle but one which is developed in the case law in a way that moral philosophers would describe as being “consequentialist”: that is, by developing the meaning of that principle through successive cases. That there is a central principle would be described by moral philosophers as being part of a “deontological” method: that is, where a central moral principle is established which governs all decision-making. Common law systems do both things: they develop their principles consequentially from case-to-case, and they also observe rules and principles which were set out in earlier cases. Equity does not operate as a completely deontological project because its principles are developed through cases: for example, a rule concerning bribery arises only once a case on bribery appears, and so on. Nor is equity completely consequentialist because it has its general principles of “conscience” to guide it, and because the courts intermittently state or re-state its core principles.

These two methodologies – the consequentialist and the deontological – slip over one another like wet crabs in a basket in the equitable context. Equity uses high-level principles and precedents on the interpretation and meaning of those principles, and their application to individual cases, to achieve its goal of mitigating the rigour of the common law and correcting people’s consciences. Equity is thus a methodology in itself.

Discretion in equity

Much of the foregoing and ongoing debate about equity revolves around a supposed binary division between “discretion” and “not discretion”. It is supposed that “discretion” is bad because it permits judges to do whatever they want and in consequence it is presumed that the law is rendered unpredictable and chaotic. By contrast, “not discretion” assumes a series of carefully crafted taxonomic categories which present order and good sense: something which is not necessarily apparent in the English law of negligence, for example.

⁷¹ [2006] UKHL 24.

⁷² [2001] 1 A.C. 596.

Of course, the courts do neither thing. Instead, the English courts have always applied a form of “weak discretion” in their use of equity. A strong discretion would involve the courts in making any decision that they saw fit. The model of strong discretion which was feared by Lord Eldon and judges of a similar ilk was a form of discretion in which the courts of equity were simply doing whatever they thought “right” in the abstract, perhaps by reference to general ethical principles expressed through the maxims of equity as drawn together by Francis and others.⁷³ This accompanied the debates about whether or not equity was governed by a doctrine of precedent at all. English courts have always been reluctant to do this. There are many examples of the English courts diluting any ostensibly strong discretion they may have. Where the courts were given the power by statute to grant injunctions whenever they considered it to be just and equitable, the Court of Appeal in *Jaggard v Sawyer*⁷⁴ set out limitations on the way in which those statutory powers would be used by the courts in practice, and each court continues to abide by those probanda.

A weaker form of discretion is still possible under the Aristotelian model: that is, the correction of the application of formal legal rules in particular cases in line with precedent and in line with clear principles setting out the way in which deviation from those formal legal rules is possible. A good example of this phenomenon is the law on secret trusts in England. The general principle is that a person may not knowingly act in a way which ought to have affected their conscience.⁷⁵ The case law precedent has clearly established that it is contrary to conscience, for example, for a person to agree to take property under a friend’s will (on the understanding that they will apply that property for the maintenance of the testator’s illegitimate child) and then to purport to take that property beneficially because no living person knows of the arrangement.⁷⁶ This line of cases, establishing the principle known as “secret trusts”, offends the provisions of s.9 of the Wills Act 1839 that a bequest in a will is only valid if it complies with the formalities set out in that statute, and moreover that a formally valid will may not be circumvented by parol evidence. However, the “friend” in this example would clearly be acting unethically in knowingly taking property not intended for them and would be causing harm to the child who was intended to be maintained by that property. Presumably the child’s mother would be the one to propel the matter to court in practice. It is a clear example of Aristotle’s equity that prompts a judge to prevent this unconscionable benefit being taken from the bequest: the statute did not anticipate this self-evident wrong and therefore the judge ought, on Aristotle’s model, to correct the legislator’s shortcomings in failing to anticipate that scenario. Assuming the matter comes up to proof, then an English judge would be acting in accordance with precedent in finding that there was a “secret trust” in existence. The approach taken in the case law is a weak discretion, even though it contravenes the Wills Act, because it is an example of an unconscionable act which will invoke the creation of a trust which has been

⁷³ Francis in his *Maxims of Equity*, 2nd ed., 1739 and Snell in his *Equity* in 1838 both used the approach of beginning with ancient equitable maxims and linking them to decided cases.

⁷⁴ [1995] 1 W.L.R. 269.

⁷⁵ *Westdeutsche Landesbank v Islington* [1996] A.C. 669.

⁷⁶ The case law in this area can be traced back at least to *Sellack v. Harris* (1708) 2 Eq. Ca. Ab. 46 through *McCormick v. Grogan* (1869) L.R. 4 HL 82.

established by precedent and which prompts the judge to circumvent the statutory formalities when the authorities permit them to do so. Moreover, the judges only make their finding of a secret trust if the facts are clear and the requirements set out in earlier cases satisfied.

Another interesting example of discretion in English law is proprietary estoppel. At the time of writing, proprietary estoppel is the closest that English equity comes to a remedial constructive trust. Indeed, a part of the reason for there being less of a clamour for a remedial constructive trust in English law is twofold. First, the constructive trust is divided into well-established categories which operated institutionally in quite predictable ways. That is, the constructive trust comes into existence automatically at the time when the defendant's conscience is said to have been affected by the matter which ought to have affected their conscience. As the House of Lords in *Westdeutsche Landesbank v Islington*⁷⁷ accepted, seemingly unanimously on this point, the requirements of the law on insolvency were such that this institutional clarity was a necessary facet of the English approach. Second, proprietary estoppel fulfils the need for a remedial doctrine. That proprietary estoppel is remedial is clear. In some cases, the court will award a purely personal remedy for an amount of money as in *Jennings v Rice*⁷⁸ where a payment of £200,000 was ordered; whereas in other cases the court will award a proprietary remedy as in *Pascoe v Turner*⁷⁹ and in *Re Basham*⁸⁰ where the transfer of the freehold in a house was ordered; or the court may order a mixture of items of property and payments of money to compensate for detriment suffered as in *Gillett v Holt*⁸¹ where the claimant received the freehold of a cottage, an identified field and a sum of money.

The principal limitation of proprietary estoppel is that it is available only where the claimant can demonstrate that there was a representation or assurance made to them on which they relied to their detriment.⁸² The existence of this three stage test – which must be satisfied before the estoppel is made out – demonstrates the transformation of a potentially broad remedial discretion into a narrower, weaker discretion.

What is apparent, however, is that there remains scope for remarkable flexibility in the remedies. That flexibility may be said to be taken to such extremes in some instances that it suggests a strong discretion. If that is so, there appears to be a division between a rational, needs-based equity and a genuinely creative equity. As an illustration of the needs-based equity, the Court of Appeal in *Baker v Baker*⁸³ held that an elderly relative who would have been entitled to an equitable interest in a co-owned home should be awarded sufficient money to pay for him to acquire an annuity which would fund the nursing and residential care that he would need for

⁷⁷ [1996] A.C. 669.

⁷⁸ [2002] EWCA Civ. 159.

⁷⁹ [1979] 2 All E.R. 945.

⁸⁰ [1986] 1 W.L.R. 1498.

⁸¹ [2000] 2 All E.R. 289.

⁸² *Re Basham* [1986] 1 W.L.R. 1498; *Thorner v. Major* [2009] 1 W.L.R. 776.

⁸³ [1993] 25 H.L.R. 408.

the rest of his life. This humane judgment recognised that the needs of the parties superseded the dictates of property law. This was, perhaps, an example of strong discretion being used within the confines of the law on proprietary estoppel to achieve the sort of result that would be familiar to a family lawyer: that is, an outcome focused on the needs of the parties beyond the detail of their property rights.

As an illustration of the latter, “creative” equity in *Porntip Stallion v Albert Stallion (Holdings) Ltd*,⁸⁴ the court was faced with a situation in which Mr Stallion’s first wife had been promised that she could occupy her former matrimonial home for the rest of her life provided that she did not contest her husband’s divorce petition. Thereafter, the first wife, the second wife and Mr Stallion himself had cohabited (apparently harmoniously) in the property in London’s Waterloo district for some time before Mr Stallion’s death. It was held that the first wife had made out the estoppel and that by way of remedy the first wife and the second wife should continue to cohabit in that property. The suggestion that the former wife and the current wife of a man newly dead should live together by court order is at first surprising. It has been suggested to me in conversation that perhaps only a woman judge could have come to such a creative outcome. (The remark was made by woman specialist in land law.⁸⁵) The two women did seem to live harmoniously. The judge had seen the parties at first hand and heard all of the evidence. The first wife had been made a promise on which she had relied to her detriment in not contesting the divorce and the concomitant re-marriage. The resolution of the issues is reminiscent of that sort of creative equity which is the currency of the family courts.

EQUITY: CONFIDENCES AND THINGS OF CONSCIENCE

The obfuscation of the equitable roots of confidence in English law

Equity presents a way of thinking about legal disputes which is different from the common law. Equity has its own methodology – based historically on its maxims – of taking high-level principles and then, using precedent, applying them to specific factual situations. Typically, common lawyers are suspicious of this approach. What that can mean is that, in circumstances in which common law and equity overlap, the principles of equity are completely overlooked by common lawyers because the concepts used by equity have no meaning for them. A good example arises in relation to the English law on misuse of confidential information.⁸⁶

⁸⁴ [2009] EWHC 1950 (Ch), [2010] 1 F.C.R. 145.

⁸⁵ I only hesitate to attribute the remark because its author has not chosen to publish it.

⁸⁶ See A.S. Hudson, “Equity, confidentiality and the nature of property” in *Concepts of Property in Intellectual Property Law*, H. Howe (ed) (Cambridge University Press, 2013), p.94-115.

In England and Wales, there has been much excitement in recent years about the development of a tort of misuse of private information.⁸⁷ What is interesting is that the discussion among the common lawyers about the supposed brave new world of confidentiality has entirely overlooked three things: first, that there continues to be a very important doctrine of breach of confidence in equity; second, that the principal remedy sought in cases of this sort is an injunction based on equitable principles; and, third, that the principles which have led to the new tort of misuse of private information were based on an equitable “obligation in conscience”.

In the “*Spycatcher*” litigation (*Attorney-General v Guardian Newspapers (No 2)*)⁸⁸ it was treated as settled law that the principle governing the action for breach of confidence was an equitable “obligation in conscience” not to misuse confidential information.⁸⁹ What is interesting is that none of the common law commentators who have addressed this equitable root to the breach of confidence action⁹⁰ have identified what the equitable doctrine actually *is*. It is generally treated as being “obscure”⁹¹ or not “firmly established”.⁹² This approach overlooks the continued use of equitable injunctions throughout the history of this doctrine, even in relation to the tort of misuse of private information today. It also overlooks the ubiquitous description of breach of confidence as being based on an “obligation of conscience” in equity in cases such as *Spycatcher* and *Douglas v Hello! Ltd (No 3)*.⁹³ And yet common law commentators do not even mention the word “conscience” in their accounts, in spite of its continued use by the courts of England, Canada and Australia. As such, by overlooking the equitable doctrine, it has been suggested that the “modern action of confidence is of surprisingly recent vintage”.⁹⁴ One is minded to say that it would appear to be of surprisingly recent vintage if one focuses exclusively on surprisingly recent cases and ignores the use of equitable concepts even then.

The reason for this omission is that conscience simply forms no part of the common law canon. Just as a military historian discussing the Spanish Civil War might overlook developments in Andalucian cuisine as being of no importance in their work, a common lawyer does not see the need to discuss the idea of “conscience”. The point here is a simple one. Common lawyers are so antipathetic to the idea of conscience as a legal category that they ignore the word “conscience” and its derivatives completely. Whereas the concepts of conscience and unconscionability are central to equity, they are constantly overlooked when intellectual property lawyers and common lawyers discuss concepts like confidence.

⁸⁷ *Campbell v. MGN Ltd* [2004] 2 A.C. 457, at [13]–[14]. That is, the same Lord Nicholls who reorganised the principles of dishonest assistance in *Royal Brunei Airlines v. Tan*, above.

⁸⁸ [1990] 1 A.C. 109.

⁸⁹ *Attorney-General v. Guardian Newspapers* [1990] A.C. 109, at 281 *per* Lord Goff and at 255 *per* Lord Keith.

⁹⁰ For example, T Aplin, et al, *op cit.*, and P Stanley, *The Law of Confidentiality* (Oxford: Hart, 2008).

⁹¹ *Ibid*, 12.

⁹² *Ibid*, 13.

⁹³ [2008] 1 A.C. 1.

⁹⁴ T Aplin, et al, *op. cit.*, 13.

The continued rude health of the equitable doctrine of breach of confidence

That the equitable doctrine of confidence is still alive and well in England is beyond question. In the Supreme Court decision in *Vestergaard Frandsen AS v Bestnet Europe Ltd*⁹⁵ in 2013, Lord Neuberger reminded us that the doctrine is equitable, that it is based on conscience, and that “in order for the conscience of the recipient to be affected, she must have agreed, or must know, that the information is confidential”.⁹⁶ Thus, conscience-based equity remains central here. His lordship also quoted Megarry VC as having held in *Coco v AN Clark (Engineers) Ltd* that “the equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust”.⁹⁷ In 2011, the Court of Appeal in *Imerman v Tchenguiz*⁹⁸ made it clear that a “claim based on confidentiality is an equitable claim” and that accordingly “the normal equitable rules apply”.⁹⁹ It is strange then that the common lawyers continue to overlook these principles. No mention of the word “conscience” even appears in their accounts of this area.

A stronger equity outside England: the “obligation in conscience” in *Spycatcher*

Equity may well have had its roots in the oddities of English history but it seems to have grown deeper roots outside England. By way of example, the roots of the judgment of Scott J in *Spycatcher* were planted in large part in the judgments of Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd*¹⁰⁰ and of Deane J in *Moorgate Tobacco Ltd v Philip Morris Ltd*¹⁰¹ to the effect that there is a “general equitable jurisdiction” to grant relief in relation to breaches of confidence. As it was put by Deane J:

‘Like most heads of exclusively equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.’¹⁰²

In the New South Wales Court of Appeal, Chief Justice Street held that the appropriate form of remedy is in the largest sense an *in personam* remedy in the sense that a court looks to the conscience of the individual in deciding which remedy or doctrine, if any, is appropriate.¹⁰³ These conceptualisations of the principles are in the grand tradition of equity and are signifiers of well-understood lines of precedent within equity. All of

⁹⁵ [2013] 1 W.L.R. 1556, 1562.

⁹⁶ *Ibid*, [23]. Moreover, it is said that “confidence is the cousin of trust” in this context, at [22], because it part of the ancient equitable jurisdiction on breach of confidence.

⁹⁷ [1969] R.P.C. 41, 46.

⁹⁸ [2011] 2 W.L.R. 592.

⁹⁹ *Ibid*, [74].

¹⁰⁰ (1980) 147 C.L.R. 39.

¹⁰¹ (1984) 156 C.L.R. 414.

¹⁰² *Ibid*, at 437.

¹⁰³ [1990] 1 A.C. 109, at 152, quoting from the judgment of that court in *Spycatcher*.

these concepts are considered in detail in *Spycatcher* but these are concepts which do not have any traction with common lawyers.

BRANCHING OUT: LAW AND MORALITY

Conscience, unjust enrichment and politics

The judgment of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington*¹⁰⁴ reminded us that “conscience” is, and always has been, at the heart of trusts law in England and Wales as well as at the heart of equity. In particular, constructive trusts in the English law context are based on the idea that a proprietary constructive trust arises on an institutional basis by operation of law when the defendant has knowledge of some factor which ought to affect their conscience. The trust is therefore deemed to have come into existence at the moment when the defendant’s conscience ought to have been affected: that is, at the moment of acquiring the necessary knowledge of the factor in question.

The debate which has ensued is due to a misunderstanding of what “conscience” involves. As outlined above, the commentators have chosen to treat the term “conscience” as being a purely technical term, and in consequence they have side-stepped the need to address complex questions as to the precise morality which might be being enforced by the courts. This is the result of a postmodern turn in our jurisprudence: that is, we are reluctant to accept claims to “right” and “wrong” from anyone, even if (or possibly, especially if) they are a public official appointed to sit in judgment over us. At conferences, one may even hear trusts law professors describe this sort of traditional equitable approach as being “just not thinking”. On that model, the only form of “thinking” is said to be the sort of taxonomy which has become popular among the English restitution school, borrowing a veneer of scientific rigour from the natural sciences. The problem is that the taxonomies produced by natural sciences are observations of the way in which the real world is actually ordered; whereas the taxonomies produced by legal positivists are ideological in nature in that they create structures of the way in which they want the world to be. As Nietzsche put it, the greatest artists in abstraction are in fact the people who create the categories.¹⁰⁵ That is, the purportedly value-free, apolitical rigour of taxonomic thinking actually conceals a deeply political, abstract project in law-making. That project is political in that the judges are effectively being lobbied to change the law and in that the law is being remodelled to prefer the needs of commercial people over the rest of society by taking concepts and models from contract law in particular.

Beyond that sort of rigidity, equity permits principled decision-making and sensitive dispute resolution. The recent case law on bribery in England is a good example of this.

¹⁰⁴ [1996] A.C. 669.

¹⁰⁵ F Nietzsche, *The Will To Power* (1901) (London: Doubleday, 2011), para 513.

Bribery

A simple moral problem arises when a person receives a bribe: should that person be entitled to profit from that bribe? That problem is simple because the clear answer, assuming no supervening circumstances, is that no-one should be able to profit from the receipt of a bribe. And yet, the courts have made heavy weather of the legal conceptualisation of that same question. Under English law, when a person receives a bribe and invests that bribe successfully, it is apparently quite difficult to know whether or not that person should be entitled to keep those successful investments which were made with the bribe. The argument based on *Lister v Stubbs*¹⁰⁶ and on the decision of the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Group plc*¹⁰⁷ is that the recipient of the bribe (the false fiduciary) only owes their beneficiary a debt equal to the amount of the bribe. There would only be a constructive trust if the fiduciary had misused trust property to acquire themselves an unauthorised benefit, but not if the fiduciary had taken a bribe from some third party which formed no part of the trust property. If the fiduciary had merely received a bribe then they would be permitted to keep the property acquired with the bribe and any profits taken from that property.¹⁰⁸ This is simply morally wrong by any measure. A wrongdoer will have benefited from their wrongdoing.

The principal reason given for permitting the false fiduciary to keep the bribe is that in cases of insolvency (as in *Sinclair v Versailles*) unsecured creditors are elevated to the status of secured creditors by being granted proprietary rights under a constructive trust in the bribe and in any property acquired with the bribe. This, of course, begs the question whether or not there is an insolvency. The Court of Appeal was gulled into changing the law on constructive trusts in all circumstances relating to bribes because of arguments relating to insolvencies.

It took the Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No2)*¹⁰⁹ to bring the English courts back to reason in this context. As the Federal Court pointed out, the receipt of a bribe is an unconscionable act which would not give rise to a constructive trust after *Sinclair v Versailles*, and therefore bribery would be an anomaly in the category of unconscionable acts which give rise to constructive trusts.

The Supreme Court in *FHR European Ventures LLP v Mankarious*¹¹⁰ reversed the law. In that case an agent had taken a secret commission from a vendor of land which meant that the agent agreed on behalf of its principal to acquire the land at a higher price than would otherwise have been required to be paid. It was held by Lord

¹⁰⁶ (1890) 45 Ch. D. 1.

¹⁰⁷ [2011] EWCA Civ. 347.

¹⁰⁸ In practice, accounting for the amount of this debt which is equal in amount to the bribe received may involve selling the property acquired with the bribe, but that does not amount to a proprietary right in that property for the beneficiaries.

¹⁰⁹ [2012] FCAFC 6.

¹¹⁰ [2013] 3 W.L.R. 466.

Neuberger that it was important to prevent the harm that is caused by bribery and by undisclosed commissions in commercial life. There is also a passing reference to the role of equity being to mitigate the rigour of the law; but there is no mention of conscience.

The fortunate outcome of this change in direction was that the moral question was aligned with the legal analysis: a wrongdoer may not benefit from their wrongdoing, and therefore a false fiduciary may not resist a proprietary claim to the bribe and thus to any property acquired with that bribe. And yet the precise reasoning of the Supreme Court in *FHR European Ventures* is not entirely satisfactory.

It is worthwhile taking a while to re-examine the judgment of Lord Templeman in *Attorney-General for Hong Kong v Reid*¹¹¹ where his lordship was clear in predicating his judgment on the idea of conscience. There are two equitable roots in this judgment. First, the idea that the taking of a bribe is unconscionable. Second, the idea that equity looks upon as done that which ought to have been done and therefore, because the bribe should have been given to the beneficiary on its receipt, equity would treat property in the bribe as having passed to the beneficiary immediately on its receipt.¹¹² The basis for this constructive trust was that the receipt of the bribe was wrong. In that case, the receipt of a bribe by the Director of Public Prosecutions of Hong Kong was corrupt (in common with all bribery) which was described by Lord Templeman as being “an evil practice”. The moral questions loom large in that judgment. Moreover, the principle that the fiduciary must account for any reduction in the value of the property acquired with the bribe, as well as holding that property on constructive trust, suggests an element of retribution as well as restitution.

The principal difference – and it is a very important difference – between the judgment of Lord Templeman in *Attorney-General for Hong Kong v Reid*¹¹³ and the judgment of Lord Neuberger in *FHR European Ventures v Vantouris*¹¹⁴ is that Lord Templeman based his judgment on the idea of conscience whereas the Supreme Court in the latter case found a constructive trust, notionally in line with the judgment in *Reid*, but without mention of the concept of conscience. Without the idea of conscience, it is more difficult to understand why there is a constructive trust in relation to bribery; with the moral centre of a conscience-based equity restored, it becomes clear again why a constructive trust encompasses cases of bribery as well as cases of conflicts of interest, cases of theft, and so forth. By re-establishing conscience as the moral centre of this area of law, it becomes clear that the constructive trust is being imposed so as to prevent the immoral earning of a profit from a bribe. The wrong is the corruption and the breach of fiduciary duty. The constructive trust is imposed so that no benefit is taken from that wrong and because equity looks upon as done that which ought to have been done.

¹¹¹ [1994] 1 A.C. 324.

¹¹² The beneficiary in that instance would be territory over which Reid was the Director of Public Prosecutions.

¹¹³ [1994] 1 A.C. 324.

¹¹⁴ [2014] 3 W.L.R. 535.

TRUSTS OF HOMES

A comparative account of the different approaches to unconscionability would show how the Commonwealth turned its back on England in relation to a particularly important area of law – the ownership of the home – when English law adopted the “common intention constructive trust”.¹¹⁵ This form of constructive trust was artificial at its heart: the purported “common intention” is often supplied by the court¹¹⁶ and therefore is not in fact the parties’ own intention. The House of Lords in *Lloyds Bank v Rosset*,¹¹⁷ motivated by the prospect of a slew of open-textured rule-making, introduced a two-tier form of constructive trust resonant of the common law of contract. Rights could only be acquired by express agreement coupled with (usually) financial detriment or by contribution to the purchase price or mortgage repayments. The more recent decision of the Supreme Court in *Jones v Kernott*¹¹⁸ has acknowledged these difficulties and decided that, when a common intention cannot be found, then the court can look to what is “fair”. In that regard, they have caught up with the law in New Zealand nearly twenty years after they had followed Lord Denning’s lead.¹¹⁹ The standard of “fairness” is undefined and it will take many years of judicial decision-making for us to see it take shape, to criticise that shape, and for it finally to adopt a recognisable form.

In Canada, the principle of unjust enrichment in ownership of the home – with its wilfully modern attitude to the rights of women and to the general avoidance of injustice in the ownership of the family home¹²⁰ – contrasts so starkly with the Oxford restitution school’s rigid model of “unjust enrichment” as to be laughable. English unjust enrichment has nothing to say about family law nor about the home. Its taxonomic focus is on areas abutting contract law and commercial law, together with its grids of numbered categories of claim.¹²¹ While Oxford restitutionists call for the end of equity, they have nothing to say about the law on injunctions, ownership of the home, or those areas of law where high-level principles are used to guide decision-making. Their project, for all its sound and fury, is actually quite narrow. The “equity” they seek to excise is merely a branch of a much larger tree.

In Australia, where equity has always seemed to be at its strongest, the principle of unconscionability in the ownership of the home reflects a pure form of equity. The court considers the parties’ relationship and considers whether it would be

¹¹⁵ [1971] A.C. 886.

¹¹⁶ *Oxley v Hiscock* [2004] EWCA Civ. 546.

¹¹⁷ [1991] 1 A.C. 107.

¹¹⁸ [2011] UKSC 53.

¹¹⁹ *Gillies v. Keogh* [1989] 2 N.Z.L.R. 327.

¹²⁰ *Pettkus v. Becker* (1980) 117 D.L.R. (3rd) 257; *Sorochan v. Sorochan* (1986) 29 D.L.R. (4th) 1; *Peter v. Beblow* (1993) 101 D.L.R. (4th) 621.

¹²¹ See S. Hedley, ‘The taxonomy of restitution’, in Hudson, AS (ed), *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish, 2004), 151.

unconscionable to award or deny rights in the family home between them.¹²² There is a principle at its heart which is concerned to observe Aristotle's requirement that formal land law rules should not permit injustice in individual cases. The idea of conscience that accompanies this doctrine has been developed in the cases. It has a generally moral project at its heart: to prevent the continuation of an unfairly gendered system in which one part of society tended to acquire property rights at the expense of the contributions of any other part of that society. There are no confusions in an equity of this sort. It is simply about preventing an identified form of unconscionable activity.

CONCLUSION

As Hamlet noted, nothing is either good or bad but rather thinking makes it so. The same is true of equity. Thinking that law must *always* involve hard-and-fast rules makes equity seem bad; but hard-and-fast rules will get us only so far in a world in which aeroplanes are flown unexpectedly into tall buildings, in which the entire financial system is able to crash without anyone anticipating it, and in which large parts of the world continue to be at war on the basis of religious denomination. Rigid systems cannot serve all of our needs in the modern world because unanticipated events will require us to be able to react quickly and to create novel solutions for novel circumstances. That is precisely what Aristotle had in mind when equity appeared in his *Ethics*. Moreover, human beings continue to be held in thrall by "big picture" ideas like god, and intangible ideas like financial instruments, the internet and the metaphysical concept of hope. Equity and the idea of conscience fit exactly into this world of big picture ideas. In a world that is constantly changing there is obviously a need for stable moorings, and the law is an essential part of ensuring that there are some things which will last forever, but there is also a need for the courts to be flexible. The world was unpredictable in the sixteenth century and it still is today.

Pinocchio is exhorted always to let his conscience be his guide. In the Disney version of the story, he has to "give a little whistle" to call his conscience to him. In the Freudian version, the conscience is always there, monitoring the conscious mind. It comes unbidden. It is this internal monitor which the earliest Lords Chancellor had in mind when they created a system of principles based on Aristotle's *Ethics* and the growing need for a moral core to the law which would be proof against the tricks and contrivances which had become the workaday tools of even medieval lawyers. Over time, with the efforts of Lords Nottingham, Eldon and Hardwicke, many of these moral maxims have hardened through precedent into predictable rules and principles. Parts of express trusts law resemble contract law as much as anything else. And yet, akin to the methodologies of family lawyers and regulation specialists, there is still a vast terrain in which equity operates to find just outcomes using only a weak discretion. What this open-textured idea of a conscience-based equity means

¹²² *Baumgartner v. Baumgartner* (1988) 62 A.L.J.R. 29, 164 C.L.R. 137.

is that the legal system is fulfilling a part of its function to set out a code of moral principles alongside its rules. Consequently, we have a little more to go on when our consciences trouble us than simply to “give a little whistle”.