THE PROPRIETARY REMEDIES SYMPOSIUM

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It is a great pleasure to be here today and to take place in this panel discussion. My engagement with the ideas this afternoon started early today. My taxi to the airport arrived at around 345am. As I got into the taxi, the driver asked me where I was going. I replied, a little sleepily, that I was on holiday leave and travelling to Melbourne. But then he asked me what I was going to do in Melbourne. I gave what I hope was a clear, although quite lengthy, exposition of the difficult issues involved in this exceptional book on *Proprietary Remedies* and the ideas which I had intended to explore. As I was getting out of the taxi, the driver turned to me and said 'In 20 years of driving a taxi, I can honestly say I've never had a conversation like that'. I'm not sure if it was meant as a compliment. But the great benefit, and the power, of this book and the symposia upon which it has been founded, is that it engages in this conversation about principle.

There is a fundamental reason why this conversation is so important. It arises from a concern which confronts the common law today. It is not a new problem. But it is getting worse. Almost a century ago, Benjamin Cardozo said this[1]

> "The fecundity of our case law would make Malthus stand aghast. Adherence to precedent was once a steadying force. The guarantee, as it seemed, of stability and certainty. We would not sacrifice any of the brood, and now the spawning progeny, forgetful of our mercy are rendering those who spared them... An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less and appeal to an informing principle is tending to count for more."

This problem which I have described is one which we have all encountered but which, as judges, Paul, Geoffrey and I have experienced in a different way from academics like Katy and Matthew and, previously, which I experienced as an academic.

One aspect of adjudication that differs fundamentally from academic research is the pressure of time. It will often be the case that the greater the delay in delivery of a judgment the less just will be the outcome. This is particularly so in areas of commercial and property law which are the subject of this very important book for which the editors are to be greatly commended. Some of the best commercial decisions were delivered in the courts of pie powder which, on one view, derived their name from the delivery of a decision within a day and a half, before the dust on the defendant's feet could settle: *pieds poudrés.* Commercial decisions today do not operate by the

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[1] Cardozo, The Growth of Law: The Need of A Scientific Restatement as an Aid to Certainty, Lecture to Yale Law School (1923) quoted in G C Hall, Precedent in Crisis: Official Law Reporting in Ireland (1996) 27 Law Librarian 1946. My thanks to McKechnie J for reminding me of this quotation.

rule of a day and a half but the pressure of time remains. There is a need to balance an appreciation of the vast bulk of authority with the importance of a speedy result for the parties.

In contrast with the role of the judge, there is not the same time pressure on academic writing. The time that academics have to think about a subject and to research the vast weight of authorities and discussion on an issue, is a luxury which judges can rarely afford. One rare exception for us is for vacation at conferences like this symposium and tomorrow's proceedings.

In the ongoing dialogue between the practising profession, the judiciary and the academy, works like this book, on *the Principles of Proprietary Remedies* perform a vital role. What this book does is to examine a whole range of problems at a higher level of abstraction, removed from the minute details which arise usually in the context of focussing on a single case. In other words, many of the chapters, and the overriding themes examined by the editors, seek to provide answers to big problems, not merely by an assessment of the weight of an overbearing bulk of authority but, as the title suggests, by carefully deriving *principle* from that mass of authority. It considers basic questions and provides principled answers which can be used as a road map through the morass of cases.

As the editors of the book observe, the title to this book begs some basic questions the answers to which are far from simple. What is a remedy?[2] Is it a right or power that arises when some legally relevant fact occurs? So my remedy for fraud might be a right to compensation or a power to rescind the transaction. Or is the remedy a power to approach a court for an order for compensation (but not a power to rescind by my own act)? Or is a remedy the rights that arise from any court order that I obtain?

Even if that question of the meaning of a remedy could be clearly answered, 'what is a *proprietary* remedy'? One grave difficulty with the language of 'property' is that we often speak of 'property' in senses which are completely contradictory. For instance, lawyers may sometimes say that 'the rights you have are contractual rights, not proprietary rights'. In this sense a boundary, insisted upon since Roman law, is drawn between property and obligations. But the same day, the same lawyer might say that a 'chose in action' against a bank, which is no more than a contractual right against a bank, is 'property'. And what about the trust? Is that 'property'? Or is it an obligation? Or is it neither fish nor fowl? Or, as Justice Leeming has said, does the answer depend upon why the question is being asked?[3]

The conception of a trust, or its effects, is an issue which is explored in a number of chapters of this important book, including my own. In the opening remarks to the book, the editors say that 'having the option to elect to rescind a transfer of title is not the same as having a vested trust right'. Many people will accept this statement as undeniable. But Lord St Leonards once said

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2 As to which, see Dr Zakrzewski's outstanding thesis *Remedies Reclassified* (2004).

3 M Leeming 'What is a trust?' (2008) 31 Australian Bar Review 211.

the opposite.[4] Sir Peter Millett thought that '[i]t probably does not matter if we say that the relationship [of rescission] is not a trust relationship, so long as we call it something else. The trouble is that we have no other name for it.'[5] Ultimately, the book avoids this debate, with the editors explaining that 'we avoid the language of constructive trust and constructive trusteeship ... and prefer the language of proprietary and specific relief'.

Without commenting further on the possible difficulty introduced by the language of '*proprietary* relief', I think it is useful to make some remarks about why even at the high level of abstraction from the cases it is necessary to have an understanding of the concept involved in labels such as 'trust'. Some consequences are obvious. Rights held on trust are removed from the assets available to creditors from a bankrupt or insolvent estate. Trustees are sometimes subject to duties and liabilities that others, such as bailees, are not. Beneficiaries under a trust have rights and powers that others may not including rights arising from tracing. With many important consequences that are often thought to be dependent upon whether the label 'trust' is attached it is important to engage with the issue as a matter of principle, not merely as a search through thousands of cases for a comparable decision.

A dominant conception of a trust is that it describes a circumstance in which one person holds rights subject to a duty not to use them for his or her own benefit. One difficulty in defining the label 'trust' in this way is the debate concerning whether it is possible for a person to hold an asset on trust without any positive duties. Can a person be a trustee without, at least, holding rights subject to a duty not to use them for that person's own benefit? This is often the view taken by those who support the idea that a right to rescind, and revest, title is not a trust. But, if this view were correct, would it be consistent with the rule of law to find a person to be a trustee, and subject to duties not a use an asset for his or her own benefit, even if that person is not aware that he or she has received the right? Resulting trusts have been recognised in such circumstances. Does their characterisation as a trust indicate that there must necessarily be any positive duties?

Another difficulty for the conception of a trust as involving a core duty not to use a right for the benefit of the trustee is that almost every commercial trust involves an express term to the contrary. A trustee remuneration clause is a clause which permits a trustee to benefit from the rights held. And what about instances of general powers to distribute to any person, including the trustee? Or circumstances in which a trustee has been held to be also a beneficiary?

As a matter of authority another question is how is this view involving a core duty not to benefit from trust rights to be reconciled with the statement by four judges of the High Court of

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4 *Stump v Gaby* (1852) 2 De GM & G 613 at 630; 42 ER 1015 at 1018. See also *Gresley v Mousley* (1859) 4 De G & J 78, 93; 45 ER 31, 36 (Turner LJ) and R Chambers *Resulting Trusts* (1997 Oxford University Press Oxford) 172-174.

5 P Millett 'Restitution and Constructive Trusts'(1998) 114 LQR 399, 404.

Australia in *Giumelli v Giumelli*[6] a trust need not 'necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests.' Their Honours acknowledged that it might operate as 'akin to orders for conveyance'. On this view, there is not necessarily any difficulty with using the label 'constructive trust' to describe the liability to an order for conveyance arising from a specifically performable obligation. There is, however, doubt whether it is appropriate to attach the term 'trust' to such bare liabilities to convey. As William Swadling has observed[7] the debate is more than a century old. In *Knox v Gye*,[8] Lord Westbury described the constructive trust on the sale of land as a 'misleading metaphor' and in *Rayner v Preston*, Brett LJ (as his Lordship was then) said that he doubted whether 'it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other'.[9] And the debate continues in Australia with discussion of this point in the High Court of Australia in *Tanwar Enterprises Pty Ltd v Cauchi*.[10]

I have previously suggested that the concept of a trust has one *necessary* element. As Maitland identified a century ago, the trust involves a right held by a trustee which is encumbered in some way. But this description cannot be a *sufficient* element for a trust because it encompasses many circumstances which, although historically the subject of doubt, are now clearly regarded as not being trusts. One example is a mortgagor's equity of redemption. Another is the, awkwardly described, 'mere equity' which is a term often used to describe an encumbrance upon a right which is not a trust. But even this very basic definition of a necessary element of a trust as an encumbrance upon a right runs into difficulty with a very problematic recent decision of the English Court of Appeal.[11]

Does it really matter whether we engage with these questions of language? Should we care whether we really know what is meant by concepts we use all the time such as a 'trust'? I strongly believe that it does matter and that we should care. Apart from the obvious consequences which I have already mentioned (insolvency, duties and liabilities of the trustee, tracing) there are also the effects that labels have in other areas of the law. Dr Elliott and I recently delivered a paper on the law of equitable assignment. A century ago Joseph Story said that equitable assignment was no more and no less than a trust. Few people think that way any more. Modern decisions have allowed consequences to occur in relation to equitable assignment which could never occur in relation to trusts. But what is the difference? An equitable assignment usually involves the holder of a legal right undertaking to hold that right for the benefit of another. The holder of the legal right, like the vendor of a title which is specifically

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6 *Giumelli v Giumelli* [1999] HCA 10; 196 CLR 101 [5].
7 W Swadling 'The Fiction of the Constructive Trust' [2011] CLP 1.
8 *Knox v Gye* (1872) LR 5 HL 656, 675–6.
9 (1881) 18 Ch D 1, 10–11.
10 [2003] HCA 57; 217 CLR 315.
11 *Shell UK Ltd & Ors v Total UK Ltd & Ors* [2010] EWCA Civ 180;[2010] 3 WLR 1192.

enforceable, is probably under a duty to convey the right when the debt is paid. How can a coherent and consistent law allow different results to be reached in the law of assignment and the law of trusts?

There may be answers to these questions but they require deep and careful thought about concepts and principles. The resort to labels, even extremely well established labels like 'trust', can be productive of confusion or error without a clear conception of what is meant by the concept underlying the label. And in a world of ever increasing and prolific authority the examination of principle and the focus upon clarity is why this book is such a valuable work.