

Introduction

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Defences in Equity

This volume is the fourth in a series that addresses defences in private law. Like those that preceded it,¹ it is animated by a belief that defences comprise an important but under-theorised part of private law. The present volume's concern is with defences in equity. It is obvious that the law of equity is not usually understood through the lens of defences (by which we mean that defences are not used as a major organisational device). Indeed, defences do not feature prominently in tables of contents of textbooks in the field, if they feature at all.

For at least two reasons, it is slightly puzzling that the concept of a defence has not received systematic treatment in the law of equity. The first concerns the relationship between equity and the rest of private law. A dominant theme in many recent attempts to classify private law is that there is no meaningful conceptual (as opposed to historical) distinction between equity and the common law. Peter Birks, a leading figure in articulating and promoting this viewpoint, contended, for example, that liability in equity is no different, ultimately, from liability arising in respect of common law wrongs.² The clear implication to be drawn from Birks's pioneering work is that liability for equitable wrongs is, properly understood, either controlled by the same rules as liability arising at common law or, alternatively, should be controlled by the same rules. Andrew Burrows derives precisely this message from Birks's work. He argues, writing in relation to restrictions on the award of compensatory damages and equitable compensation, 'there is no good reason for equity going its own separate way'.³ Similarly, he contends 'that it is simply false to imagine that there are irreconcilable differences between common law and equitable defences'.⁴ In another contribution, Burrows contends, 'I make no apology for reiterating that, in my opinion, there are common law counterparts to the famous equitable defences'.⁵ If there is no conceptual difference between common law and equitable wrongs, the strong presumption would be that just as there are many defences to liability arising in common law wrongs, the law of equity does (or should) readily recognise defences too. But whereas the notion of a defence features widely in the architecture in at least certain major parts of the common law, notably tort and unjust enrichment, it does not enjoy quite the same prominence in the thinking of scholars working in the law of equity.

The second reason why it is arguably somewhat odd that equity lawyers have tended not to organize their thinking in terms of defences is that equity recognizes many rules that are

¹ The previous volumes are A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Tort* (Oxford, Hart, 2015); A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Unjust Enrichment* (Oxford, Hart, 2016); A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Contract* (Oxford, Hart, 2017).

² P Birks, 'The Concept of a Civil Wrong' in DG Owen (ed), *Philosophical Foundations in Tort Law* (Clarendon, 1997).

³ Andrew Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 12.

⁴ *ibid*, 14.

⁵ A Burrows, 'Remedial Coherence and Punitive Damages in Equity' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Thomson Reuters, 2005) 386.

widely understood to be defences in other departments of the law of obligations. Illegality, limitation, and consent, for instance, are regularly regarded as defences in other parts of private law. Equity also provides for a wide array of rules that are specific to the law of equity but to which the term defence could readily be (and sometimes is) applied. A good example is the rule in section 61 of the Trustee Act 1925 (UK), which provides that where a trustee has committed a breach of trust ‘but has acted honestly and reasonably’ the court may ‘relieve him either wholly or partly from personal liability’ if the court considers that he ‘ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach’.⁶ In his chapter in this volume, Robert Stevens singles out several rules that he considers plainly qualify as ‘archetypal defences’, including equitable set off, laches, acquiescence and release.⁷ In short, equity contains many rules that are regularly recognized as defences in other fields or which otherwise have a strong claim to having the label of defence applied to them.

If the law of equity can fairly be regarded as being populated by a wide network of defences, several important issues arise. One key question is what is meant by the term ‘defence’. One message the previous books in this series clearly communicated is that there is no uniform understanding of the concept of a defence. The term is used in a wide variety of ways. Sometimes it is used in contradistinction to the idea of a ‘denial’. A denial is typically understood as an argument that attacks the existence of something that forms part of the claimant’s cause of action. When contrasted with a denial, a defence is a rule that allows the defendant to escape or reduce his liability even if what the claimant says is true. A second way in which the notion of a defence is often understood is in terms of onuses of proof. On this view, defences are rules which the defendant must establish by proving certain facts. A third way of defining the concept of a defence is suggested by Stevens in his chapter in this volume. He argues that ‘Whether or not something constitutes a defence is, in private law, a purely formal question. Is it something that the defendant asserts in his pleadings, that is not merely a denial, in order for a claim to fail?’⁸ This way of understanding is similar to but not the same as the second definition since a defendant might be required to plead a certain rule but not prove it (such as the case in relation to limitation bars, where the claimant must show that the action was brought in time once the question of limitation has been pleaded by the defendant). All three of these ways of comprehending the concept of a defence are subtly but importantly distinct from each other. They do not exhaust the range of ways in which that notion can and has been understood.

Another important question that is of general significance concerns classification. If the concept of a defence is employed in a given field of law, one issue that arises is whether defences in the field concerned can be organised in any particular way. The classification of defences has been one of the largest research projects ever undertaken in the criminal law, for

⁶ See J Lowry and R Edmunds, ‘Relieving the Trustee-Solicitor: A Modern Perspective on Section 61 of the Trustee Act 1925?’ (2017) 133 LQR 223; P Davies, ‘Section 61 of the Trustee Act 1925: deus ex machina?’ [2015] Conv 379.

⁷ Chapter 3 at p.XXX. [p.12 of paper]

⁸ Chapter 3 at p.XXX. [p.12 of paper]

instance. It has been either the sole or main concern of several books⁹ and the subject of countless law review articles. It is widely thought that these endeavours have significantly advanced understanding of the criminal law. In light of this experience, it is surprising that similarly sustained efforts have not been undertaken in relation to the various parts of private law. Efforts to arrange tort defences can be traced at least as far back as Wigmore,¹⁰ and scholars have regularly offered a variety of ways of arranging defences to liability in tort since Wigmore's time.¹¹ The situation is different in relation to private law's other departments, where scholars have not sought to engage in systematic treatment of defences generally. If a more complete understanding of private law is to be obtained, the question of classification also needs to be asked in relation to the law of contract, unjust enrichment and equity. After all, assigning a rule to a given category within a taxonomy of defences might be thought to have certain practical ramifications, such as which party should bear the onuses of pleading and proof.

Before proceeding, we should mention one radical challenge to the entire enterprise that this book represents. We mentioned, above, the Birksian understanding that equitable wrongs do not differ in any material way from common law wrongs and that it is thus an error to see equitable wrongs as pertaining to a separate category within private law.¹² If this view is pursued to its logical conclusion, equity is not a separate branch of private law with the result that it makes no sense to look at defences in equity as an independent category. Instead, equitable defences that affect rights to redress that would otherwise arise in contract, tort or unjust enrichment should properly be considered alongside common law defences in each of those branches of the law. Stevens, perhaps, commits to this understanding at the start of his chapter.¹³ However, even if this understanding were correct, it would not follow that it is not also worthwhile examining defences in equity as a group. The jurisdictional origin of this group of defences at least raises the question of whether there is anything distinctive about *equitable* defences. It is this question that is considered in the first contribution to this edited collection.

The nature of equitable defences

In his contribution (Ch 2), Henry Smith asks whether the jurisdictional origin of equitable defences, such as laches, equitable estoppel and unclean hands, helps us to understand these doctrines. For Smith, an important characteristic of the equitable jurisdiction is what is referred to as its 'second order' status. Equitable rules are 'second order' because they refer to common law rules and, hence, depend upon them for their existence.¹⁴ In other words, they are rules about rules. This is necessary, Smith explains, to root out forms of opportunism,

⁹ The leading works are GP Fletcher, *Rethinking Criminal Law* (Boston, Little, Brown & Co, 1978) chs 7, 9–10; PH Robinson, *Criminal Law Defenses*, (St Paul, Minn, West Publishing Co, 1984) (two volumes).

¹⁰ JH Wigmore, 'The Tripartite Division of Torts' (1894) 8 *Harvard Law Review* 200; JH Wigmore, 'A General Analysis of Tort-Relations' (1895) 8 *Harvard Law Review* 377.

¹¹ Several attempts to categorise tort defences are recounted in J Goudkamp, *Tort Law Defences* (Hart, 2013) ch 7.

¹² See the text accompanying n 2, above.

¹³ Chapter 3 at p. XXX [p.2 of paper].

¹⁴ The same proposition features prominently throughout in Stevens' chapter (Ch 3).

where individuals identify and then seek to exploit weaknesses in the apparatus of the common law. Individuals exploiting loopholes in the tax system is one example identified by Smith. Another is the case of an estoppel, where an individual acts unconscionably, but stops short of making any legally binding promise. A secondary system, Smith explains, is one that takes aim at those who opportunistically avoid the effects the general legal rules.

It is within this conception of equity as a whole that Smith attempts to place equitable defences. They are different, he argues, from defences recognised at common law because they are of a 'second order' nature. They modify the result that would otherwise obtain by the application of standard rules. This, Smith argues, explains certain features of equitable defences, particularly the fact that they tend to be discretionary. An individual who exploits a tax loophole, or encourages another to act to their detriment, might be acting in a way that is permissible pursuant to common law principles. As such, the only way to measure their behaviour is against some form of moral code. This might explain why unconscionability features so heavily in equitable defences. Given the distinct function and features of equitable defences, the project of fusion with common law defences is, Smith argues, a difficult one, and it might be preferable to recognise equitable defences as a distinct category.

Stevens is concerned in his chapter (Chapter 3) with the defence of equitable set-off. He begins his treatment by distinguishing equitable set-off from other species of set off that do not have equitable underpinnings, including what he refers to as 'contractual set-off', 'insolvency set-off' and 'procedural set-off'. The defence of equitable set-off, unlike the other species of set-off, does not involve netting off claims. Rather, Stevens argues, it entails the defendant bringing a counterclaim on the basis of equitable rules which counterclaim, if successful, would result in the failure of the claim that has been asserted against him. A defendant raises the defence of equitable set-off whenever he counterclaims, relying on equitable doctrines, on the basis that the 'claimant's conduct has caused a claim against him to arise' with the result that 'the claimant may not assert a claim which is causally related to the same conduct'.¹⁵ *Lord Cawdor v Lewis*¹⁶ supplies an excellent illustration of what Stevens has in mind, which case Stevens cites. The claimant landowner sued the defendant for mesne profits and the defendant successfully counterclaimed for an injunction restraining the bringing of the claimant's action on the basis that the claimant had stood by while the defendant had, to the claimant's knowledge, made improvements to the land.

The defence of equitable set-off, as described by Stevens, means that it has little, if anything, in common with other types of set off, and should not, in fact, even be labelled a type of set off in so far as the idea of set off necessarily involves the netting off of claims. Rather, Stevens argues, the defence of equitable set-off is much more closely allied with other equitable rules generally. Equitable rules, Stevens reminds us, are rules about other rules and, as such, lack any independent vitality. They presuppose, and are only intelligible against, the backdrop of the common law's rules. The defence of equitable set-off, consistent with its

¹⁵ Stevens at p. XXX [p.9 of paper].

¹⁶ (1835) 1 Y&C Ex 427; 160 ER 174.

equitable nature, involves the assertion of a counterclaim that the defendant would be unable to pursue absent a claim against him. It is a counterclaim that has no independent existence.

Bona fide purchase for value without notice

The bona fide purchase for value without notice plea has been described, as David Fox notes in the introduction to his chapter (Chapter 4), as the ‘polar star’ of equity. Although its origins lie in trusts (or uses) of land, it has developed into a general plea, available to any recipient of legal rights as a possible defence to pre-existing equitable interests. The plea is available not only in the context of equitable interests arising under trusts, but to all forms of equitable interest. The features of the modern defence have been clearly articulated by the courts and are generally well understood. Where difficulty lies in the modern law is in the relationship between this defence and forms of personal liability in equity, particularly the action of knowing receipt.

Fox considers the basis and scope of the modern defence through the prism of its historical development. His approach yields surprising conclusions. In short, he argues that the modern defence has been largely uncoupled from its original purpose and scope. Fox explains that the enforceability of the early beneficial interests, or uses, depended on notions of privity and consideration. Where a trustee (the feoffor), held land for the benefit (or use) of a *cestui que use*, that use could endure against a transferee (the feoffee) of the land, in much in the same way that a modern equitable interest in land can bind a successor in title. If the feoffee had provided consideration for the transfer (i.e., a sale), then one would say that they had intended to acquire the title to their own use. However, if consideration was absent, and the feoffee was aware of the *cestui que use*’s interest, they were said to have acquired the title to the use of the *cestui que use*. Notions of privity and consideration, therefore, lie at the heart of the emergence of the trust, and explain how equitable interests ceased to be merely personal obligations and acquired a proprietary status.

The origin of the bona fide purchaser without notice plea, Fox explains, is closely related to origin of uses. If land subject to a use was transferred to a feoffee, then the feoffee’s notice of the use, and his or her failure to provide consideration, justified his or her being bound by the use; conversely, if a feoffee took the land without notice of the use, and he or she had given consideration, then there was no justification for the use persisting against the title. In its earliest form, the bona fide purchaser without notice plea was not so much a defence, but the very negation of the binding force of a use; it was the very opposite of the argument that the feoffee was privy to the use.

The way in which the bona fide purchase without notice plea developed into the modern defence, which cuts across all equitable interests (and not just equitable interests under trusts of land, where the defence has been superseded by registration principles), is the story told by Fox. Modern trusts are no longer based upon the medieval idea of privity, but more so upon the notion that third parties can be bound due to the proprietary nature of a beneficiary’s interest. Yet the bona fide purchaser defence has features that can only be explained in the context of its historical origins and relation to the rules of privity of uses.

Consent

Consent to breach of trust, as Mitchell and Liew explain, can play a crucial role in the normal functioning of express trusts. Take the case of an overly cautious settlor who ties the hands of trustees by restricting their investment powers, for instance by limiting them to buying government bonds. The trustees may reasonably take the view that the trust fund will lose value unless they breach its terms and invest in other assets. One way to defend against such a breach is by invoking section 61 of the Trustee Act 1925 (UK). The other, and perhaps easier way, is to seek the consent of the beneficiary. It is this type of case that Mitchell and Liew examine. What, they ask, is the legal consequence of consent? Does it furnish the trustee with a defence against any future claim by the beneficiary, or does it actually alter the terms of the trust, such that there is no breach to speak of?

Mitchell and Liew examine the proposition that a beneficiary can unilaterally change the terms of the trust, and can do so merely by instructing the trustee to behave in a particular way. Support for this view can be found in the rule in *Saunders v Vautier*,¹⁷ whereby the beneficiaries of a trust can call upon a trustee to terminate the trust and distribute the trust property. This analysis is rejected by Mitchell and Liew. Their reasoning depends upon the rules that govern the creation of trusts. A settlor might express a wish that a particular person act as trustee and take property subject to certain duties but, unless the nominated trustee accepts, those duties cannot come into existence and the court must appoint a new trustee. If a trustee's consent is necessary for the creation of trust rights, then it is equally necessary for the variation of the trust. In other words, whilst a beneficiary might bring the trust relationship to an end, he cannot force a different one upon the trustee without his consent. Just as the creation of a trust depends upon more than just the settlor's intention, the variation of a trust needs more than just the beneficiary's consent.

Another angle on consent is provided by Simone Degeling (Chapter 6). Her concern is to understand how consent functions in the context of fiduciary duties. Degeling observes that a principal and a fiduciary can contract so as to exclude fiduciary obligations and that, where a breach of fiduciary duty has occurred, equity provides for a parallel result where the principal gave his or her fully informed consent. The question that Degeling poses is whether the court can give the fiduciary permission to breach his or her fiduciary obligations. In other words, can the principal be bypassed? Degeling explores this question first by looking (primarily) at the powers that are available to the court in New South Wales to authorise trustees to exercise conflicting powers in certain circumstances. Degeling then specifically addresses whether the court can authorise a breach of a fiduciary obligation. Her ultimate conclusion is that it cannot, including where, for example, the principal is uncontactable. Degeling arrives at that conclusion based on a combination of descriptive and normative reasons. More specifically, she contends that it is 'difficult to find a general power ex ante to authorise a breach of

¹⁷ (1841) 4 Beav 115; 41 ER 482.

fiduciary duty'¹⁸ and considers that the nature of the office occupied by a fiduciary is incompatible with prior authorization to commit a breach of duty.

Exemption clauses, professional advice and equitable compensation

The next three chapters deal with situations which commonly arise where the actions of trustees cause loss to be suffered by the trust fund. The focus of Sir Philip Sales' chapter is exemption clauses: the trustees may be able to rely upon a clause in the trust instrument which means that they do not have to pay. Michael Ashdown analyses the different contention made by trustees that they were not in breach of duty because they properly took professional advice. Finally, Peter Turner considers that even if there is no exemption clause or defence of having properly taken professional advice available to defaulting trustees, their liability may nonetheless be curtailed, in some circumstances, if the breach did not cause the relevant loss.

There are of course two different types of exemption clause. The most common excludes liabilities that might arise upon a breach of trust. Another category of exemption clause excludes duties that a trustee would ordinarily owe to the beneficiaries. Where a trustee relies upon the latter type of exemption clause, the trustee is in effect arguing that he has done nothing wrong. This might strictly be viewed as a denial. The former category of exemption clause is more straightforwardly relied upon by a trustee as a defence to a claim brought by beneficiaries. In practice, both raise similar issues as to whether the exemption clause is so extensive that what remains fails to satisfy the 'irreducible core' of a trust.¹⁹ But it should nevertheless be borne in mind that important differences exist between the two types of clause. For example, if only liability is exempted following a breach of trust, then the trustee will still have committed a wrong, and as a result an accessory to that wrong may be liable as a dishonest assister. But where the trustee did not owe a duty in the first place as a result of the second type of exemption, then it cannot be said that the trustee committed a wrong and therefore there is no wrong to which accessory liability might attach.

Sales analyses in detail a possible analogy with contract law. He highlights the importance placed upon 'freedom of contract', and considers whether 'freedom of trust' should be similarly emphasised, such that the settlor be able to agree to (almost) whatever he wishes. In some situations, the settlor and beneficiary will be the same party, and might have a contract with the trustee. In such circumstances, the contractual regimes regarding unfair terms will also be in play.²⁰ But in other circumstances the settlor will no longer be around, and the beneficiary will have no contract with the trustee. Sales discusses whether exemption clauses are invalid as a matter of interpretation (which could be overcome by clear drafting) or as a rule of law – and, if the latter, what the basis of such a rule may be.

The chapter raises fundamental issues for the law of trusts, and, indeed, more generally. For instance, the relationship between exemption clauses and the *ex post* relief from liability

¹⁸ P. xxx [p.21 of the manuscript].

¹⁹ See, notably, *Armitage v Nurse* [1998] Ch 241 (CA).

²⁰ Either the Unfair Contract Terms Act 1977 (UK) or the Consumer Rights Act 2015 (UK).

which may be granted under section 61 of the Trustee Act 1925 presents some interesting questions about the role of statute in the development of the common law. It is clear that exemption clauses can be valid when drafted much more broadly than the language of section 61. This perhaps shows the importance placed upon the freedom of a settlor to dispose of his property how he wishes. But some limits seem appropriate, and it is unclear whether the Court of Appeal in *Armitage v Nurse*²¹ struck the right balance. Indeed, following the split decision of the Privy Council in *Spread Trustee Company Ltd v Hutcheson*,²² it may be that the issue should be considered by the Supreme Court. Criticism of *Armitage v Nurse* has tended to contend that the decision was too generous to trustees, but, as Sales shows, it could be argued that it was too tough on settlors. This debate is clearly linked to the scope of the ‘irreducible core’ of a trust, without which the relationship in question is not that of beneficiary-trustee. The shift in focus (or at least litigation) from small, family trusts to larger, commercial trusts has inevitably influenced this question. If the irreducible core contains very little, then it is to be expected that very broad exemption clauses will be valid.

In chapter 8, Michael Ashdown draws attention to a rule – acting on professional advice – which he describes as ‘now one of the most important defences’ in the law of equity but which is not identified as a freestanding answer to liability in the leading works in the field.²³ The rule, stated simply, involves a trustee asserting that ‘I can’t possibly have committed a breach of trust: I just did what my professional adviser told me to’. The rule is confined, it appears, to cases in which the trustee acted within the scope of their powers. Ashdown’s concern, after demonstrating how the rule obtained a foothold in English law, is to isolate its elements and consider what each of them entails. Those elements, he says, comprise: (i) obtaining professional advice; (ii) the advice was obtained conscientiously; (iii) the advice was followed; and (iv) the advice was apparently competent.²⁴

One interesting question is whether the professional advice rule is really a defence at all. There is much in Ashdown’s chapter to suggest that he does not regard the professional advice rule as a freestanding answer to liability. He refers constantly throughout his chapter to there being no breach of trust where the rule applies. That is suggestive. If the rule really were an independent doctrine and hence separate from the matters that must be shown by the claimant to establish liability, one might expect Ashdown to speak instead of the rule as precluding liability despite a breach of trust. It is strongly arguable that it is not a defence in so far as the word defence is understood in contradistinction to the idea of a denial. Except in cases in which trustees exceed their powers, where strict liability is imposed, no liability will be imposed on trustees unless they are at fault in their conduct. The professional advice rule, however, bears all of the hallmarks of a simple denial of fault on the part of the trustee. The idea is that a trustee who acts upon apparently competent advice is not at fault. But this analysis raises several puzzles. One question that arises is why, if professional advice is a

²¹ [1998] Ch 241 (CA).

²² [2012] UKPC 13; [2012] AC 194.

²³ See, further, M Ashdown, *Trustee Decision Making: The Rule in Re Hastings-Bass* (Oxford, OUP, 2015).

²⁴ There is clearly a connection of sorts between the professional advice rule and section 5 of the Trustee Act 2000 (UK), which imposes a duty on trustees who are exercising a power of investment to obtain and consider proper advice about how the power should be exercised.

mere denial of fault, does it comprise (as Ashdown argues) four elements. Why does the rule not turn, instead, on a conventional enquiry as to whether the trustee exercised reasonable care? The answer to this question may well be that the professional advice rule is merely a device that is aimed to lend greater structure to the enquiries as to whether a trustee is at fault in cases involving professional advice.

In Chapter 9, Peter Turner considers the controversial issue of monetary remedies available to beneficiaries following a misapplication of trust assets by trustees. The decisions of the House of Lords in *Target Holdings Ltd v Redferns*²⁵ and the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co Solicitors*²⁶ have prompted a great deal of discussion, largely because – on at least one view – they seem to depart from long-standing equitable principles (despite the contrary protestations of Lord Toulson in the latter case). On a traditional view, trustees who misapply or misappropriate trust property immediately become liable to restore the trust property. Yet these more recent decisions perhaps suggest that rather than taking an account and falsifying improper disbursement, beneficiaries should simply sue for equitable compensation, and recover compensation for their loss (or, preferably, the loss suffered by the trust fund – at least in situations where there is not only one sole beneficiary under a bare trust).

Turner recognises that *Target* marked a shift in the law. But he explains this in a novel way. Turner argues that *Target*, and *AIB*, show that there has not been incorporated into the law a defence of ‘want of causation’. As Turner puts it, ‘where a trust suffers direct loss by reason of trustees’ misapplication of trust moneys, the trustees’ liability therefor may be reduced – even to nil – by showing that the loss would have been suffered even had the moneys been properly applied’.²⁷ This is an unusual type of defence, and how and why the defence developed is somewhat murky, but Turner illustrates how the defence is consistent with both *Target* and *AIB*. Turner further argues that the decision of the High Court of Australia in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*²⁸ provides support for such a defence, despite *Youyang* often being considered to show that Australian law remains grounded in traditional orthodoxy, unlike the decision of the Supreme Court in *AIB*.

Turner argues that Lord Reed’s judgment should be considered to be the leading judgment in *AIB*, and this further restricts the scope and impact of *AIB* upon traditional equitable doctrine. The accounting process remains intact, but there is a defence available to trustees who manage to show that the loss would have been suffered regardless of the breach of duty. It will be interesting to see whether such a defence comes to be explicitly recognised by the courts. If so, the outlines of the defence as sketched by Turner will no doubt prove to be helpful. In any event, recent judgments appear to show some inclination to restrict the scope of *AIB*,²⁹ and the pressures to fit *Target* and *AIB* within traditional equitable learning are considerable. It may be that a clear break has been made with the law prior to 1995, and it

²⁵ [1996] AC 421 (HL).

²⁶ [2014] UKSC 58; [2015] AC 1503.

²⁷ p. XXX.

²⁸ [2003] HCA 15; (2003) 212 CLR 484.

²⁹ See eg *Various Claimants v Giambrone and Law (A Firm)* [2017] EWCA Civ 1193.

may also be that this has really been through adopting a ‘want of causation’ defence as Turner suggests.

Co-trustees and creditors

Co-trustee liability is the focus of Joshua Getzler’s contribution (Chapter 10). Co-trustees are not agents the one for the other, and nor is one trustee vicariously liable for the acts of another. The liability of trustees is said to be ‘joint and several’, and Getzler carefully analyses what this means, and its implications. Getzler considers instances where an ‘innocent’ co-trustee seeks to escape liability because he simply followed an ‘active’ co-trustee, and whether this can be characterised as a defence. As Getzler suggests, the claim of the ‘innocent’ co-trustee might also be considered to be a denial, or amount to a dilution of liability, and classification of this issue is not entirely straightforward.

However, the issue remains important. In *Central Bank of Nigeria v Williams*³⁰ the Supreme Court had to decide upon the limitation regime applicable to dishonest assisters and knowing recipients. But in the course of his judgment, Lord Sumption made his view clear that an innocent co-trustee’s joint liability for a co-trustee’s fraudulent breach could still be shielded by limitation. Getzler questions why this should be so, and whether a co-trustee who tolerates or ignores the breaches of another should really be treated so generously.

Getzler combs through the origins of co-trustee liability in detail, and highlights that a proper understanding of the modern law should rest upon its historical roots. Indeed, one reason why there are not very many modern cases discussing the issue of co-trustee liability appears to be that the law has already been well-settled. That in turn has perhaps been one prompt for the rise of indemnity clauses, the broad nature of which causes Getzler some concern.³¹ In any event, Getzler’s exposition of the leading cases emphasises the importance of each trustee not hiding behind the decision of another trustee, and that each trustee should ensure personal knowledge of the state of the trust assets. As Getzler puts it, ‘The duty of the co-trustee was apparently to mistrust the other co-trustees’. A trustee who fails to meet this duty should in general be equally liable with the other co-trustees, and only rarely should the principle of equal liability be departed from in contribution proceedings.

In Chapter 11, Christopher Hare tackles the difficult doctrine of marshalling. Marshalling has perhaps not received the attention it deserves because it has long defied juridical classification. Hare analyses the problems inherent in treating marshalling as a ‘right’ or a ‘remedy’, and suggests that greater clarity can be achieved by considering at least some instances of marshalling to be an example of an equitable defence. Hare argues that no matter what explanation of marshalling is favoured, the doctrine operates as an essentially defensive tool in the hands of the junior secured creditor.

³⁰ [2014] UKSC 10; [2014] AC 1189.

³¹ Cf Sales’ chapter (ch 7).

The recent decision of the Supreme Court in *National Crime Agency (formerly Serious Organised Crime Agency) v Szepietowski*³² perhaps highlights that a reconsideration of marshalling comes at an opportune moment. Although the Supreme Court's decision was unanimous in result, the reasoning of the Justices diverged and the lack of agreement about the basis of marshalling leads to problems in its application.³³ Hare examines the roots of marshalling to illustrate that Equity has traditionally taken a broad view of 'unconscionability', and that, in its origins, marshalling could operate against both the senior secured creditor and the debtor. It might therefore be viewed as an equitable defence that a junior secured creditor could raise directly against the senior secured creditor, in order to restrict the latter's enforcement options against assets that the former viewed as collateral, but also as a defence raised against the debtor – or more likely the debtor's representatives, especially where the liquidator or administrator seeks directions from the court as to how to distribute the surplus from the sale of an asset by the senior security-holder.³⁴ It would seem that both possibilities can exist in tandem, and that adopting a 'hybrid' approach helps to maintain the doctrine's traditional flexibility. Greater appreciation of the historical origins of marshalling may well help to elucidate the modern law.

However, it is to be hoped that the flexibility sought does not lead marshalling to merge with subrogation. Functionally, the two doctrines appear similar: the junior creditor may effectively end up standing *pro tanto* in the shoes of the senior creditor in relation to an asset in which the junior creditor did not originally have a security interest. But such apparent equivalence should not obscure the different origins and purposes of the two doctrines. This seems particularly important given the complications that have recently surrounded subrogation following the decision of the Supreme Court in *Menelaou v Bank of Cyprus UK Ltd.*³⁵

Illegality and unclean hands

The volume contains chapters that address the illegality and unclean hands doctrines respectively. These rules, in our view, are animated, at least superficially, by similar concerns,³⁶ and it is thus somewhat curious that the connection between them is not something that has been subjected to sustained critical examination to date. They are often treated in separate silos and we hope that presenting the chapters side by side in this volume will facilitate understanding regarding the nature of their relationship.

³² *National Crime Agency (formerly Serious Organised Crime Agency) v Szepietowski* [2013] UKSC 35; [2014] AC 338.

³³ There are other difficulties raised by the decision of the Supreme Court: for discussion of the relationship between a debt and a charge see, eg, N Hopkins, 'Marshalling arguments: the relationship between a debt and a charge' [2014] Conv 344.

³⁴ See, eg, *McLean v Berry* [2016] EWHC 2650 (Ch); [2017] 3 WLR 198.

³⁵ *Menelaou v Bank of Cyprus Plc* [2015] UKSC 66; [2016] AC 176.

³⁶ According to *Snell's Equity*, the unclean hands 'maxim is closely related to the common law maxim *ex turpi causa non oritur actio* ("no action can arise from a bad cause")': J McGhee (ed), *Snell's Equity*, 33rd edn (London, Sweet & Maxwell, 2016) para 5-010.

The illegality doctrine is addressed by Paul Davies in Chapter 12. The law of illegality has been the subject of intensive investigation recently³⁷ and has been considered repeatedly over the course of the last few years at the ultimate appellate level. Matters came to a head when the Supreme Court handed down judgment in *Patel v Mirza*.³⁸ In that landmark decision, the Supreme Court opted for a ‘range of factors’ approach to the illegality doctrine in preference of the reliance test, which test was embraced by the House of Lords in *Tinsley v Milligan*.³⁹ Although *Patel* is a case in the law of unjust enrichment, the explicit rejection by the majority of the reasoning in *Tinsley*, a case in the law of trusts, leaves little room for any suggestion that the ‘range of factors’ analysis does not now govern the illegality doctrine as it applies in equity.⁴⁰

Davies’s primary concern in his chapter is to consider the impact of *Patel* in the bribery context in light of Lord Toulson’s remark that the ‘range of factors’ approach to the law of illegality will rarely result in the denial of a claim in unjust enrichment.⁴¹ Davies’s thesis is that bribers should generally be unable to recover the payments that they made and he casts doubt on the merits of *Patel* to the extent that it suggests that the bribes might be more readily recoverable by the payor than was previously the case. Davies also contends that *Patel* should neither be construed as obstructing a claim by a beneficiary to recover a bribe under a constructive trust nor as standing in the way of any personal claims that the beneficiary may have against bribers and bribees.

One important issue is what (if anything) justifies the illegality doctrine. *Patel* does not endeavour to answer to that question.⁴² The Supreme Court’s concern was not with the justifiability of the illegality doctrine – it was essentially assumed that the doctrine was justified – but with the test that should be applied to determine when illegality on the part of the claimant is sufficiently associated with the claimant’s cause of action that the claim should fail. The question of what justifies the doctrine is separate from that of pursuant to which test pursuant the doctrine (if it is justified) falls to be governed. Davies is more concerned in his chapter with the former issue. He sees rather more promise than do many other writers in the concept of deterrence as one (of several) of potential rationales, although

³⁷ Recent contributions include G Virgo, ‘Illegality’s Role in the Law of Torts’ in M Dyson (ed), *Unravelling Tort and Crime* (Cambridge, CUP, 2014); B McLachlin, ‘Weaving the Law’s Seamless Web: Reflections on the Illegality Defence in Tort Law’ in Dyson, Goudkamp and Wilmot-Smith (2015) (n 1); RA Buckley, ‘Illegality in the Supreme Court’ (2015) 131 LQR 341; J Fisher, ‘The Ex Turpi Causa Principle in *Hounga and Servier*’ (2015) 78 MLR 854; J Goudkamp, ‘The Doctrine of Illegality: A Private Law Hydra’ (2015) 6 *United Kingdom Supreme Court Yearbook* 254; N Strauss, ‘Ex Turpi Causa Oritur Actio?’ (2016) 132 LQR 236; S Erbacher, *Negligence and Illegality* (Oxford, Hart, 2017); A Grabiner, ‘Illegality and Restitution Explained by the Supreme Court’ (2017) 76 CLJ 18.

³⁸ [2016] UKSC 42; [2016] 3 WLR 399.

³⁹ [1994] 1 AC 340 (HL).

⁴⁰ Davies opines that the ‘range of factors’ approach applies to private law generally: ch 12 at p.

⁴¹ *Patel* (n 38) [116].

⁴² Although note Lord Toulson’s brief remark at, *ibid*, [99] that: ‘there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand’.

his remarks are intended to be suggestive rather than a fully-developed argument on this score.

Nicholas McBride in Chapter 13 asks whether the unclean hands doctrine should remain part of the law or whether it should be swallowed up by the defence of illegality. McBride thus engages with a familiar but important debate, namely, whether it is desirable that an equitable counterpart to a common law defence should continue to be recognized. McBride proceeds by organising remedies into three groups: (1) remedies to which a claimant is ‘entitled’, (2) remedies that are ‘necessary’ to grant in order to preserve the legitimacy of the legal system, and (3) ‘supererogatory’ remedies that are neither remedies to which the claimant is entitled nor remedies that it is necessary to award and which are awarded on the basis that granting them does more good than harm. McBride places within category (3) specific performance, most injunctions and aggravated damages. He seems to suggest that it is unclear whether rescission and remedies for unjust enrichment fall within category (2) or category (3). Having put this taxonomy in place, McBride argues that it is proper for the law to take into account the uncleanness of the claimant’s hands where the claimant seeks a category (3) remedy. He writes: ‘in determining whether awarding a [supererogatory remedy] would do more harm than good, it would seem irrational not to have regard to the question of whether awarding [the claimant] a [supererogatory remedy] would encourage people to engage in undesirable forms of behaviour’.⁴³ Once this is appreciated, McBride says, it becomes clear that room must be preserved for the unclean hands doctrine. As he puts it:⁴⁴

‘The law on illegality should be seen as being concerned with whether awarding a remedy would normally be awarded in order to preserve the legitimacy of the law will in fact do more harm than good *to the law’s legitimacy*. By contrast, the law on clean hands should be seen as being concerned with whether awarding a supererogatory remedy will do more harm than good *in general*, given the way the person seeking that remedy has behaved in the past’.

It would appear to be necessary to make various changes to both the illegality and unclean hands doctrines in order for McBride’s analysis to fit the positive law regarding these rules. It is tolerably clear that the law of illegality, as recast by the Supreme Court in *Patel*, is sensitive to matters that do not immediately relate to the preservation of the law’s legitimacy. Similarly, it is fairly obvious that the application of the unclean hands does not turn on an enquiry as to whether utility would be maximised by denying the remedy sought. None of this necessarily impugns McBride’s treatment. The point is merely that his argument appears to require that certain changes be made to the law.

Statute, limitation and laches

The burden of Mark Leeming’s chapter (Chapter 14), is to examine the relationship between equity and statutes of limitation. The analysis is motivated mainly by the fact that equity sometimes ‘follows’ limitation statutes even where those statutes do not apply in terms.

⁴³ McBride at p.XXX. [p.18 of the manuscript]

⁴⁴ *ibid*, p.XXX. [p.18 of the manuscript]

Leeming's concerns are several but a key issue for him is the circumstances in which equity should deny its assistance in view of a relevant statute of limitation even though the statute does not, properly construed, apply directly. It may well be that Leeming's analysis will assist in understanding the intersection between equity and statutory law more generally, even though limitation statutes are his focus.

It is important to appreciate that Leeming's chapter is concerned with just one facet of what is a much wider problem, namely, the circumstances in which judge-made law can and should be developed by analogy with statutory law.⁴⁵ That problem is magnified in Australia (as Leeming's chapter amply demonstrates) on account of Australia's unique federal arrangements and the major differences in the statutory law that prevails in different states and territories. It is on account of these and certain other considerations that Australian courts, perhaps more so than the courts in any other common law country, are required to dedicate significant resources to statutory construction and grappling with the interplay between statutory and judge-made law.

Leeming's overarching thesis is, ultimately, fairly modest, namely, that everything depends upon the precise parameters and objectives of the legislation in issue and the particular equitable doctrine that is under consideration. In his words, the matter ultimately entails 'a contestable question of judgment, based upon the nature and purpose of the statute in question, as well as the similarity or otherwise of the equitable claim to the legal claim which engages the statute'.⁴⁶ The modesty of this thesis does not, of course, diminish the complexity or importance of the tasks that Leeming isolates.

Complexity in this area of defences is not merely a product of the interaction between case law and statute but also a consequence of the multiplicity of defences that are closely related to limitation bars. The effluxion of time seems to form the basis of, in addition to limitation bars, several other defences, including laches, estoppel, acquiescence and release. These defences, as Lusina Ho demonstrates in her chapter (Ch 15), overlap to a considerable extent. For instance, a promise not to sue on a past breach might in one particular case be pleaded as a release, acquiescence, and even laches. This can be a source of confusion. One possible way of reducing the complexity of the law in this regard that is alluded to in some cases⁴⁷ but rejected by Ho is to roll the various defences into a single principle of estoppel. By delaying bringing a claim, the argument goes, the claimant represents to the defendant that he or she will not stand upon his or her rights, and the defendant might then rely upon this representation to his detriment. This over-arching principle of estoppel, based upon a broad notion of unconscionability, is rejected by Ho as being overly simplistic. In her chapter, she pulls apart the separate threads underpinning these defences, and shows that they each recognise various moral duties. These moral duties, Ho contends, are distinct and ought not to be subsumed by a generic principle of unconscionability.

⁴⁵ Classic treatments of this subject include R Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383; PS Atiyah, 'Common Law and Statute Law' (1985) 48 *MLR* 1.

⁴⁶ Leeming at p. XXX.

⁴⁷ Eg, *Orr v Ford* (1989) 167 *CLR* 316, 339 (Deane J).

Delay in bringing a claim is not normally a reason, in and of itself, to deny that claim. Rather, it is the further facts that tend to follow from delay that are doing the normative work in this field of defences. Ho distinguishes between three types of case. First, where there has been undue delay it might be the case that the claimant has, expressly or impliedly, promised not to sue the defendant for a past breach. The claimant's moral duty to do as he promised, and not sue, bars the claim. Second, a delay might be evidence that a claimant has represented to the defendant that he does not have a cause of action against the defendant. The defendant's detrimental reliance upon this representation might furnish him with a good reason to bar the claim. Third, delay might, independently of what the claimant has promised or represented, encourage the defendant to believe that he is free from liability. Any subsequent claim might cause irreversible prejudice to the defendant. These are the normative reasons identified by Ho for denying a claim.

Ho's approach avoids the arguably unsatisfactory overlap between the actions by linking them to the three principles identified in the chapter. This requires a fair amount of re-arranging. Laches, for instance, can be disaggregated into cases where delay amounts to a representation that the claimant holds no rights, and cases where there is no representation, but the defendant will suffer irreversible prejudice. Acquiescence can similarly be split up between cases where the silence amounts to a promise not to sue and a representation that the claimant holds no cause of action against the defendant. Under Ho's analysis these cases ought to be treated separately. This is an ambitious project but Ho makes a compelling case for a more coherent taxonomy of defences arising in cases of undue delay.