

‘Not slavishly nor always’ – Equity and Limitation Statutes

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Introduction

In judgments delivered at the beginning and the end of some three decades as a member of the United States Supreme Court, Scalia J observed that ‘[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.’¹ That passage confirms that the way in which equity is understood and analysed in the United States is of continuing interest,² as well as introducing the theme of this chapter, which is equity’s relationship with limitation statutes. That relationship is complex and subtle. Its nuances are more accurately captured by the familiar statement in Cardozo CJ’s dissent in the New York Court of Appeals in *Graf v Hope Building Corpn* from which this chapter’s title derives. Unlike the majority, the Chief Judge would have issued relief against the lender’s opportunistic foreclosure following the borrower’s trivial mistake and delay. In support of the availability of equitable relief, Cardozo CJ said, using characteristically³ evocative language: ‘[E]quity follows the law, but not slavishly nor always’.⁴ Cardozo CJ was referring to common law, and, obviously enough, if equity had invariably followed the common law, there would never have been a distinctive equitable jurisprudence. However, the Chief Judge’s aphorism may also be read as applying to statute. Understood in that way, there is no inconsistency with Scalia J’s observation, for to follow is certainly not to disregard. Naturally, a court adjudicating an equitable claim will and must apply a statute which applies in terms. But equity goes further, and sometimes ‘follows’ limitation statutes even when they do not directly apply. The result is significant: equitable relief which would otherwise be available is denied by reason of a statute which does not in terms apply to a claimant’s claim. How that occurs is a matter of no little complexity and subtlety. It is easier to point out, as Cardozo CJ did, what equity is *not* doing than to explain the processes at work in such cases.

As this chapter will explain, two quite distinct processes are in play. The first is statutory construction – and statutory construction which presents difficult and interesting issues relating to the interplay between equity and statute. The second, which only operates where

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¹ *Immigration and Nationalization Service v Pangilinan* 486 US 875, 883 (1988) and *Armstrong v Exceptional Child Centre* 135 S Ct 1378, 1385 (2015), both citing *Hedges v Dixon County* 150 US 182, 192 (1893).

² Scalia J’s reasons were both directed to innovative equitable remedies created by the Ninth Circuit, reasoning which reads a little strangely to Anglo-Australian eyes. However, that is not to deny the ongoing interest and importance in the United States of what has been called ‘the New Equity’: S Bray, ‘The Supreme Court and the New Equity’ (2015) 68 *Vanderbilt Law Review* 997. See, also, many of the chapters in P Turner (ed), *Fusion and Fission* (Cambridge, Cambridge University Press, forthcoming).

³ In B Cardozo, ‘Law and Literature’ (1925) 14 *Yale Review* 699, Cardozo had endorsed ‘The mnemonic power of alliteration and antithesis’ and ‘The terseness and tang of the proverb and the maxim’. See M Hall (ed), *Selected Writings of Benjamin Nathan Cardozo* (New York, Matthew Bender, 1975) 338, 342.

⁴ *Graf v Hope Building Corpn* 254 NY 1, 9; 171 NE 884, 887 (1930). The merits of the dissent were recognised even at the time: see A Bergman, ‘Equitable Relief from the Effect of an Acceleration Clause in a Mortgage’ (1930) 5 *St John’s Law Review* 55. The division anticipates that more recently seen in *Cukurova Finance Ltd v Alfa Telecom Ltd (No 4)* [2013] UKPC 20; [2016] AC 923.

the statute (as construed) does not apply, is the equitable doctrine of applying the statute by analogy. This doctrine also gives rise to difficult and interesting questions, but of a different nature. This chapter will consider how the requisite ‘analogy’ is identified, and how any such analogical application operates, something which has been closely considered by appellate courts in New South Wales.

This chapter adopts the following structure. First, it mentions, but only so as to put to one side, some superficial complexities in this area. It then outlines the historical background, in order to expose how the sources of doctrinal obscurity have arisen. The main portions of the chapter focus upon the processes of statutory construction and application by analogy mentioned above. It will be seen that each process involves the relationship between equity and statute, in ways which are more nuanced than may at first be appreciated.

Some superficial complexity

Ashburner’s overview discloses a straightforward account of the relationship between equity and limitation statutes.⁵

Lapse of time operates in itself as a defence ... under one or other of the following circumstances. (a) A statute of limitation may apply in terms to equitable rights. (b) It may apply to legal rights, and courts of equity in aiding legal rights act in obedience to the statute. (c) It may apply to legal rights to which equitable rights correspond, and courts of equity in dealing with these equitable rights act by analogy to the Statute.

It is easy to see why the situation is more complex – indeed, *much* more complex – than stated by Ashburner. It is convenient at the outset to sketch some of the sources of complexity. I do so not with a view of providing a full analysis, but instead so as to be able to put them to one side, in order to focus without peripheral distraction on the relationship between equity and limitation statutes.

Complexity from overlapping equitable doctrines

Limitation statutes typically state in terms that they do not affect ‘the rules of equity concerning the refusal of relief on the ground of laches acquiescence or otherwise’.⁶ Even so, there remains a large question as to whether and if so how, if a limitation statute applies directly or by analogy, other delay-based equitable defences might apply.⁷ Consistently with two other aspects in this chapter, it is submitted that there is no simple answer applicable to all statutes of limitation, but that the analysis is essentially the same irrespective of whether the statute applies directly or by analogy. The analysis will turn on the particular statute and the particular equitable defence on which reliance is placed. The issue is whether the statute precludes reliance on the equitable defence (such that the statute is the exhaustive of the

⁵ D Browne, *Ashburner’s Principles of Equity*, 2nd edn (London, Butterworth & Co, 1933) 501–2.

⁶ See, eg, Limitation Act 1980 (UK), s 36(2); Limitation Act 1969 (NSW), s 9; see also Limitation of Actions Act 1936 (SA), s 26; Limitation of Actions Act 1974 (Qld), s 43; Limitation Act 1974 (Tas), s 36; Limitation Act 1958 (Vic), s 31; Limitation Act 2005 (WA), s 80. There are minor differences in the wording of these provisions, which most probably are immaterial: see *In re Loftus (decd)* [2006] EWCA Civ 1124; [2007] 1 WLR 591 [33] ff.

⁷ See the 11 Australian, Canadian and English cases collected in G Dal Pont, *Law of Limitation* (Sydney, LexisNexis, 2016) [3.31]–[3.32].

circumstances when relief is not available). That will turn upon the construction of the Act as a whole, in which task provisions which are expressly directed to the relationship between statute and equitable defences are apt to be determinative (although falling short of being conclusive).⁸ In the common case where a defendant points not merely to delay but to delay coupled with prejudice, it would seem unlikely that the statute (whether applying directly or by analogy) would exclude the equitable defence.⁹

Although this chapter is directed to the interaction between statute and equitable defences where both may be available, it passes over the question of the relationship between equitable defences such as laches, waiver and release as between themselves and their relationship with doctrines such as estoppel by acquiescence.¹⁰ There are competing views as to the extent to which those overlapping defences are, or else should be, rationalised. One approach is to remove that which adds nothing save confusion. For example, ‘acquiescence’ is an imprecise term which on one view adds nothing to what is more precisely connoted by laches (understood as delay coupled with prejudice) and waiver, release and estoppel by acquiescence.¹¹ A more elaborate approach is to seek to rationalise those doctrines so that they cease to overlap.¹²

Complexity from historical legislative haphazardness

Another aspect of complexity derives from the fact that statutes of limitation have evolved haphazardly. In 1998, The Law Commission said that ‘The current law on limitations has developed in an *ad hoc* way over a period of several centuries. Little thought has been given to the overall coherence of limitations law.’¹³

The problem is more acute in Australia, where there are vastly different approaches in different jurisdictions. One leading Australian commentator, referring to this historical dimension, has observed that the ‘Australian States and Territories are at very different stages of development’.¹⁴ In very general terms, the South Australian law reflects nineteenth century English statutes. The Victorian, Tasmanian and Queensland laws reflect the English reforms of the late 1930s. New South Wales and the Northern Territory have statutes based on a 1967 New South Wales Law Reform Commission report,¹⁵ while the laws of Western Australia and the Australian Capital Territory are modern and distinctive (for example, they apply directly to all equitable claims).

Complexity from Australian federal considerations

⁸ See (albeit in a different context) *John Holland Pty Ltd v Victorian Workcover Authority* [2009] HCA 45; 239 CLR 518 [20] ‘such a statement is only a statement of intention which informs the construction of the Act as a whole. It must be an intention which the substantive provisions of the Act are capable of supporting.’

⁹ See *Lallemand and Stevenson v Brown and Swan* [2014] ACTSC 235; 9 ACTLR 313 [140]–[155].

¹⁰ See Lusina Ho, ch 15 in this volume.

¹¹ See J Edelman, ‘Money Awards for the Cost of Performance’ (2010) 4 *Journal of Equity* 122, 129.

¹² See Lusina Ho, ch 15 in this volume; cf *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81; 91 NSWLR 732 [49]–[51] and *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2017] NSWCA 19; 94 NSWLR 83 [44].

¹³ Law Commission, *Limitation of Actions* (Law Com CP No 151, 1998) [11.2].

¹⁴ P Handford, *Limitation of Actions*, 3rd edn (Sydney, Thomson Reuters, 2011) vi; see, further, Dal Pont (n 7) [1.10]–[1.13], summarising the legislative history in each Australian jurisdiction.

¹⁵ Australian Law Reform Commission, *First Report on the Limitation of Actions* (No 3, 1967).

A third aspect of complexity is peculiarly Australian. It derives from the (for the most part) absence of a general federal statute of limitations,¹⁶ the substantial divergence between the Australian States and Territories, and the nature of the Australian federation.

There is no general federal limitation law, so that, ordinarily, Australian courts (state and federal) will be directed to state limitation statutes, which are far from uniform. Uniform legislation enacted in the 1990s had provided that for choice-of-law purposes limitation laws were regarded as substantive,¹⁷ a result which was shortly thereafter confirmed (realigning the general law to the result achieved by statute)¹⁸ by the High Court.¹⁹ There are further complexities in the exercise of federal jurisdiction, which turn on sections 79 and 80 of the Judiciary Act 1903 (Cth), which has very recently been reinterpreted by the High Court and the operation of which in relation to choice of law rules may fairly be regarded as unsettled.²⁰ And the choice of law rules governing trusts are not straightforward, particularly in relation to trusts created by operation of law to which one aspect of this paper is directed.²¹ But enough is enough. For the balance of this chapter, I shall put to one side Australian federal complexities.

Historical overview

This chapter considers two deeper aspects of complexity in the relationship between equity and limitation statutes: the way in which statute has addressed equitable principle in terms, giving rise to complex questions of construction, and the nature of the equitable doctrine of itself. Neither aspect may be considered without regard to the historical development of this area of the law. This section provides a brief (and somewhat simplified) summary.

For present purposes, the starting point is the statute of 21 Jac 1 c 16 enacted in 1623,²² which is the source of the rule that most claims in tort and contract have a six-year limitation period.²³ The actions specified in s 3 ‘shall be commenced and sued within ... six years next after the cause of such Accions or Suit, and not after’ in most cases. There were exceptions for accounts between merchants, and the statute did not apply to speciality debts. It was not until another two centuries had passed that the Civil Procedure Act 1833²⁴ provided that speciality debts be barred after 20 years.

¹⁶ The specific limitations under federal legislation such as the Corporations Act 2001 (Cth) and intellectual property legislation falls far short of providing for a limitation period in all matters in federal jurisdiction.

¹⁷ Choice of Law (Limitation Periods) Act 1993 (NSW); Choice of Law (Limitation Periods) Act 1993 (Vic); Limitation of Actions Act 1936 (SA), ss 38, 38A; Limitation of Actions Act 1974 (Qld), s 43A; Choice of Law (Limitation Periods) Act 1994 (WA); Limitation Act 1974 (Tas), ss 32A–32D; Choice of Law (Limitation Periods) Act 1994 (NT); Limitation Act 1985 (ACT), Pt 4, Div 4.4.

¹⁸ This is perhaps an example of common law following statute: see M Leeming, ‘Theories and Principles underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002, 1021–26. The same phenomenon can be seen in the text below.

¹⁹ *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503 [100].

²⁰ See *Rizeq v Western Australia* [2017] HCA 23; 91 ALJR 707.

²¹ See JD Heydon and M Leeming, *Jacobs’ Law of Trusts in Australia*, 8th edn (Sydney, LexisNexis, 2016) 626.

²² For earlier statutes, including the Statutes of Fines and Non-Claim and the statute of 32 Hen 8 c 2, see J Brunyate, *Limitations of Actions in Equity* (London, Stevens and Sons, 1932) 2–4.

²³ Section 3 was directed to ‘all Accions or Trespass, Quare clausum fregit, all Accions of Trespas, Detinue, Accion sur Trover and Replevyn for taking away of Goods and cattell, all Accions of Accompt and upon the Case, all Accions of Debt grounded upon any lending or contract without specialitie, all Accions of Debt for Arrerages of Rent, and all Accions of Assault Menace Battery Wounding and Imprisonment.’

²⁴ 3 & 4 Will 4 c 42.

A series of 18th century cases made it clear that courts of equity would apply the statute, but fell short of clearly explaining how that would occur. Two decisions of Lord Redesdale at the beginning of the 19th century have proven to be influential. His Lordship reached the following conclusion in *Hovenden v Annesley*:²⁵

I think it is a mistake in point of language to say that Courts of Equity act merely by analogy to the statutes; they act in obedience to them. ... I think therefore that Courts of Equity are bound to yield obedience to the Statute of Limitations upon all legal titles and legal demands and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include Courts of Equity; for when the legislature by statute limited the proceedings at law in certain cases and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also.

In *Cholmondeley v Clinton*, Lord Redesdale dealt with a claim in equity's exclusive jurisdiction, saying that 'I conceive therefore that the very words of the Statute of James 1, if it is a statute which has any application to a Court of Equity, apply to such a case as this'.²⁶ His Lordship said that Parliament was to be taken to know that 'all large estates and every considerable property was constantly turned into an equitable property' and explained what he had said in *Hovenden v Annesley* as follows:²⁷

I take it, therefore, to be a positive law which ought to bind all Courts and for that reason I have taken the liberty in another place to say that I considered it not simply a rule adopted by Courts of Equity by analogy to what had been done in Courts of Law under the statute but that it was a proceeding in obedience to the statute and that the framers of that statute must have meant that Courts of Equity should adopt that rule of proceeding.

The equitable doctrine thereafter became settled, notably by *Knox v Gye*,²⁸ and as will be seen in the next section of this chapter, statute itself came to recognise the existence of a doctrine of application by analogy when there was a gap in the statute.

Precisely how the doctrine operated remained debatable. John Brunyate, who later revised Maitland's lectures in Equity,²⁹ won the Yorke Prize in 1929 for his influential essay, later published, on how limitation statutes applied in equity.³⁰ He said there were two views:³¹

The first, Lord Redesdale's opinion, that in cases in which equity was accustomed to follow the law the statutes were adopted by virtue of this custom, and that in other cases they were adopted by analogy as part of the law of laches; the second, the later opinion, that in deciding questions that might have arisen at law, being questions within their auxiliary and perhaps also their concurrent jurisdiction, the Courts of Equity were as

²⁵ *Hovenden v Lord Annesley* [1806] 2 Sch & Lef 607, 630.

²⁶ *Cholmondeley v Clinton* (1821) 4 Bli 1; 4 ER 721.

²⁷ *ibid* Bli 119–20; ER 736

²⁸ *Knox v Gye* (1872) LR 5 HL 656.

²⁹ *Equity – A Course of Lectures*, rev edn (Cambridge, Cambridge University Press, 1936).

³⁰ Brunyate (n 22).

³¹ *Cholmondeley* (n 26).

much bound by the statutes as were the Courts of Law, and that in other cases they adopted the statutes by analogy.

The difference in approach turns in part on a question of statutory construction – whether the statute spoke directly to courts of equity. The difference had practical consequences, because equity would only follow the law when it was not inequitable to do so. Hence, to the extent that equity’s approach turned on equity following the law, there would *in all such cases* be a residual discretion to disapply the statute. On the other hand, if the statute were regarded as applying directly to a suit, then there would be no such discretion.

Construing statutes which draw upon equitable doctrine

The intertwined history of equitable doctrine and statutes means that that question of construction can be especially complex. Although this is ‘merely’ a question of statutory construction, the following examples illustrate some recurring themes.

First example: statutory recognition of equitable principle

A ready example of the interrelationship may be found in s 36 of the Limitation Act 1980 (UK) and s 23 of the Limitation Act 1969 (NSW). Each section provides that the statutory time limits for many common law actions: ‘[do] not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy ...’.

These sections are best seen as recognising longstanding equitable principle, rather than being the source of or authority for applying statutes by analogy.³² It is an example of statute responding to and preserving an equitable doctrine which itself depended upon the *absence* of statute applying to a particular class of case. It may be said to be a case of statute following equity (resembling the exceptions now found for resulting and constructive trusts in the modern equivalents of the Statute of Frauds),³³ reflecting the result reached by equity prior to those exceptions being enacted. It also reflects one aspect of an important point once made by Gleeson CJ: ‘Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship’.³⁴

Second example: the meaning of constructive trustee

The decision of the United Kingdom Supreme Court in *Williams v Bank of Nigeria* confirmed that even though the statute applied in terms to a claim against a ‘trustee’, and even though ‘trust’ and ‘trustee’ were expressly defined to include a constructive trust, the statute did not apply to a knowing recipient of trust funds who was accountable as a constructive trustee.³⁵ Lord Sumption JSC referred with a measure of understatement to the ‘rather complicated

³² A point made in *Alec Finlayson Pty Ltd v Royal Freemason Benevolent Institution of New South Wales Nominees Ltd* [2013] NSWSC 1168 [41].

³³ Law of Property Act 1925 (UK), s 53; Conveyancing Act 1919 (NSW), s 23C(2). See A Burrows, ‘The relationship between common law and statute in the law of obligations’ (2012) 128 *LQR* 232, 248–51.

³⁴ *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 [31].

³⁵ *Williams v Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189.

interaction between the successive statutes of limitation and the equitable rules regarding the limitation of actions against trustees'.³⁶ The legislative history pointed squarely in support of the conclusion reached, which was that a person said to be accountable as a constructive trustee could not plead the statute of limitations applicable to trustees. The legislative history is essentially as follows.

First, the Judicature Act 1873 confirmed the traditional position that express trusts were not within the Statute of Limitations.³⁷ However, the Trustee Act 1888 reversed the position and extended the benefit of the statute of limitations to trustees in special cases.³⁸ Section 8(1) applied:

In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use ...

If the section applied, the trustee was entitled to the same period of limitation as would have applied if he or she were not a trustee. 'Trustee' was defined to include an executor or administrator 'and a trustee whose trust arises by construction or implication of law as well as an express trustee'.³⁹ In *Taylor v Davies*,⁴⁰ a Canadian appeal based on a cognate statute, where a person in knowing receipt of trust assets sought to invoke the statute, the Privy Council held that the statute did not apply 'to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court'. Despite the consideration of a Law Revision Committee chaired by Lord Wright in 1939,⁴¹ the Limitation Act 1939 repealed the Trustee Act 1888 and re-enacted s 8 of that Act by s 19 in substantially similar terms to s 21 of the current Act. According to Lord Sumption, the result was to confirm that the legislation did not deal with constructive trusts, but rather (as had been held in *Taylor v Davies*) to persons who, at the time of misapplication of trust assets, had assumed the responsibilities of a trustee, whether expressly or de facto.⁴² Although that aspect of the reasoning has been criticised, its force is that the Wright Committee made no mention of *Taylor v Davies* nor did it recommend the abolition of a distinction for this purpose between constructive trusts and express trusts. Modern English cases have so held,⁴³ and they were confirmed in *Williams v Bank of Nigeria*.

The position in Australia is different, and for two quite different reasons. For one thing, Australian State legislatures have made different choices. The Victorian decisions, which

³⁶ *ibid* [6].

³⁷ Section 25(2).

³⁸ 51 & 52 Vict c 59.

³⁹ Section 1(3).

⁴⁰ *Taylor v Davies* [1920] AC 636 (PC (Can)).

⁴¹ See P Mitchell, *A History of Tort Law 1900-1950* (Cambridge, Cambridge University Press, 2015), 243 ff for the creation and operation of this committee.

⁴² [2014] UKSC 10; [2014] AC 1189 [24]–[27].

⁴³ See *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA), *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467; [2002] 1 BCLC 162, *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, [139]–[143], *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048; [2004] 1 BCLC 131, *Halton International (Holdings) Inc Sarl v Guernroy Ltd* [2006] EWCA Civ 801; [2006] WTLR 1241, *Cattley v Pollard* [2006] EWHC 3130 (Ch); [2007] Ch 353 and *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] 5 HKC 135.

closely follow the 1888 legislation, have preserved the result that constructive trusts are outside the statute.⁴⁴ However, in its First Report on the Limitation of Actions,⁴⁵ the New South Wales Law Reform Commission addressed the point directly, referring squarely to *Taylor v Davies* and altering the statutory language.⁴⁶ The position was thoroughly examined by the New South Wales Court of Appeal in *Sze Tu v Lowe*, where it was concluded:⁴⁷

By contrast, when one looks at the definitions of ‘trust’ and ‘trustee’ in s 11(1) of the Limitation Act, the reference to ‘and whether or not the trust arises only by reason of the transaction impeached’, makes clear that it was intended that ‘constructive trustee’ or ‘trustee’ was to have a wider meaning than that which they had been given by the Courts of Equity previously, such as in *Taylor v Davies*.

There is another, more subtle, distinction between the United Kingdom and Australian positions. Not only is there a different legislative history, but there is now a different formulation of equitable principle. Take the case of a person accountable as a constructive trustee for knowing assistance. Lord Sumption observed:⁴⁸

it is now clear that knowing assisters are liable on account of their own dishonesty, irrespective of the dishonesty of the trustees: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. There is no rational reason why the draftsman of section 21(1)(a) should have intended that the availability of limitation to a non-trustee should depend on a consideration which had no bearing on his liability, namely the honesty or dishonesty of the trustee.

In Australia, Lord Browne-Wilkinson’s reformulation basis of liability is inconsistent with what was held by the High Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd*, and is not good law in Australia until and unless the High Court so determines.⁴⁹ In Australia, such a person cannot be liable under this limb of *Barnes v Addy* unless the breach of duty by the fiduciary amounts to a fraudulent and dishonest design.⁵⁰

⁴⁴ *Paragon* (n 43) and *Nolan v Nolan* [2004] VSCA 109.

⁴⁵ New South Wales Law Reform Commission, *First Report on the Limitation of Actions* (Law Com 3, 1967).

⁴⁶ The Limitation Act 1969 (NSW) as initially enacted had a sidenote which included ‘cf *Taylor v Davies* [1920] AC 636 at 653’, and ‘trusts’ was defined to include ‘express implied and constructive trusts.’ The Commission wrote:

The reference to a trust arising only by reason of a transaction impeached and the marginal reference to *Taylor v Davies* ([1920] AC 636) are made so as expressly to comprehend what might appear to many minds to be a typical constructive trust, namely, the case of a man in a fiduciary position acquiring, in breach of his duty, property in relation to which he is a fiduciary. In *Taylor v Davies* (above) however, Viscount Cave, giving the reasons of the Privy Council, said that such a man was not a trustee within a definition similar to that in the Trustee Act and was thus not disentitled to plead a statute of limitations. ... We think that a fiduciary who becomes a constructive trustee by taking property in breach of his duty should not be in a better position in relation to the limitation of actions than other trustees and the references inserted in the definition of ‘trust’ will ensure that he is not.

⁴⁷ *Sze Tu v Lowe* [2014] NSWCA 462; (2014) 89 NSWLR 317 [338].

⁴⁸ *Williams* (n 35) [35].

⁴⁹ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 [163].

⁵⁰ That does not prevent other forms of ancillary liability: see *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 266; 87 NSWLR 609 [68]–[82].

My point is not merely to identify small textual and doctrinal differences between the United Kingdom and Australia. It is to observe that, underneath those superficial differences, a broader identity of reasoning may be seen. In all cases, the tangled legislative history of statutes of limitation, which engage directly with equitable doctrine, requires a close analysis.

Third example: concealed fraud

Similar themes may be seen in relation to the doctrine of concealed fraud. Eighteenth century cases in equity upheld claims made after the six-year period where there was fraud.⁵¹ In 1806, in *Hovenden v Lord Annesley*,⁵² Lord Redesdale held that in cases of fraud, the period of limitation would not run in equity until the fraud was discovered.⁵³ That judicial development was reflected in the Real Property Limitation Act 1833,⁵⁴ which repealed the 1623 Act insofar as it applied to land and replaced it with a fuller body of rules, including s 26 which applied in terms to ‘every case of a concealed fraud’.

Once again, the law here was, at least until recently, quite confused. Sheridan put the position vividly:⁵⁵

If any branch of the law can be described as a muddle, the doctrine of concealed fraud has no rival for that epithet; presenting, as it does, an impression of multitudes of decisions confusing to such a degree that it seems incredible that the judges are speaking of the same doctrine.

A series of decisions confined the availability of the doctrine to equitable claims.⁵⁶ However, a more subtle analysis was given by *Metacel Pty Ltd v Ralph Symonds Ltd*,⁵⁷ holding that either the doctrine was a ‘peculiar doctrine of equity’ limited to claims in equity’s exclusive jurisdiction, or else, to the extent that it applied to claims in the concurrent jurisdiction, courts either regarded themselves as bound by the limitation statute or acted by analogy to it. Six members of the High Court of Australia said, in *Commonwealth v Cornwell*:⁵⁸

First, in cases of ‘concealed fraud’ courts of equity refused to apply by analogy statutes of limitation which operated upon actions at law. Secondly, this doctrine of ‘concealed fraud’ did not furnish an answer on equitable grounds to a plea in a common law court of the 1623 Act or other limitation statute to, for example, an action in tort; it was not possible to plead by way of replication on equitable grounds that the existence of the plaintiff’s cause of action had been fraudulently concealed from the plaintiff by the defendant. Accordingly, in *Metacel Pty Ltd v Ralph Symonds Ltd*, Suger JA said:

⁵¹ For example, *Booth v Lord Warrington* (1714) 4 Bro PC 163 and *South Sea Co v Wymondsell* (1732) 3 P Wms 143.

⁵² (n 25).

⁵³ Concealed fraud is considered in the following section of this chapter.

⁵⁴ 3 & 4 Will 4 c 27.

⁵⁵ L Sheridan, *Fraud in Equity* (London, Sir Isaac Pitman & Sons Ltd, 1956) 159.

⁵⁶ Including *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC (Aust)) and *John v Dodwell & Co Ltd* [1918] AC 538 (PC (Ceylon)), cited with approval in *R v McNeil* (1922) 31 CLR 76, 99–100.

⁵⁷ (1969) 90 WN (Pt 1) (NSW) 449.

⁵⁸ *Commonwealth v Cornwell* [2007] HCA 16; 229 CLR 519 [9] (citations omitted).

Concealed fraud remains a special doctrine of courts of equity applicable where relief is sought in those courts and is not applicable in bar of the Statute of Limitations in a pure common law action.

That narrow but principled approach nevertheless provided scope for claimants to avoid defeat by the statute, because Exchequer decisions had established the rule made it clear that the fraudulent concealment by the defendant *itself* gave rise to a cause of action. Thus in *Imperial Gas Company v London Gas Company* the claim for conversion was barred, notwithstanding the defendant's interference with the claimant's pipes, but a separate action in trespass in concealing the wrongful acts was allowed.⁵⁹ Martin B observed during argument, 'It constantly happens that the owner of a coal mine takes coal from an adjoining mine, and by fraud prevents its being found out for more than six years, yet that is no answer to the Statute of Limitations'.⁶⁰ *Hunter v Gibbons* was another such case: the equitable replication of concealed fraud in answer to the statute which was pleaded in defence to an action for trespass for taking underground coal was not allowed, but the court said that the claimant could sue in a court of equity making fraud the gist of the action.⁶¹

Finally, the equitable doctrine of concealed fraud was then extended, by statute, to legal claims. The joint judgment in *Cornwell* explains the process whereby the equitable doctrine was enacted, with modifications, in s 26(b) of the Limitation Act 1939 (UK) and then s 32 of the Limitation Act 1980 (UK).⁶² This is an instance of limitation statutes not only recognising equitable doctrine in terms, but expanding the scope of its area of operation.

Conclusions

It would be idle to multiply examples.⁶³ The richness of the analysis tends to confirm the hypothesis that the interaction between statute and equity is rich and distinctive. That is a consequence of a lengthy history, where equity has responded to perceived gaps in the statutory scheme, *and* where statute has responded – in a variety of ways – to equitable principle. It is an example of what I have elsewhere referred as the temporal dimension to the interaction between legislative and judicial changes in the law, a phenomenon which recurs throughout the law.⁶⁴

The nature of the analogical reasoning

Let it be assumed that the question of construction has been resolved, and that a limitation statute does *not* apply directly to an equitable claim. A quite different process then takes place. It is necessary to consider whether the statute is to be applied by analogy, and, if so, how that is to occur, bearing in mind that equity has its own doctrines directed to delay. These issues are interesting, and have given rise to confusion. Indeed, it has been said that

⁵⁹ *Imperial Gas Light Company v London Gas Light Company* (1854) 10 Exch 39; 156 ER 346.

⁶⁰ *ibid* Exch 42–3; ER 348.

⁶¹ *Hunter v Gibbons* (1856) 26 LJ Ex 1; 156 ER 1281.

⁶² [2007] HCA 16; 229 CLR 519 [40]–[44].

⁶³ Eg, in *Creggy v Barnett* [2016] EWCA Civ 1004; [2017] PNLR 4, the Court of Appeal divided on whether a claim against a trustee for the recovery of trust money which was wrongly paid away or for compensation in respect of other trust assets wrongly misapplied was a 'liquidated pecuniary claim' in s 29(5)(a) of the Limitation Act 1980 (UK).

⁶⁴ Leeming (n 18) 1002, 1021–6.

‘The reason why a statutory limitation period is applied to a circumstance which was not recognised in the terms of the statute has never been clearly explained’.⁶⁵ That is unfortunate, particularly from the perspective of the claimant whose claim is denied only because of a statute which does *not* apply in terms. There is thus good reason to attempt to unpack the considerations which apply.

The starting point must be to compare the legal right which is barred by the direct operation of the statute with the equitable claim at hand. For example, in *Cohen v Cohen*,⁶⁶ Dixon J upheld a wife’s claim that her estranged husband was required to account specifically for the proceeds of sale of her furniture as not being barred by the statute by analogy, but came to the opposite conclusion regarding her claim to be repaid the proceeds of converting a sum of German marks into pounds, because he was found not to be required to hold the amount specifically for her. Dixon J observed (by reference to authority) that ‘courts of equity have refused to see any analogy when a person, intending to act in a capacity which is fiduciary, has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit’.⁶⁷

How does this process of analogical comparison operate? One looks at the elements of the legal and equitable rights, and in particular to whether the claimant’s entitlement to a common law or equitable remedy is derived from the same conduct. Thus, for example, it has been said that ‘one could scarcely imagine a more correspondent set of remedies as damages for fraudulent breach of contract and equitable compensation for breach of fiduciary duty in relation to the same factual situation, namely, the deliberate withholding of money due by a manager to his artist’.⁶⁸ However, *Cohen v Cohen* shows that quite fine distinctions may be drawn.⁶⁹ By way of further examples, *Harris v Harris*⁷⁰ and *In re Robinson; McLaren v Public Trustee*⁷¹ were cases where a trustee had mistakenly paid the wrong beneficiary and, many years later, the underpaid beneficiary had sued and was met by a limitation defence. The different outcomes reflected the facts that Mr Harris, 12 years later, sought and obtained orders for the specific property he should have received (5,000*l* Consols, rather than 5,000*l* sterling), while Mrs McLaren sought merely an order for the payment of money. She failed, on the basis that ‘although, owing to the fact that the claimant is not the person who paid the money, the action is one which could not have been maintained at common law, it is in substance a mere money demand to which a Court of Equity, acting by analogy to the statute, would apply the same period of limitations’.⁷²

What justifies those distinctions? They are an instance of the important general phenomenon in legal analysis of ascribing the right level of abstraction or particularity. This may also be seen in the identification of the ‘risk of harm’ and the kind of harm which must be reasonably foreseeable for the purposes of the law of negligence,⁷³ and the identification

⁶⁵ *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102; 42 WAR 1 [207].

⁶⁶ *Cohen v Cohen* (1929) 42 CLR 91.

⁶⁷ This was the critical distinction applied in *In re Robinson; McLaren v Public Trustee* [1911] 1 Ch 502 (Ch D).

⁶⁸ *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707 (Ch D) 730.

⁶⁹ So, too, does *P & O Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717; [2007] 1 WLR 2288 [34]–[53].

⁷⁰ *Harris v Harris* (1861) 29 Beav 107; 54 ER 567.

⁷¹ *In re Robinson; McLaren v Public Trustee* (n 67).

⁷² *ibid* 513.

⁷³ See *Uniting Church in Australia Property Trust (NSW) v Miller* [2015] NSWCA 320; 91 NSWLR 752 [110]–[122] and the authorities there considered.

of the ‘purpose’ of a statute or a contract;⁷⁴ there are many other examples. Professors Twining and Miers have said of this that ‘There are no categorical rules to direct judges about the selection of appropriate levels of generality’.⁷⁵ That is one reason, not without force, in favour of limitation legislation which speaks directly to equitable claims.⁷⁶

It seems to me that it is also necessary to look to the limitation statute itself, to consider whether it is consistent with its application by analogy to the equitable claim.⁷⁷ For the statute may be aligned with, or quite foreign to, the values vindicated by equity. Take for example the relatively short limitation periods which tend to apply to applications for judicial review. A claimant who seeks injunctive relief preventing reliance on an administrative decision which has been made through misuse of the claimant’s confidential information may have a strong case for contending that the limitation period should have no application by analogy. Conversely, a short limitation period aimed at protecting government revenue may not be applicable either in terms or by way of analogy to an equitable claim for pecuniary relief.

Considerations of that nature suggest that the process may resemble that adopted in Australia where statutory illegality is relied on in answer to an equitable claim. In Australia, where a contract or trust is ‘not directly contrary to the provisions of the statute by reason of any express or implied prohibition in the statute’ but which is ‘associated with or in furtherance of illegal purposes’, then ‘the courts act not in response to a direct legislative prohibition but, as it is said, from ‘the policy of the law’.⁷⁸ That bears some resemblance to the analysis where it is said that a limitation statute applies by analogy.

Finally, a threshold question, which can be overlooked, is the nature of the limitation statute itself. That is not merely because regard must be had to the text and purpose of the particular limitation statute. It is also because limitation statutes themselves come in a wide variety of types. As Windeyer J said:⁷⁹

Statutory provisions imposing time limits on actions take various forms and have different purposes. Some are for preventing stale claims, some for establishing possessory titles, some for the protection of public authorities, some in aid of executors and administrators. Some are incidents of rights created by statutes. Some prevent actions being brought after, some before, a lapse of time.

For example, if the statute is merely an incident of the statutory right, then it will be inapplicable directly, and unlikely to be applicable by analogy.⁸⁰

⁷⁴ See *Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd* [2013] NSWCA 231; 304 ALR 436 [90]–[102] and the authorities there considered.

⁷⁵ W Twining and D Miers, *How To Do Things With Rules*, 5th edn (Cambridge, Cambridge University Press, 2010) 150.

⁷⁶ See, eg, the observation by the Western Australian Law Reform Commission that ‘The doctrine of analogy, already reduced to a shadow of its former self by the fact that most equitable claims are now directly the subject of Limitation Act provisions, will disappear. The Commission sees this as a wholly desirable development’: Law Reform Commission of Western Australia, *Limitation and Notice of Actions* (Project 36II, 1997) [13.76].

⁷⁷ See *Johns v Johns* [2004] NZCA 42; [2004] 3 NZLR 202 [78]–[80].

⁷⁸ *Nelson v Nelson* (1995) 184 CLR 538, 552; *Miller v Miller* [2011] HCA 9; 242 CLR 446 [26]. Contrast the position in the decisions that culminated in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467.

⁷⁹ *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, 488.

⁸⁰ See, eg, the analysis in *Airey v Airey* [1958] 2 QB 300 (CA).

The way in which equity applies a limitation statute by analogy?

Next, let it be assumed that a limitation statute is considered to apply by analogy to an equitable claim. A key idea is that if equity applies a limitation statute by analogy, it means just that. There is no *analogical* application of the statute if it is merely a contributing consideration to a more general exercise of discretion. Most limitation statutes provide bright line and necessarily arbitrary resolutions to questions of delay. If the statute applies by analogy to an equitable claim, then there will be no scope for a further, residual discretion, although that is not to deny that separate equitable defences such as acquiescence or estoppel may also be available in a particular case.

There was a measure of authority for the limitation statute to apply *as part of* the law of laches, thereby retaining a ‘residual discretion’, reflecting the position favoured by Brunyate. Typical was the statement in a South Australian case that ‘before applying the statutory time limit by analogy, I must be satisfied that in all the circumstances it is just to do so’.⁸¹ For the most part, the position was stated without analysis, and may not even have been argued. *Gerace v Auzhair Supplies*⁸² reviewed the position from first principle.

The appellants were three brothers who were the sole directors and shareholders of Auzhair Supplies. In 2002 and 2003, two lenders advanced funds to Auzhair, and received interest payments over the next six years. However, in 2005, the appellants and the lenders agreed to transfer the company’s assets to a different company, Auzhair 1 Pty Ltd, a company in which the lenders as well as the brothers were shareholders. The first company was then deregistered following a declaration that it had no liabilities. The declaration was incorrect; it still owed its lenders, but it was not alleged that he had acted dishonestly (it seems that all parties assumed that the assignment was effective to assign the company’s liability as well as its assets). It was accepted that in transferring the company’s assets to Auzhair 1 Pty Ltd for little or no consideration, the appellants had acted in breach of fiduciary duty.

Auzhair was reinstated in 2010 on its lenders’ application and sued Auzhair 1 Pty Ltd and the three brothers. By then, more than six years had elapsed. The Corporations Act 2001 (Cth) provides for a six-year limitation period for claims for compensation for breaches of directors’ statutory duties.⁸³ Auzhair had, of course, only sued in equity, but the directors sought to apply the statute by way of analogy to the equitable claims made against them. In opposition to this, it was pointed out that for most of that six-year period, Auzhair had ceased to exist.

At first instance, it was held that the claim for breach of fiduciary duty in equity was ‘as close as possible’ to a claim for breach of statutory duties to act in good faith in the best interests of the corporation and for a proper purpose, and not to gain an advantage for themselves or to cause detriment to the corporation.⁸⁴ No challenge was made to that assessment on appeal. However, the primary judge took the view that there was a residual

⁸¹ *The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 415 (appeal dismissed *Barker v Duke Group Ltd (in liq)* [2005] SASC 81; 91 SASR 167). See also *Hewitt v Henderson* [2006] WASCA 233 [25], *KM v HM* (1993) 96 DLR (4th) 289, 333 and *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 (CA) 509–510.

⁸² [2014] NSWCA 181; 87 NSWLR 435, noted (2014) 88 *Australian Law Journal* 621. For criticisms, see *Issa v Issa* [2015] NSWSC 112 [41]–[81] and A O’Dea and P O’Dea, ‘The application of statutory time limitation provisions by analogy to claims in equity’s exclusive jurisdiction’ (2015) 4 *Journal of Civil Litigation and Practice* 56.

⁸³ Section 1317K.

⁸⁴ Sections 181–182.

discretion to be exercised, and held that it would be inequitable to apply the limitation period, in light of the facts that the company and its liquidator could not exercise their rights against the former directors after it had been deregistered and until such time as it had been reinstated, and in light of the absence of any evidence of prejudice.⁸⁵ The brothers' appeal was allowed.

Meagher JA, with whom Beazley P and Emmett JA agreed, reviewed the authorities extensively and concluded:⁸⁶

None of the authorities to which reference has been made so far suggest, as Brunyate does, that where there is a limitation statute and closely analogous remedy at law, equity applies the statute as part of the law of laches and allows, as exceptions to the application of the statute, 'any exceptions that are allowed in the law of laches'. Brunyate's analysis fixes upon Lord Redesdale's distinction between equity acting in obedience to the statute and it acting by analogy. This analysis suggests that when equity was acting in obedience to the statute, its application of the bar was 'peremptory'. In such a case only fraudulent concealment would suspend the statute from operating. Whereas, when equity was acting by analogy it applied the statute as part of the law of laches so that the running of time would be suspended by the plaintiff's ignorance of his rights, and without the need to establish fraudulent concealment or some other equitable ground.

Meagher JA observed that Lord Redesdale's distinction had neither been generally nor consistently adopted, and did not accord with Isaac J's statement in *R v McNeil* that equity applied the statute unless a greater equity operated to prevent a defendant from relying on it.⁸⁷ There was a clear rejection of the proposition that equity retains a general residual discretion to decline to apply the statute.⁸⁸

An application for special leave to appeal was dismissed,⁸⁹ and the result was confirmed by the subsequent decision of the Court of Appeal in *Sze Tu v Lowe*,⁹⁰ from which decision an application for special leave to appeal was also dismissed.⁹¹

Even so, the position established by those decisions has, so far, proven to be a little controversial.⁹² Although the point is a narrow one, it goes to something which is fundamental to the relationship between equity and statute. Subject to two matters, once equity has determined that the statute applies by analogy, then that is how a defence of delay is applied, and *in the manner specified by the statute*, rather than as some ingredient in a broader discretion. That accords with orthodox notions of legislative supremacy, especially where the Legislature has itself endorsed the existence of the equitable doctrine. The two qualifications are (a) the statute itself might confer a discretion, and (b) there seems to me to be no reason why familiar doctrines concerning unconscientious reliance on a statute need not apply.

⁸⁵ *Re Auzhair Suplies Pty Ltd (in liq)* [2013] NSWSC 1; 272 FLR 304 [90].

⁸⁶ *Gerace* (n 82) [51].

⁸⁷ (1922) 31 CLR 76, 100.

⁸⁸ [2014] NSWCA 181; 87 NSWLR 435 [74].

⁸⁹ [2014] HCASL 231.

⁹⁰ [2014] NSWCA 181; 89 NSWLR 317 [365].

⁹¹ [2015] HCA Trans 179.

⁹² *Issa* (n 82) [41]–[81], *O'Dea and O'Dea* (n 82) and *Dal Pont* (n 7) [13.40]–[13.41].

Thus, in Australia, if a limitation statute does not apply directly to an equitable claim, one asks whether the equitable claim ‘corresponds’ to a legal claim to which it does apply. If not, then no application by analogy is possible and the only question is whether some other equitable defence is available. If there is a corresponding legal claim to which the statute applies, then the statute is to be applied by analogy in its terms, subject to any discretions it may contain, and subject to other doctrines precluding a party from relying on a statute, but not subject to some further ‘residual’ discretion which lacks foundation in the statute. If that were not so, then to use Meagher JA’s language, equity ‘would not truly be acting by analogy and following the law’.⁹³

Conclusion

Lord Sumption once wrote that: ‘issues of limitation are bedevilled by an unarticulated tendency to treat it as an unmeritorious procedural technicality. Limitation in English law is generally procedural. But it is not a technicality, nor is it necessarily unmeritorious’.⁹⁴ I respectfully agree. The topic is interesting and complex, in part because much of the legislation (particularly the older legislation) is directed to the vast majority of litigation: actions at common law in tort and contract, as opposed to suits in equity. Further the legislation tends to involve a direct legislative engagement with legal taxonomy, which is apt to give rise to dispute in cases where the categories are evolving.⁹⁵ One result has been the creation of equitable doctrine responding to a perceived gap in the statute, consistently with equity’s traditional role of supplementing the law. That in turn has given rise to a rich interaction between equitable principle and statute. In *Gerace*, federal legislation had in substance incorporated directors’ obligations in equity as a new statutory obligation, such that the analogy between the statutory and equitable claims and remedies was ‘as close an analogy as one can conceive’.⁹⁶ But it will not always be so, thus leading to 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.

The questions of statutory construction and the process of determining whether a statute applies by way of analogy are different facets of what the High Court of Australia has described as: ‘the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws’.⁹⁷

Two final observations may be made. The first is that the relationship is more nuanced than is commonly considered. The second is that this is another instance where equity has interacted and continues to interact with statute differently from other areas of the law.⁹⁸

⁹³ [2014] NSWCA 181; 89 NSWLR 317 [74].

⁹⁴ *Abdulla v Birmingham City Council* [2012] UKSC 47; [2012] ICR 1419 [41].

⁹⁵ Eg, the leading provision in the Limitation Act 1969 (NSW), imposing a six-year limitation period on actions founded on contract and tort extends contract to ‘including quasi contract’: s 14(1)(a).

⁹⁶ *In the Matter of Auzhair Supplies Pty Ltd (in liq)* [2013] NSWSC 1 [79].

⁹⁷ *Zheng v Cai* [2009] HCA 52; 239 CLR 446 [28].

⁹⁸ See M Leeming, ‘Equity: Ageless in the “Age of Statutes”’ (2015) 9 *Journal of Equity* 108.