

## ***Sir Anthony Mason Oration***

### **Blue Mountains Law Society 2018 Succession Conference**

*Justice Julie Ward, Chief Judge in Equity<sup>1</sup>*

- 1 Distinguished guests, members of the Blue Mountains Law Society, legal practitioners, and most importantly, the subject of this morning's oration, Sir Anthony Mason.
  
- 2 At the outset, I wish to acknowledge and pay my respects to the traditional owners and custodians of the land on which we meet, the Darug and Gundungurra peoples. As knowledge and learning is shared at this Conference, taking place upon their ancestral lands, may we also pay respect to the knowledge embedded within the Aboriginal custodianship of Country.
  
- 3 I am honoured to give this opening address dedicated to Sir Anthony Mason, who has been a long-time supporter of the Blue Mountains Law Society. He opened the Society's last Succession Conference, by providing a review of significant decisions in succession law. When my planned address changed from opening remarks on succession law to an inaugural Sir Anthony Mason oration, I had to consider how best to honour Sir Anthony. What more could I say about Sir Anthony Mason and succession law following last year's opening address on that topic from the man himself? And indeed, so much has been said and written about Mason's monumental contribution to Australian jurisprudence, in 23 years on the High Court (eight of those as Chief Justice), that it was difficult to see what I could usefully add to that wealth of literature.
  
- 4 However, upon reviewing the masses of books, publications and speeches either authored by Sir Anthony Mason or written about him, I considered that comparatively less attention has been paid in the academic literature to the contribution of Chief Justice Mason, and the Mason High Court as a whole, to

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the development of equity in Australia. With good reason, orators and authors tend to be drawn to Sir Anthony's constitutional and administrative law jurisprudence, to his many landmark judgments in public law and his essays and speeches on subjects such as the role of precedent, judicial policy, and constitutional interpretation.

- 5 That focus may, however, risk overlooking the fact that the leading Australian cases today on fiduciary obligations, estoppel, constructive trusts, and unconscionable conduct (among many other topics in equity) remain decisions of the Mason era. In fact, although he later became known for his public law jurisprudence, while at the Bar, Sir Anthony's practice was primarily in equity and commercial law. During this time, he also lectured in equity at the University of Sydney Law School, teaching future High Court Justices Gaudron and Gummow.
- 6 Not only for those students directly taught by Sir Anthony Mason, but for all of us, our intellectual heritage as equity lawyers has been profoundly shaped by decisions of Chief Justice Mason and his judicial colleagues, such as *Hospital Products v United States Surgical Corporation*,<sup>2</sup> *Waltons Stores v Maher*,<sup>3</sup> *Commonwealth v Verwayen*,<sup>4</sup> *Muschinski v Dodds*,<sup>5</sup> *Baumgartner v Baumgartner*,<sup>6</sup> and *Commercial Bank of Australia v Amadio*,<sup>7</sup> to name but a few examples. Indeed at last weekend's Banking and Financial Services Lawyers' Association conference, it was said that no authoritative discussion about fiduciaries could fail to include reference to the decision in *Hospital Products*.

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<sup>2</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; [1984] HCA 64 ("*Hospital Products*").

<sup>3</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; [1988] HCA 7 ("*Waltons Stores v Maher*").

<sup>4</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394; [1990] HCA 39 ("*Verwayen*").

<sup>5</sup> *Muschinski v Dodds* (1985) 160 CLR 583; [1985] HCA 78.

<sup>6</sup> *Baumgartner v Baumgartner* (1987) 164 CLR 137; [1987] HCA 59.

<sup>7</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14 ("*Amadio*").

- 7 I do not propose to summarise the facts and reasoning of these very well-known decisions. Rather, what I propose to do this morning is to examine a handful of recent appellate decisions in this State (judgments delivered within approximately the last two years) in order to illustrate the extent to which the judgments of Sir Anthony (first as Justice Mason and then as Chief Justice Mason) continue to permeate our contemporary equity jurisprudence.
- 8 My focus will be on three decisions, each of which falls into one of the areas of equity I mentioned earlier: fiduciary obligations, estoppel, and unconscionable conduct. (I leave the topic of constructive trusts – and the controversy as to the concept of the remedial, as opposed to institutional, constructive trust – for another day.)
- 9 Before turning to those decisions, however, let me say something about Sir Anthony Mason’s view of equity. Speaking in Canada, extra-judicially, in 1993, Sir Anthony commented that “the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.”<sup>8</sup> Sir Anthony saw the underlying values of equity as centred on good conscience, and sought to shape equitable principles “with a view to inhibiting unconscientious conduct and providing for relief against it”.<sup>9</sup>
- 10 Of course, in itself this was hardly radical; equity was concerned, very early on, with the unconscionable exercise of legal rights and with correcting one’s “conscience[s] for frauds, breach of trust, wrongs and oppressions”.<sup>10</sup>
- However, in the equity jurisprudence of the Mason High Court, the notion of

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<sup>8</sup> This address was subsequently published as: Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238 (see at 239).

<sup>9</sup> *Ibid* at 258; The Hon Sir Anthony Mason AC KBE, ‘Equity’s Role in the Twentieth Century’ (1997-1998) 8 *King’s College Law Journal* 1, 1.

<sup>10</sup> *Earl of Oxford’s Case* (1615) 1 Ch Rep 1 at 7; 21 ER 485 at 486.

moral conscience (or conversely of unconscionability) became a spearhead for extending equitable doctrines and relief beyond old boundaries, into new territory where, as Sir Anthony himself said, no Lord Chancellor's foot had previously left its imprint.<sup>11</sup>

- 11 In the recent appellate decisions which I will now examine, we see manifested Mason's enduring legacy for modern equity in Australia, and in particular, his focus on the demands of moral conscience.
- 12 First, on the subject of fiduciary obligations, about three weeks ago the NSW Court of Appeal delivered judgment in *Gunasegaram v Blue Visions Management Pty Ltd; Blue Visions Management Pty Ltd v Chidiac*,<sup>12</sup> dismissing two related appeals from a decision of a Judge of the Equity Division.<sup>13</sup> This case illustrates the unquestioned acceptance today of what was a dissenting judgment of Mason J in *Hospital Products*, and Mason J's careful observations in that case about how to navigate the imposition of fiduciary responsibilities in a commercial, contractual context were influential in the outcome of the appeal.
- 13 The appellant, Blue Visions, was engaged in a major contract with the Western Australian Department of Treasury and Finance to provide programming services in respect of the development of the Perth Children's Hospital (I will call this "the hospital project"). Dealings with Blue Visions were administered on the Department's behalf by its Office of Strategic Projects, and in particular by a Mr Hamilton. Mr Chidiac and Mr Gunasegaram were two senior employees of Blue Visions who were involved in managing the hospital project.<sup>14</sup>

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<sup>11</sup> Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 238.

<sup>12</sup> [2018] NSWCA 179 ("*Gunasegaram*").

<sup>13</sup> *Blue Visions Management Pty Ltd v Chidiac* [2017] NSWSC 255.

<sup>14</sup> *Gunasegaram* at [82], [90]-[93] per Gleeson JA.

- 14 In mid-March 2014, Mr Chidiac and Mr Gunasegaram gave notice of their resignation from Blue Visions. The primary judge found that when Mr Chidiac informed Mr Hamilton (of Strategic Projects) of his resignation, Mr Hamilton asked him whether he was interested in continuing to assist with the hospital project; Mr Chidiac replied, in effect, that he was; and Mr Hamilton said that he would “look into it”.<sup>15</sup>
- 15 On 28 March 2014, Mr Gunasegaram emailed the managing director of Blue Visions, Mr Khreich, regarding “three options” which Mr Hamilton would give Blue Visions in light of the resignations. Those options were (1) for Blue Visions to replace Mr Chidiac immediately with a strategic programmer of at least equal ability; (2) for Mr Hamilton to terminate Blue Visions’ engagement in the hospital project immediately, for breach; or, (3) for Blue Visions to agree to novate the existing contract to remove strategic programming, which Mr Hamilton would then give to “another company”.<sup>16</sup>
- 16 On 31 March 2014, Mr Hamilton had a conversation with Mr Khreich in which, it was found at first instance, he made clear to Mr Khreich that he wanted Mr Chidiac to continue working on the hospital project. He put forward a proposal in which the strategic programming aspect of the contract would be novated to a company associated with Mr Chidiac. Mr Khreich deposed that he was concerned that if he showed any resistance to the partial novation, Mr Hamilton may follow through with his threat to terminate the contract altogether.<sup>17</sup>
- 17 Mr Chidiac deposed that Mr Hamilton told him, a day or so later, that Mr Khreich had chosen the partial novation option, and that that would mean that Mr Chidiac would continue working on the hospital project. On 3 April 2014, Mr Chidiac and Mr Gunasegaram incorporated a company, “Aspire”. Five days later, the Department and Aspire (as well as, eventually, Blue Visions),

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<sup>15</sup> Ibid [105].

<sup>16</sup> Ibid [106].

<sup>17</sup> Ibid [110]-[111].

signed the partial novation of the hospital project contract.<sup>18</sup> Thereafter, Aspire supplied the services of Mr Chidiac in respect of the strategic programming functions of the project, while Blue Visions continued to supply other services to the project. When the hospital project contract expired (after several extensions), work on the hospital was not complete, and Strategic Projects put the remaining work out to tender. Blue Visions and Aspire both tendered for that work, and Aspire was successful.<sup>19</sup>

- 18 Blue Visions commenced proceedings against Mr Chidiac, Mr Gunasegaram and Aspire, claiming damages and an account of profits resulting from the novated portion of its contract. It alleged breach of fiduciary duty by the two former employees, improper use of position by each in breach of s 182(1) of the *Corporations Act 2001* (Cth), and made an accessorial liability claim against Aspire.<sup>20</sup> There were further claims pleaded in respect of other conduct, particularly against Mr Gunasegaram, however I will focus on those aspects of the appeal which concern fiduciary duties.
- 19 Relevantly, Blue Visions appealed from that part of the primary judge's decision which dismissed its claims for breach of fiduciary duty against Mr Chidiac and Mr Gunasegaram and its claim of accessorial liability against Aspire.<sup>21</sup> By notice of contention, Mr Chidiac and Aspire submitted that the primary judge should have found that Mr Chidiac did not owe fiduciary duties of the type alleged.<sup>22</sup>
- 20 In the majority in the Court of Appeal, Gleeson JA commenced consideration of the notice of contention and the fiduciary duty aspect of the appeal by emphasising that, as Mason J explained in *Hospital Products* at pp 96-97, the critical feature of fiduciary relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another in the exercise of

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<sup>18</sup> Ibid [83], [113]-[116].

<sup>19</sup> Ibid [117], [119].

<sup>20</sup> Ibid [1] per Basten JA; [84]-[85] per Gleeson JA.

<sup>21</sup> Ibid [87] per Gleeson JA.

<sup>22</sup> Ibid [140].

a power or discretion which will affect the interests of that other person in a legal or practical sense.<sup>23</sup>

- 21 Dismissing the notice of contention, Gleeson JA held that it was consistent with the scope of their respective functions and responsibilities as senior employees that Mr Chidiac and Mr Gunasegaram owed fiduciary duties to Blue Visions of the type alleged in relation to their dealings with Strategic Projects on the hospital project. In relation to Mr Chidiac for example, his Honour said:

Mr Chidiac as the third most senior employee was directly responsible on behalf of Blue Visions for the hospital project. He was the point of contact between Blue Visions and the client, Strategic Projects, in particular Mr Hamilton. He had responsibility for resourcing under and negotiating variations to the contract with Strategic Projects. As Mr Chidiac acknowledged in his evidence, Blue Visions had to trust him (in his dealings with Strategic Projects). Blue Visions was vulnerable to abuse by Mr Chidiac of his position when dealing with Mr Hamilton in relation to the hospital project.<sup>24</sup>

- 22 The influence of Mason J's powerful dissent in *Hospital Products* is evident here in two respects. First, in Gleeson JA's focus on vulnerability to abuse: Mason J's judgments in both *Hospital Products* and in the subsequent decision of *United Dominions Corp. v Brian* illustrate that a fiduciary relationship will arise out of a commercial arrangement when one party undertakes to act in the interests of the other party rather than in his or her own interests in relation to a particular matter or aspect of their commercial arrangement *and* that other party, being vulnerable in the sense that they are unable to look after their own interests in that matter or aspect, is basically dependent upon the first party acting in conformity with his or her undertaking.<sup>25</sup> In so holding, Mason J expanded the reach of fiduciary

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<sup>23</sup> Ibid [145].

<sup>24</sup> Ibid [167].

<sup>25</sup> *United Dominions Corp. Ltd v Brian Pty Ltd* (1985) 157 CLR 1; [1985] HCA 49; and see *Hospital Products* at 96-97 per Mason J. This summary is Mason J's own, from: Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 245-246.

principles into commercial relationships, long thought to be immune from the intrusion of such principles.<sup>26</sup>

- 23 Second, in *Hospital Products*, Mason J explained that the precise scope of fiduciary duties is to be moulded according to the nature of the relationship and the facts of the case. Where contractual and fiduciary relationships co-exist, the scope of the fiduciary's duties must be accommodated to the particular circumstances of the underlying relationship that gave rise to the fiduciary duties in the first place. His Honour said (at p 97):

In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

- 24 In the passage of Gleeson JA's reasons quoted above, his Honour determines the scope of Mr Chidiac's fiduciary duties by reference to his functions and responsibilities. His Honour quoted Mason J's remarks on this point,<sup>27</sup> and noted that this statement of Mason J was referred to with approval in *John Alexander's Clubs v White City Tennis Club*.<sup>28</sup> To similar effect, in his judgment in *Gunasegaram*, Meagher JA emphasised that Mr Chidiac's responsibilities and functions defined the ambit of his fiduciary duty, again referring to Mason J in *Hospital Products* (at pp 96-97 and 103).<sup>29</sup>

- 25 Turning to whether Mr Chidiac had breached his fiduciary duty in these circumstances, Gleeson and Meagher JJA both focussed on the "basic

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<sup>26</sup> See Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 238

<sup>27</sup> *Gunasegaram* at [146] per Gleeson JA.

<sup>28</sup> *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 at [91].

<sup>29</sup> *Gunasegaram* at [55] per Meagher JA.



principle” of the conflict rule as it was stated by Mason J in *Hospital Products*,<sup>30</sup> namely, that a fiduciary is:

... under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect...<sup>31</sup>

Although, as I have mentioned, Mason J was in dissent in *Hospital Products*, this principle was affirmed and restated in the unanimous judgment of the High Court, with Chief Justice Mason presiding, in *Warman v Dwyer*,<sup>32</sup> and it has since been referred to with approval by the High Court on numerous occasions.<sup>33</sup> For example, both Gleeson and Meagher JJA note in *Gunasegaram* that Mason J’s “influential” dissenting remarks in *Hospital Products* were adopted by the majority of the High Court in *Pilmer v Duke Group*.<sup>34</sup>

26 In *Gunasegaram*, one source of the disagreement between Gleeson and Meagher JJA in the majority, on the one hand, and Basten JA in dissent, on the other, was the differing extent to which their Honours focussed on what precisely had been pleaded by way of breach of fiduciary duty at trial.

27 Gleeson JA emphasised that the relevant pleaded claim was that Mr Chidiac and Mr Gunasegaram “caused or procured [Mr] Hamilton of Strategic Projects to demand that” Blue Visions take one of the three options (set out in the

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<sup>30</sup> Ibid at [58] per Meagher JA, [147]-[148] per Gleeson JA.

<sup>31</sup> *Hospital Products* at 103 per Mason J.

<sup>32</sup> *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558; [1995] HCA 18 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ (“*Warman v Dwyer*”). In *Gunasegaram*, Gleeson JA quoted this statement at [148].

<sup>33</sup> See for example the authorities referred to by Gleeson JA at [148], being: *Breen v Williams* (1996) 186 CLR 71 at 93-94 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ); [1996] HCA 57; *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [74], [78] (McHugh, Gummow, Hayne and Callinan JJ); *Friend v Brooker* (2009) 239 CLR 129; [2009] HCA 21 at [84]; *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21 at [31]-[33] (French CJ and Keane J), [56], [62] (Hayne and Crennan JJ).

<sup>34</sup> *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [78] (McHugh, Gummow, Hayne and Callinan JJ). See *Gunasegaram* at [58] per Meagher JA; [149]-[150] per Gleeson JA.

email I have described earlier), that they incorporated Aspire and took up shareholdings and directorships in that company, carried on business through it in direct competition with Blue Visions, and “effectively diverted the benefit” of part of the hospital project from Blue Visions to Aspire.<sup>35</sup> Blue Visions alleged that by engaging in such conduct, Mr Chidiac and Mr Gunasegaram each breached his fiduciary duty not to prefer his interests to Blue Visions’ interests and not to allow himself to be in a position where his interests and Blue Visions’ interests conflicted.<sup>36</sup>

- 28 This, as Gleeson JA characterised it, was a pleading relying on *the conflict rule*, the basic principle being that stated by Mason J to which I referred a moment ago. Gleeson JA noted that there was no pleading relying on the profit rule; that is, no pleading to the effect that either of the former employees took advantage of an opportunity or information derived from his fiduciary position that was created by his employment to make a gain for himself.<sup>37</sup> Meagher JA made the same point, referring to the two distinct rules articulated by the Mason Court in *Warman v Dwyer* and emphasising that:

Importantly for the outcome of this appeal, Blue Visions relied before the primary judge and in its appeal *only* on the first rule above, described as the conflict rule (as distinct from the profit rule). In this respect, Blue Visions’ claim was limited in the same way as that in *Howard v Federal Commissioner of Taxation*.<sup>38</sup>

- 29 Meagher JA continued, here applying the test articulated by Mason J in *Hospital Products*:

The significance for this appeal of Blue Visions’ reliance only on a breach of the conflict rule is that it must establish that Mr Chidiac undertook faithfully to perform, for or on behalf of Blue Visions, some function or responsibility engaged in the circumstances in which he pursued a relevant opportunity with Strategic Projects.

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<sup>35</sup> *Gunasegaram* at [120] per Gleeson JA.

<sup>36</sup> *Ibid* [121].

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at [57] per Meagher JA, citing *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21 at [33], [109]; cf [58].

Blue Visions' case depends on its establishing that at the time of Mr Chidiac's conversation with Mr Hamilton (on about 25 March 2014), or his agreement in principle to enter into the novation agreement (on 31 March 2014), there was a conflict, or real or substantial possibility of a conflict, between his pursuit of that opportunity and the discharge of a function or responsibility to which his fiduciary obligation attached.<sup>39</sup>

- 30 The majority focussed only on the conflict rule, and Mason J's observations about the need to define the content of the fiduciary duty by reference to contractual functions and responsibilities were highly influential in the outcome of the appeal. Meagher JA stressed that Mr Chidiac was not a director in name or substance of Blue Visions, and was not charged with the general management of its affairs, referring in this regard to specific terms of Mr Chidiac's employment contract.<sup>40</sup> Likewise, Gleeson JA emphasised that the contractual context had to be borne in mind, and that Mr Chidiac was not subject under his contract to any post-employment restraints or obligations.<sup>41</sup> His Honour found it significant that Mr Chidiac was not contractually (or practically) responsible for considering or deciding whether Blue Visions should agree to the partial novation of the hospital project, and that he waited until after Mr Khreich on behalf of Blue Visions had agreed with Mr Hamilton to a partial novation, before he pursued and took up the opportunity.<sup>42</sup> The majority therefore concluded that there was no error by the primary judge in rejecting the breach of fiduciary duty case against Mr Chidiac.
- 31 Basten JA, in dissent, found that Aspire and Mr Chidiac were liable to account to Blue Visions for the profits derived from the novated contract, and would therefore have allowed Blue Visions' appeal.<sup>43</sup> His Honour said that although there are circumstances in which it will be helpful to distinguish between the

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<sup>39</sup> *Gunasegaram* at [63], [67] per Meagher JA. Gleeson JA applied the same test at [189]-[190].

<sup>40</sup> *Ibid* [68].

<sup>41</sup> *Ibid* [190].

<sup>42</sup> *Ibid* [200], [202]; see also at [222]-[223].

<sup>43</sup> *Ibid* at [1] per Basten JA.

no conflict principle and the no profit principle, the present case did “not fit squarely within one principle or the other”.<sup>44</sup>

32 Basten JA reasoned that Mr Chidiac “obtained the benefit of the very contract under which he had established the relationship with the third party contractor, whilst a senior manager for his employer. By doing so, he deprived his employer of the benefit of an extant contract, whilst in the course of his employment.”<sup>45</sup> His Honour placed weight on the fact that Mr Chidiac “put in train the events leading to the novation in the course of his employment” (citing *Warman v Dwyer* in this regard), and concluded that the circumstances involved a breach of the fiduciary duty owed by Mr Chidiac to Blue Visions.<sup>46</sup>

33 Irrespective of which of the differing approaches is to be preferred, what should be apparent is that, in more than name, this hospital project case demonstrates the power of Mason J’s dissent in *Hospital Products*. That dissent continues to govern the law of fiduciary obligations in Australia today.<sup>47</sup> Mason J saw the concept of the fiduciary relationship as a driver of equity’s incursions into the area of commerce, and took the firm view that fiduciary relationships *could* arise out of commercial transactions or arrangements even with arm’s length parties who stood on a relatively equal footing.<sup>48</sup> By extending equity’s protection of relationships of trust and confidence, and its concern with abuse of vulnerability, into the sphere of commerce, Mason J left a powerful legacy in this area of equity.

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<sup>44</sup> Ibid [19].

<sup>45</sup> Ibid [27].

<sup>46</sup> Ibid [43].

<sup>47</sup> For other recent NSWCA examples, see *Hart Security Australia Pty Ltd v Boucosis* [2016] NSWCA 307; (2016) 339 ALR 659 at [86], [94], [96]; *Coope v LCM Litigation Fund Pty Ltd* [2016] NSWCA 37; (2016) 333 ALR 524 at [106], [119], [203]; *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* [2016] NSWCA 347; (2016) 340 ALR 580 at [130]-[131].

<sup>48</sup> Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238, 245.

- 34 My second case study is in estoppel – the decision of the Court of Appeal about two years ago in *Doueihi v Construction Technologies Australia*.<sup>49</sup> This appeal concerned a claim of proprietary estoppel relating to premises in Seven Hills owned by the first to fourth appellants, to whom I will refer as “the co-owners”. The fifth appellant, Marble Plus, was a company owned by those co-owners and/or their family companies.<sup>50</sup>
- 35 The respondent (Construction Technologies) brought proceedings in the Supreme Court, claiming that there was a binding agreement for lease between it and either the co-owners or Marble Plus in respect of a designated area of the premises, for five years at a specified rent, with an option for renewal for a further five years. Alternatively, Construction Technologies claimed that it had the benefit of either a conventional estoppel or an equitable estoppel against the co-owners, or against the co-owners and Marble Plus, which precluded them from denying the existence of such an equitable lease.<sup>51</sup>
- 36 The primary judge rejected Construction Technologies’ contract claim and the conventional estoppel claim, but upheld the claim to an equitable estoppel, which his Honour characterised as a proprietary estoppel by encouragement.<sup>52</sup> To satisfy the equity which arose, his Honour made declarations and orders to the effect that a lease existed between Construction Technologies and the co-owners on specified terms.<sup>53</sup>
- 37 The co-owners and Marble Plus appealed. On appeal, there were two main issues. The first concerned the quality or nature of the assumption required to found an equitable proprietary estoppel. The appellants asserted that the

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<sup>49</sup> *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105 (“*Doueihi*”).

<sup>50</sup> *Doueihi* at [2] per Gleeson JA.

<sup>51</sup> *Ibid* [3].

<sup>52</sup> *Construction Technologies Australia Pty Ltd v Doueihi* [2014] NSWSC 1717; (2014) 17 BPR 33,457.

<sup>53</sup> *Doueihi* at [4] per Gleeson JA.

primary judge made errors of law in recognising a proprietary estoppel in circumstances where his Honour had expressly found that Construction Technologies did not assume that “a particular legal relationship” would exist between the parties. Instead, his Honour found that Construction Technologies assumed that “an interest” would be granted, namely exclusive possession of its designated area of the premises for five years with an option to extend that period for a further five years if it paid the agreed rent.<sup>54</sup>

38 The second issue concerned the reasonableness of the assumption found by his Honour, reliance by Construction Technologies upon that assumption, and whether it was unconscionable for the appellants to depart from that assumption. In particular, at issue was whether the degree of completeness of the bargain between Construction Technologies and the appellants, particularly the absence of agreement as to rent over the entire term and as to all commercial terms, rendered unreasonable any reliance by Construction Technologies on an assumption that an interest in the premises would be granted to it.<sup>55</sup>

39 The appellants failed in respect of both issues. As addressing the second issue would involve delving into the complex factual background of the dealings between the parties, I will focus instead on the first issue which, both at first instance and in the Court of Appeal, amply illustrates the significant position which continues to be occupied by the High Court’s 1988 decision of *Waltons Stores v Maher*.

40 It is probably the case that Brennan J’s judgment in *Waltons Stores* has become the more frequently employed so-called ‘test’ for the ‘elements’ of equitable estoppel. However, what *Doueihy* shows, in my view, is that it is important not to neglect the other judgments in *Waltons Stores*, and in particular the joint judgment of Mason CJ and Wilson J.

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<sup>54</sup> Ibid [5]-[6].

<sup>55</sup> Ibid [8].

41 On the first issue, concerning the quality or nature of the assumption required to found an equitable proprietary estoppel (and whether it must be an assumption as to a “particular legal relationship”), the Court of Appeal’s reasoning in *Doueih* relies heavily on that joint judgment. At the outset of consideration of this issue, Gleeson JA (with whom Beazley P and Leeming JA agreed) stated that the principle of proprietary estoppel was formulated by Mason CJ and Wilson J in *Waltons Stores* (at p 404) as follows:

... a person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person’s land and on the basis of that expectation the other person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances.<sup>56</sup>

42 In *Doueih*, the appellants’ argument relied on the formulation of the first of Brennan J’s six well-known propositions in *Waltons Stores*, namely, that an essential element of equitable estoppel is that the plaintiff “assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship”.<sup>57</sup> The appellants contended that because (as found by the primary judge) Construction Technologies did not have any expectation or assumption that “a particular legal relationship” would exist and that the appellants would not be free to withdraw from the expected legal relationship, proprietary estoppel could not arise.<sup>58</sup>

43 The Court of Appeal rejected that argument, and in so doing referred to the statement of principle by Mason CJ and Wilson J in *Waltons Stores* which established that the circumstances in which a proprietary estoppel will arise include those in which assurances are given so as to create or encourage an assumption that “a particular legal relationship would be established” or “an

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<sup>56</sup> *Ibid* [131].

<sup>57</sup> *Waltons Stores v Maher* at 428 per Brennan J.

<sup>58</sup> *Doueih* at [154] per Gleeson JA.

interest” would be granted.<sup>59</sup> Gleeson JA in *Doueihi* said that it would be wrong to ignore that in *Waltons Stores*, Mason CJ and Wilson J did *not* say that the party asserting the estoppel must have assumed that a particular legal relationship existed, or that the party said to be estopped would not be free to withdraw from an expected legal relationship.<sup>60</sup>

44 Perhaps more significantly, what emerges from the Court of Appeal’s reasoning in *Doueihi* is an illustration of the marked emphasis on unconscionability in modern doctrines of equitable estoppel. At the start of this address, I mentioned Sir Anthony Mason’s view that the underlying values of equity are centred on good conscience. This view is particularly evident in his Honour’s estoppel judgments. Some years after *Waltons Stores* and *Verwayen*, Sir Anthony said that he saw unconscionability as lying “at the heart” of the doctrinal refinements which the Mason Court made with respect to estoppel.<sup>61</sup> Sir Anthony emphasised that it was important to continue to “adhere to the traditional concept of unconscionability as denoting conduct which involves one person unconscientiously taking advantage of another’s special vulnerability or disadvantage in a way that is both unreasonable and oppressive”.<sup>62</sup> In Sir Anthony’s view, the estoppel cases of his era (in particular, *Legione v Hateley*,<sup>63</sup> *Waltons Stores*, and *Verwayen*), reflected the strong sense of morality which underlies equity.<sup>64</sup>

45 *Doueihi* is a cautionary lesson against ignoring those underlying values in an attempt mechanically to apply “Brennan J’s six elements of equitable

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<sup>59</sup> *Ibid*; see also *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 at [2] per French CJ, Kiefel, Bell and Keane JJ; *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; [2011] NSWCA 348 at [56] per Meagher JA; [102], [126] per Handley AJA.

<sup>60</sup> *Doueihi* at [166] per Gleeson JA.

<sup>61</sup> Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238, 254.

<sup>62</sup> *Ibid* 259.

<sup>63</sup> (1983) 152 CLR 406; [1983] HCA 11.

<sup>64</sup> The Hon Sir Anthony Mason AC KBE, ‘Equity’s Role in the Twentieth Century’ (1997-1998) 8 *King’s College Law Journal* 1, 1.



estoppel". The appellants' argument relied on the assumption that each of those elements applies in every case, and that was resoundingly rejected in *Doueihi*.

- 46 The primary judge referred, as did the Court of Appeal, to the distillation of a number of propositions from *Waltons Stores* by Priestley JA in *Silovi v Barbaro*<sup>65</sup> and *Austotel v Franklins*,<sup>66</sup> relevantly, proposition (5), formulated in the latter as follows:

For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.

- 47 In *Austotel v Franklins*, Priestley JA had said that even if the "tests" of Brennan J did not represent the views of the majority of the High Court in *Waltons Stores*, they were useful as a check and if the facts of a particular case did not measure up to those tests, it would be necessary to think thoroughly about why not.<sup>67</sup> The primary judge in *Doueihi* characterised the requirement for a particular legal relationship in the first of Brennan J's propositions as the "narrower view" and contrasted it with the "broader view" reflected in the joint judgment of Mason CJ and Wilson J and the formulation of principle by Priestley JA in *Austotel*. His Honour rejected the narrower view and any rigid requirement for a belief as to current rights, or as to whether the defendant is legally bound to proceed, finding that non-satisfaction of Brennan J's first proposition did not preclude the conclusion that it was in all the circumstances unconscionable for the appellants to depart from the assumption Construction Technologies had adopted.<sup>68</sup>

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<sup>65</sup> *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472.

<sup>66</sup> *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 610 and 612 (Kirby P agreeing at 585).

<sup>67</sup> *Ibid* at 615-616.

<sup>68</sup> *Construction Technologies Australia Pty Ltd v Doueihi* [2014] NSWSC 1717; (2014) 17 BPR 33,457 at [145]-[147] per White J (as his Honour then was).

- 48 This approach was affirmed on appeal, indicating that it is *unconscionability*, rather than ‘ticking the box’ of each of Brennan J’s elements, which will be decisive. To similar effect, in *Arfaras v Vosnakis* earlier in 2016, the Court of Appeal had noted that “[t]he cases show a wide range of variation in both the main elements [of proprietary estoppel], that is the quality of the assurances which give rise to the claimant’s expectations and the extent of the claimant’s detrimental reliance on the assurances” and said that this “emphasis[ed] that the doctrine applies only if these elements, in combination, make it *unconscionable* for the person giving the assurances ‘to go back on them’.”<sup>69</sup>
- 49 In *Doueihi*, Gleeson JA explained (quoting Mason CJ and Wilson J) that the “something more” in *Waltons Stores* which made departure from the basic assumptions underlying the transaction between the parties unconscionable was the expectation or assumption that “a particular legal relationship” would exist and that the other party would not withdraw from the negotiations.<sup>70</sup> However, as his Honour explained in *Doueihi*, this was in the context of promissory estoppel, where the parties intended to enter into a contract; whereas the “something more” creating unconscionability may be different in a proprietary estoppel case, where the expectation or assumption created or encouraged by the party said to be estopped is that “an interest” would be granted, in circumstances where (as here) the parties did not believe they needed to enter into a contract or otherwise contemplate formalising their legal relationship.<sup>71</sup>
- 50 As Meagher JA said in *DHJPM v Blackthorn*, while Brennan J’s formulation in *Waltons Stores* is usually applicable to circumstances which would give rise to an orthodox proprietary estoppel, this is subject to the significant qualification that “any general formulation of the relevant principles must necessarily, in its

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<sup>69</sup> *Arfaras v Vosnakis* [2016] NSWCA 65; (2016) 18 BPR 35,819 at [75] per Ward JA, Beazley P and Simpson JA agreeing, referring to *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at [44] per Robert Walker LJ.

<sup>70</sup> *Doueihi* at [156]-[158] per Gleeson JA, referring to *Waltons Stores v Maher* at 406 per Mason CJ and Wilson J; at 422-423 per Brennan J.

<sup>71</sup> *Doueihi* at [159] per Gleeson JA, referring also to *DHJPM v Blackthorn* at [43]-[44] per Meagher JA and *Legione v Hateley* at 432, 434-435.

application in particular circumstances, be subject to qualification and refinement reflecting or giving effect to the broad equitable principles which underlie its application”.<sup>72</sup> *Doueihi* is an illustration of different circumstances to the specific situation in *Waltons Stores*, where the general formulation of “elements” by Brennan J was subject to qualification and refinement, by reference in particular to the guiding principle which Mason CJ perceived as underlying estoppel, unconscionability.

51 Before leaving *Doueihi*, there is one further aspect of the case which should be noted. There was also an issue raised on appeal as to whether there is a dichotomy in the law of proprietary estoppel between arms-length or commercial cases and domestic or family cases. The primary judge considered that this dichotomy was unnecessary and introduced refined distinctions that do not address equity’s fundamental concern with conscionable conduct.<sup>73</sup> Nonetheless, his Honour considered that he would have been compelled by *DHJPM v Blackthorn* not to recognise a proprietary estoppel in the present case *but for* its domestic or family context, which meant that another Court of Appeal decision, *Tadrous v Tadrous*,<sup>74</sup> was applicable. His Honour considered that *Tadrous v Tadrous* permitted what he viewed as undesirable fragmentation of equitable principle;<sup>75</sup> however ultimately concluded that because the case fell into the domestic or family context, *Tadrous* meant that a proprietary estoppel could be established, notwithstanding that Construction Technologies did not believe that the appellants were bound to grant to it the lease that it expected.

52 On appeal, the appellants contended that his Honour erred in concluding that *Tadrous v Tadrous* fragmented equitable principles into those applicable in a

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<sup>72</sup> *DHJPM v Blackthorn* at [47] per Meagher JA.

<sup>73</sup> *Construction Technologies Australia Pty Ltd v Doueihy* [2014] NSWSC 1717; (2014) 17 BPR 33,457 at [217].

<sup>74</sup> *Tadrous v Tadrous* [2012] NSWCA 16.

<sup>75</sup> *Construction Technologies Australia Pty Ltd v Doueihy* [2014] NSWSC 1717; (2014) 17 BPR 33,457 at [227].

commercial context and those applicable in a domestic or family context.<sup>76</sup> The Court of Appeal held that drawing a distinction between arms-length or commercial cases and domestic or family cases is not to be seen as fragmenting equitable principles, provided it is appreciated that the dichotomy is not universal or finite. The Court stressed that as always, “care must be exercised when using shorthand labels to describe the context” of a case, even more so because many cases “do not fall neatly into such separate categories”.<sup>77</sup> Ultimately, what will be important is the particular circumstances of each case, including the nature of the relationship between the parties.

53 In the estoppel context, questions of “unified” or “fragmented” doctrine have a tendency to evoke strong opinions. I suspect that there is a risk of characterising judicial views on both sides as more extreme than they in fact are. The estoppel judgments of Mason CJ and Deane J, particularly in *Verwayen*, exhibit a preference for unified doctrine. So, in *Doueihi*, the Court of Appeal noted that in *Verwayen*, Mason CJ had described, (at p 411), “a single overarching doctrine” of estoppel, and Deane J had identified, at p 440, a “general doctrine of estoppel by conduct”.<sup>78</sup> The Court observed that these views were not shared in *Verwayen* by Dawson J or McHugh J,<sup>79</sup> and that Brennan J approached the subject on the footing that “equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to resile from the promise”.<sup>80</sup>

54 There may be value on both sides of the “fragmentation” / “unification” divide (and perhaps those labels are not particularly helpful, tending to obscure rather than to elucidate the nuances of the judicial views expressed in each case).

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<sup>76</sup> *Doueihi* at [86] per Gleeson JA.

<sup>77</sup> *Ibid* at [173]–[179].

<sup>78</sup> *Doueihi* at [136] per Gleeson JA.

<sup>79</sup> *Verwayen* at 454 per Dawson J; 499–501 per McHugh J.

<sup>80</sup> *Ibid* at 428–429 per Brennan J.

- 55 In *Doueihi*, what the primary judge viewed as “fragmentation” was viewed on appeal as close attention to particular factual circumstances. That kind of “fragmentation”, if it be correctly so named, requires close attention to the discrete lines of authority, principles and concepts which underlie high-level labels and in essence, requires incisive examination of particular facts rather than mechanical application of umbrella statements. It requires judicial engagement with the moral conscience of the party to be estopped in any particular case and careful consideration of whether the particular conduct was unconscionable in all the circumstances because it involved unconscientiously taking advantage of another’s special vulnerability or disadvantage in an unreasonable and oppressive manner.
- 56 Sir Anthony Mason’s judgments undoubtedly exemplified the ability to distil the unifying themes and fundamental values which underpin discrete equitable doctrines. However, that is not to say that his Honour was blind to the virtue of the kind of close examination of particular circumstances which I have just described. Indeed, his Honour has written that the “unity” in estoppel which he advocated in *Verwayen* would “of course, need to allow for inevitable differences in the nature of some estoppel-based claims and defences”.<sup>81</sup> His Honour has said that “[o]bviously, promissory estoppel and proprietary estoppel call for some difference in treatment”.<sup>82</sup> Within the legacy that Sir Anthony has left to modern equity, is the illustration (not impossible notwithstanding at first blush its inconsistency) that there may be some virtue in both “unification” and “fragmentation”.
- 57 Finally, my third case study is in unconscionable conduct. Two of the leading cases in this area remain *Louth v Diprose*<sup>83</sup> and *Commercial Bank of Australia*

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<sup>81</sup> Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238, 254–255.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Louth v Diprose* (1992) 175 CLR 621; [1992] HCA 61.

*v Amadio*, both of which were considered and applied in the Court of Appeal's recent decision in *Wu v Ling*.<sup>84</sup>

58 Two propositions may be distilled from this case.

59 First, in the area of unconscionable conduct, as in that of fiduciary obligations and estoppel, the statements of basic principle or the "tests" which continue to define the application of the law to the particular facts at hand are frequently taken from the judgments of Sir Anthony Mason. So it is that in *Wu v Ling*, Bergin CJ in Eq quotes at length from Mason J's judgment in *Amadio*.<sup>85</sup> Her Honour notes that in *Amadio*, Mason J referred to the judgments of Fullagar and Kitto JJ in *Blomley v Ryan*,<sup>86</sup> and went on to say at p 462:

It is not to be thought that relief will be granted only in the particular situations mentioned by their Honours. It is made plain enough, especially by Fullagar J., that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.

60 In this passage from Mason J, we see again the concern with underlying general principle rather than precise, rigid formulae, and the preoccupation with good conscience which defined so many of his Honour's equity judgments. The Court of Appeal in *Wu v Ling* distinguished the circumstances at hand from those in *Louth v Diprose* and *Amadio*. Leeming JA said of the former:

Knowledge or belief of a plaintiff's foolishness alone is not sufficient to affect the defendant's conscience. The point of *Louth v Diprose* (1992) 175 CLR 621 was not that the plaintiff (Mr Diprose) had made an imprudent gift because of his infatuation with the defendant (Ms Louth), but that she had unconscientiously manipulated him, creating a false sense of crisis. For that reason, Mason CJ said that Ms Louth's conduct was unconscionable in that it

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<sup>84</sup> *Wu v Ling* [2016] NSWCA 322.

<sup>85</sup> *Ibid* at [98]-[99] per Bergin CJ in Eq (Leeming and Payne JJA agreeing).

<sup>86</sup> *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81 at 405 per Fullagar J; at 415 per Kitto J.

was dishonest and was calculated to induce, and in fact induced, Mr Diprose to enter into an improvident transaction...<sup>87</sup>

61 In the result in *Wu v Ling*, applying Mason CJ's tests, the Court of Appeal found that the appellant was under no *special* disadvantage vis-à-vis the respondent and that, even if wrong on that point, it would still have been necessary for the primary judge to decide whether the respondent's conduct amounted to taking *unconscientious* advantage of the appellant. The Court concluded that the respondent's conduct was not predatory, victimising, or unconscionable and the respondent's cross-appeal was therefore allowed.<sup>88</sup>

62 The second point is that *Wu v Ling* illustrates that equity, as Mason J saw it, is flexible, discretionary and conduct-oriented, in contrast to the strict legalism of the common law.<sup>89</sup> So it is that Leeming JA in *Wu v Ling* emphasised that equitable intervention in a case of unconscionable conduct is based upon "a precise examination of the particular facts" and "a scrutiny of the exact relations established between the parties".<sup>90</sup> His Honour said:

... one should not expect to find a bright line separating circumstances which place an impugned transaction inside or outside the reach of equitable principle.<sup>91</sup>

## Conclusion

63 In conclusion, can I say that – both with respect to unconscionable conduct and more broadly – Sir Anthony Mason eschewed bright line tests in favour of the demands of equity and good conscience in light of all of the relevant

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<sup>87</sup> *Wu v Ling* at [11] per Leeming JA; referring to *Louth v Diprose* at 626 per Mason CJ; see also at 638 per Deane J.

<sup>88</sup> *Ibid* at [109]-[115] per Bergin CJ in Eq (Leeming and Payne JJA agreeing).

<sup>89</sup> The Hon Sir Anthony Mason AC KBE, 'Equity's Role in the Twentieth Century' (1997-1998) 8 *King's College Law Journal* 1, 2.

<sup>90</sup> *Wu v Ling* at [7] per Leeming JA, citing *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119; [1953] HCA 2; and *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [18].

<sup>91</sup> *Wu v Ling* at [7] per Leeming JA.

circumstances. The three decisions examined today underline the enduring legacy of Sir Anthony Mason in this regard for modern equity in Australia.

- 64 Perhaps there are lessons here also to be learned with respect to the practice of succession law. Sir Anthony's thorough and principled approach to equity, underpinned by a strong sense of moral conscience, and his concern to reason carefully with respect to particular factual circumstances rather than to adopt any kind of "one-size-fits-all" method or rigid formulae, commends itself as a wise course in many areas of practice (not least in family provision cases, for example).
- 65 Writing in the *Law Quarterly Review* in 1994, Sir Anthony described his last decade on the High Court as a "period of legal transition in which we have been moving from an era of strict law to one which gives greater emphasis to equity and natural law".<sup>92</sup>
- 66 It was an era for the rejuvenation of equity. Equity lawyers and judges alike remain greatly indebted to the formidable legacy of Sir Anthony Mason and his judicial colleagues on the Mason High Court.

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<sup>92</sup> Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 259.