Leeming, "How Long is Too Long for an Equitable Claim?" (2014) 88 *ALJ* 621

HOW LONG IS TOO LONG FOR AN EQUITABLE CLAIM?*

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[621] Asked to advise on an aged equitable claim, many lawyers will think of three equitable doctrines: "laches", "applying statutes of limitation by analogy" and "concealed fraud". The relationship between the three is easily misunderstood, and has been the subject of conflicting appellate dicta. The careful analysis in *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181 (6 June 2014) resolves much confusion in this difficult area.

FACTUAL BACKGROUND

The facts were straightforward. The appellants were three brothers who were the sole directors and members of the first respondent Auzhair. In 2002 and 2003, two lenders advanced $600,000 to Auzhair, and received interest payments over the next six years. In around February 2005, the appellants and the lenders agreed to transfer the assets of Auzhair to the second respondent, Auzhair 1 Pty Ltd, a company in which the lenders as well as the brothers were shareholders. In June 2005, Auzhair was deregistered on the application of one of the brothers, who declared that it had no liabilities. That was not so, because of its continuing indebtedness to the lenders, but it was not alleged that he had acted dishonestly. To the contrary, it was found that the brother believed that Auzhair's liability had been assigned along with its assets.

The primary judge (Brereton J) recorded that the only evidence explaining the transaction was a statement by one of the brothers: "We decided to establish a new company. We all discussed it, and decided to transfer everything to the new company".[1] However, it was not seriously in dispute that in

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[1] *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304 at [2]; [2013] NSWSC 1.

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 the application of the lenders. It sued Auzhair 1 Pty Ltd and the three brothers, but only after more than six years had elapsed from its assets being transferred. Section 1317K of the *Corporations Act 2001* (Cth) provides a six-year limitation period for claims for compensation for breaches of directors' statutory duties under ss 180-183. Auzhair 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.

The primary judge held that it would be inequitable to apply a limitation period, Auzhair having been deregistered before considering whether it should take proceedings, and applied inter alia, passages in *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, which in turn had approved statements made by the Supreme Court of Canada in *KM v HM* (1993) 96 DLR (4th) 289 and in Brunyate's influential text, *Limitation of Actions In Equity*.[2] The Court of Appeal (Meagher JA, with whose reasons Beazley P and Emmett JA agreed) allowed the appeal and disapproved those passages.

The principal issue on appeal was the interrelationship between the equitable doctrines of laches and applying a limitation statute by analogy. It was common ground on appeal that there had been no concealed fraud. (That said, there is a useful analysis of "fraudulent breach of trust" in the reasons at first instance,[3] to which may now be added the analysis in *Williams v Central Bank of Nigeria* [2014] 2 All ER 489; [2014] UKSC 10, as to which see further below.)

TWO THRESHOLD CONSIDERATIONS

Two threshold considerations may be put to one side immediately. First, Auzhair's claim (like this note) is confined to claims in equity's *exclusive* jurisdiction. If, say, relief by way of injunction or [622] specific performance is sought in equity's *auxiliary* jurisdiction, but a claim at law for damages for nuisance or breach of contract would be statute-barred, then the analysis is different, not least because of the express reference to such equitable claims in many important limitation provisions,[4] which is probably the key to reconciling the divergent authorities (contrast *R v McNeill* (1922) 31 CLR 76 at 100, where Isaacs J said that equity has "no more power to remove or lower the bar than

[2] Brunyate JW, *Limitation of Actions In Equity* (Stevens & Sons, 1932).
[3] *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304 at [10]-[18]; [2013] NSWSC 1.
[4] See, eg *Limitation Act 1969* (NSW), s 23; *Limitation of Actions Act 1974* (Qld), s 10(6)(b); *Limitation Act 1974* (Tas), s 9; *Limitation of Actions Act 1958* (Vic), s 5(8).

has a Court of law" with the result in *Fitzgerald v Masters* (1956) 95 CLR 420, where specific performance was decreed of a contract for sale of land executed more than two decades earlier).

Secondly, a limitation statute may apply *directly* to a claim in equity's exclusive jurisdiction. One example is a claim brought by a beneficiary against a trustee of an express trust for breach of trust. Section 25(2) of the *Judicature Act 1873* (UK) had confirmed that no such claim was "barred by any Statute of Limitations", thereby restating and not altering the existing law (see *Clay v Clay* (2001) 202 CLR 410 at [23]). However, s 8 of the *Trustee Act 1888* (UK) reversed the position and made *all* limitation defences applicable to such claims save where the claim was founded on "any fraud or fraudulent breach of trust". This was part of legislative reforms designed to relieve honest trustees from what was perceived to be the harshness of equitable principles (see *Williams v Central Bank of Nigeria* [2014] 2 All ER 489 at [22] (Lord Sumption JSC)). The 1888 provision is preserved in the legislation of South Australia, and continues in modified form in other Australian States and Territories.

LACHES AND THE APPLICATION OF LIMITATION STATUTES BY ANALOGY

But where statute does not apply in its terms to an equitable claim, then there are two potentially conflicting equitable doctrines. On the one hand, a defence based on laches or acquiescence may be available. Alternatively, equity may apply a limitation statute by analogy, where (in Lord Westbury's words in *Knox v Gye* (1872) 5 LR HL 656 at 674) "the suit in Equity corresponds with an action at law which is included in the words of the statute". What is the relationship between the two?

The lack of clarity in the authorities is in part a product of looseness in language, for the term "laches" has not always been used with precision. For example, Lord Wensleydale referred in *Archbold v Scully* (1861) 9 HLC 360 at 383 to "simple laches", by which was meant nothing more than mere effluxion of time such that a limitation defence applicable by analogy had become available. But for present purposes it suffices to say that laches will usually involve some form of detrimental reliance (as Lord Neuberger said in *Fisher v Brooker* [2009] 1 WLR 1764 at [64]), or else conduct amounting to abandonment or release. Ultimately, equity has regard to what Lord Selborne described as whether it would be "practically unjust" to give relief "which otherwise would be just" (*Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239-240).

Most statutes of limitations work differently. Some (like s 1317K of the *Corporations Act*) are indifferent to the plaintiff's knowledge or the defendant's reliance. Others impose a bar which may be removed if the plaintiff can demonstrate a proper basis, but even so, it will be conferred in different terms from the equitable discretion formulated in *Lindsay Petroleum*. Hence the issue which arose squarely and acutely in *Gerace*: how is that conflict to be resolved?

One approach would be for the limitation statute to apply as *part of* the law of laches, so that a residual discretion is retained. That approach was adopted in *KM v HM* and in the earlier Court of Appeal decision in *Williams v Minister, Aboriginal Land Rights Act 1983.* Both were influenced by a passage in Brunyate's work, to the effect that where a statute of limitations is applied by analogy, it does so "as part of the law of laches" and "may reasonably allow any exceptions that are allowed in the law of laches".[5] This approach is illustrated by a passage by Doyle CJ in *Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 415:[6] "before applying the statutory time limit by analogy, I must be satisfied that in all the circumstances it is just to do so".

[623] Meagher JA's reasons in *Gerace* refer to many other decisions, including in New South Wales, Victoria and Western Australia, where similar statements have been made, albeit not following full argument on the point. However, Meagher JA's reasons demonstrate, with respect persuasively, that those statements do not accord with principle or High Court authority, notably *R v McNeil.* His Honour said (*Gerace* at [70]):

> The authorities referred to above, and in particular *R v McNeil*, show that in purely equitable proceedings, where there is a corresponding remedy at law in respect of the same matter and that remedy is the subject of a statutory bar, equity will apply the bar by analogy unless there exists a ground which justifies its not doing so because reliance by the defendant on the statute would in the circumstances be unconscionable. They do not support the proposition that equity retains any broader discretion whether to apply the bar.

One difficulty with any other course is readily stated: if a residual discretion were retained as to whether to apply a limitation statute by analogy, then equity "would not truly be acting by analogy and following the law" (at [74]). That was the approach taken by all members of the High Court in *R v McNeil*, following what had been said in *Gibbs v Guild* (1882) 9 QBD 59 at 68 by Brett LJ. It is implicit in the reasoning of Dixon J in *Cohen v Cohen* (1929) 42 CLR 91. Consistently with this, one author had said, more than a century ago: "The doctrine of laches, therefore, is confined to equitable claims which are subject to no statutory bar either expressly or by analogy".[7]

SUMMARY

In many cases, little may turn on the differences considered in this note, but it will be seen that in *Gerace* it was decisive. It is suggested that the approach which is correct in principle and accords with *Gerace* is to proceed as follows in relation to a claim in equity's exclusive jurisdiction. First, does some limitation statute apply directly? – if so, the question turns on the application of the statute

[5] Brunyate, n 2, p 17.
[6] Appeal dismissed: *Barker v Duke Group Ltd (in liq)* (2005) 91 SASR 167.
[7] Lightwood J, *The Time Limit on Actions* (Butterworth & Co, London, 1909) p 255.

and the analysis ceases. Secondly, if not, does the equitable claim "correspond" to a legal claim to which a limitation statute applies? That inquiry can be contentious, but was not in *Gerace*, where the equitable claims were close to identical with the time-barred allegations of statutory breaches of directors' duties. If the equitable claim does not correspond, then no application by analogy is possible and the only question is whether some other defence, such as laches or release, is available. However, if it does, then the statute is to be applied by analogy in its terms, subject to any discretions it may contain, but not subject to some further "residual" discretion which lacks foundation in the statute.

FRAUDULENT CONCEALMENT

The relationship between the two equitable doctrines of laches and applying a statute of limitation by analogy reflects the maxim that equity follows the law, and illustrates the relationship between them. So too does the third equitable doctrine mentioned at the outset of this note, fraudulent concealment. This doctrine is in its terms only an answer to an *equitable* claim, as has consistently been held at the appellate level in this country (*Metacel Pty Ltd v Ralph Symonds Ltd* [1969] 2 NSWR 201 at 203; *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 269-270; *Commonwealth v Cornwell* (2007) 229 CLR 519 at [9]). However, fraudulent concealment *does* have a role in answer to claims at law. The joint reasons of the High Court in *Cornwell* (at [40]-[44]) explain 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); similar processes may be seen in the modern Australian statutes of limitation. As made applicable by statute, concealed fraud may be an answer to a limitation defence to a *legal* claim. Naturally it will be important to have regard to the precise terms of the statute (for example, the necessary and sufficient conditions for "fraud deceit or concealment" in s 55 of the *Limitation Act 1969* (NSW)) but those terms in that context will be informed by equitable principle.

The interplay of these doctrines is a striking example of the interrelationship between equity and statute. It reflects what Gleeson CJ, Gummow, Hayne and Callinan JJ described in *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at [27] as "the normative complexity of the [624] Australian legal system, with the interaction between the rules of law, principles of equity, requirements of statute, and between legal, equitable and statutory remedies".

POSTSCRIPT

Coincidentally, a fortnight later, another appellate court struck down an expansive approach to laches. A majority of the United States Supreme Court in *Petrella v Metro-Godwyn-Mayer Inc* (19 May

2014) held that laches was not a defence to a belated claim by copyright infringement brought by the daughter of the co-author of the screenplay of the film *Raging Bull*. Ginsburg J for the majority, speaking of the uniform federal rules of procedure introduced in 1938, said that “the substantive and remedial principles [applicable] prior to the advent of the federal rules [have] not changed”. Thus, even in the United States, where there was a much more determined legislative fusing of common law and equity than was effected in England and Australia, there may be seen the continuing importance of an historical perspective, which, as Gageler J noted earlier this year, may “help us to see more clearly the shape of the law of today by seeing how it took shape” (*Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 88 ALJR 552 at [107]; [2014] HCA 14).