

Equity, Trusts and Private International Law

Introductory Remarks at Journal of Equity Conference

**The Hon A S Bell
Chief Justice of New South Wales**

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- 1 I extend a warm greeting to all but especially our interstate and international visitors, especially the distinguished scholars from the Singapore Management University who will be presenting papers later in the day.
- 2 The New South Wales and Singapore judiciaries have excellent relations and I know that there is a healthy and close relationship between the High Court of Singapore and the academy, especially in matters relating to private international law, international trade and shipping. Four former judges of the Supreme Court of New South Wales currently sit on the Singapore International Commercial Court where private international law questions are frequently litigated.
- 3 I also thank and acknowledge Allens for their hospitality and support of this Conference.
- 4 Let me begin by saying something about the importance of the topic “Equity, Trusts and Private International Law” and, thereby, the value and significance of this Conference.
- 5 Equity and trusts play a critical role in commerce, including international commerce, as my good friend and colleague, Justice Leeming, explained with his usual erudition and panache in his 2019 paper entitled “*The role of equity in*

21st century commercial disputes - Meeting the needs of any sophisticated and successful legal system".¹ His Honour wrote:²

"Most commercial aircraft operated by an Australian, New Zealand or east Asian carrier are owned in equity via a moderately complicated series of trusts established by and for sophisticated investors. Some of those trusts will have aggregated the wealth of a multitude of investors (typically, a pension fund); others will have been arranged on behalf of the carrier because it is a more efficient way of financing aeroplanes and their engines.

A similar structure will own the land on which many city hotels and office buildings are built. Further, the funds to invest in those special purpose vehicles or trusts were likely acquired through a financially engineered product. None of this is possible without equity. Part of a debt cannot be assigned at common law, and even an entire debt can only be assigned at law by signed writing of which notice has been given to the debtor. That makes the entirety of derivatives (including all forms of swaps underpinning much international trade) impossible but for equity. The same is true of any form of securitisation and many other forms of modern capital raising. Consequently, disputes which arise inevitably involve the application of equitable principle."

- 6 And it is not just large multinational businesses that depend upon equitable structures. Referring to Dr D'Angelo's book on *Commercial Trusts*,³ his Honour also noted that trading trusts arose in Australia and New Zealand in the 1970s as a tax-efficient alternative to the limited liability company, suitable to operate a family business.⁴
- 7 Given our global economy, it follows inexorably that a good understanding of the principles of private international law and how they apply to disputes in relation to trusts or disputes involving an equitable estate or interest or in which an equitable remedy is sought should be essential for commercial lawyers and litigators. Of course, it is not only commercial and finance lawyers who should have an interest in the private international law aspects of equitable doctrines, remedies and trusts. It is also of great importance, for example, for estate planning and family lawyers and litigators whose clients may have what we

¹ (2019) 47 *Australian Bar Review* 137.

² Ibid 148-149, omitting footnotes.

³ N D'Angelo, *Commercial Trusts* (LexisNexis Butterworths Australia, 2014) 76ff.

⁴ Leeming (n 1) 143.

would recognise to be an equitable interest in property situate in countries which do not recognise dualities of estates.

- 8 The decision of the New South Wales Court of Appeal in *Murakami v Wiryadi* is a case in point.⁵ It involved, inter alia, a high value cross border dispute involving a deceased estate with property in Indonesia, Singapore and Australia, two wives and their children, divorce proceedings in Indonesia against the second wife which had been commenced before the Japanese patriarch died and the property settlement component of which continued in the name of the estate after his death.
- 9 The Court of Appeal's decision involved an interesting reference to a 1962 Sydney Law Review article entitled "Community of Property and the Conflict of Laws" by an AM Gleeson!⁶ Spigelman CJ recorded a submission by the appellant's counsel (now Meek J) that:⁷

"even if the law of the matrimonial domicile applies to immovable property [which I think was the submission I had put], the position changes [Meek SC continued] because of the equitable rights asserted on the pleadings, for which the applicable law [he contended] is the *lex fori*. The appellant asserts, alternatively, a claim of constructive trust and a claim of resulting trust. Both claims are proprietary in nature. The appellant asserts an equitable interest, not merely a claim to equitable relief."
- 10 Notwithstanding the importance of the subject, and with one notable exception, being a 1986 article by a young Richard White,⁸ the interaction between equity and private international law had attracted little academic or judicial attention until the pathbreaking work of Professor TM Yeo, whose Oxford University Press monograph entitled *Choice of Law for Equitable Doctrines* was published in 2004 and whose central thesis secured the endorsement in 2007 of the Singapore Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von*

⁵ (2010) 109 NSWLR 39.

⁶ A M Gleeson, "Community of Property and the Conflict of Laws" (1962) 1 *Sydney Law Review* 139.

⁷ *Murakami* (n 5) [124].

⁸ R W White, 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11 *Sydney Law Review* 92.

Uexkull.⁹ Professor Yeo and I were both fortunate to have had our doctorates supervised by Professor Adrian Briggs.

- 11 To illustrate my point as to the relative paucity, until recently, of scholarly or judicial discussion of the theme of this Conference, there is but fleeting reference to private international law issues in *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*,¹⁰ and a short chapter in *Jacobs' Law of Trusts in Australia*.¹¹ A chapter on choice of law in restitution and equity was only introduced into *Nygh's Conflict of Laws in Australia* in its 8th edition, published in 2010. The equivalent chapter in the soon-to be published 11th edition of that work is much expanded as is the chapter on characterisation which has particular relevance to equitable issues, particularly given the duality of legal and equitable estates and the scope for overlapping claims at common law and in equity.¹²
- 12 The role of characterisation of equitable claims is the subject of much recent academic literature and of various papers to be presented today. Indeed, the topic of characterisation in the conflict of laws generally was the subject of an entire conference in Oxford earlier this year.¹³
- 13 There is a significant degree to which the academic analysis of characterisation and choice of law in equity is parasitic upon other established legal categories with which an equitable claim may be associated such as movable and immovable property (pointing to the *situs* of the property as supplying the governing law or *lex causae*), contract or "wrongs". Thus it has been held in both England and Singapore that a claim of accessorial liability for knowing assistance in a breach of fiduciary duty or trust should be characterised as a "wrong" for private international law purposes and thus is governed by the law

⁹ [2007] 1 SLR 377.

¹⁰ J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) [3.255].

¹¹ J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 8th ed, 2016) ch 28.

¹² See M Leeming "Overlapping Claims at Common Law and in Equity – An Embarrassment of Riches?" (2017) 11(3) *Journal of Equity* 229.

¹³ See Conflict of Laws .net, *Report of the Oxford Conference on "Characterisation in the Conflict of Laws"* (Website, 2 April 2025), available at <<https://conflictoflaws.net/2025/report-of-the-oxford-conference-on-characterisation-in-the-conflict-of-laws/>>.

of the place of the wrong (which is, at least in Australia,¹⁴ the choice of law rule in tort). That is to say, even though the claim may lead to an equitable remedy, whether the claim is made good and the substantive law to be applied to that end will be the law of the place where the events constituting the dishonest assistance occurred or 'if they occurred in more than one [country], the law of the country in which the most significant element or elements of those events occurred'.¹⁵

- 14 As reflected in Mr Meek's submission in *Murakami*, for many years, the prevailing view in Australia was that any question in an international dispute which raised the doctrines and remedies of equity would be governed by Australian law as the law of the forum.¹⁶
- 15 Choice of law in relation to equitable claims was touched upon briefly in two famous Australian cases in the 1980s involving the law of confidence and claims for constructive trusts: *United States Surgical Corporation v Hospital Products International Pty Ltd*¹⁷ at first instance and *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd*¹⁸ in the Court of Appeal. Express trusts had been treated differently and in *Augustus v Permanent Trustee Co (Canberra) Ltd*,¹⁹ the High Court held that the governing law of an express trust of personalty was to be ascertained in the same way as the proper law of a contract. The common law position has now been largely overtaken by the *Hague Trusts Convention* which Professor Garnett will address.

¹⁴ *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331.

¹⁵ *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [221]. See also *Dinesh Kishin Kikla v The Hong Kong and Shanghai Banking Corporation Ltd* [2013] SGHCR 6 and A Chong, 'Characterisation and Choice of Law for Knowing Receipt' (2023) 72 ICLQ 147.

¹⁶ *National Commercial Bank v Wimborne* (1978) 5 BPR 97,423, 11, 982. In *OZ-US Film Production Pty Ltd (in liq) v Heath* [2000] NSWSC 967, Young J suggested, in *obiter*, that that the law of the forum would govern a claim for breach of fiduciary duty and an account of profits even where the relevant conduct occurred outside of New South Wales, and that because contractual and fiduciary obligations have different origins, the proper law of any applicable contract was irrelevant: see M Davies, A S Bell, M Douglas and P Herzfeld, *Nygh's Conflict of Laws in Australia* (LexisNexis, 11th ed, 2025) [21.20] (forthcoming).

¹⁷ [1982] 2 NSWLR 766, 796–9.

¹⁸ (1987) 10 NSWLR 86, 151.

¹⁹ (1971) 124 CLR 245.

- 16 Returning to the traditional Australian *lex fori* approach to these matters, I well remember attending a conference in 2007 organised by Professor Degeling and Dr Edelman, as he then was, in which Professor Yeo offered some characteristically innovative thoughts about choice of law in equity. Justice Peter Young, a man of few doubts and no observable deficit in terms of self-esteem, attended the conference and proceeded to explain to the Professor that what he had said was overly theoretical and unnecessary, that it was all very simple and that, in New South Wales, “we just apply the law of the forum”. This exchange was alluded to by Professor Briggs at a subsequent conference.²⁰
- 17 We have moved on in Australia from the crude application of the law of the forum including in cases such as *Paramasivan v Flynn*,²¹ *Damberg v Damberg*,²² *Murakami*,²³ *Nicholls v Michael Wilson & Partners Ltd*,²⁴ and *Dialogue Consulting Pty Ltd v Instagram Inc*,²⁵ but one explanation for the traditional view in relation to the role of the *lex fori* may have been that questions of remedy (and in this context, equitable remedies) were once placed on the procedural line in the axiomatic distinction between what constituted matters of substance and procedure for private international law purposes with the principle being that matters of procedure were governed by the law of the forum. While the broad principle remains, the location of the dividing line between substance and procedure was decisively redrawn with the High Court’s decision in *John Pfeiffer Pty Ltd v Rogerson*.²⁶
- 18 A rather more nuanced and sophisticated explanation for the traditional favouring of the *lex fori* in Australia authority was proffered by WMC Gummow

²⁰ A Briggs, “Misappropriated and Misapplied Assets and the Conflict of Laws” in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, 2008) ch 3.

²¹ (1998) 90 FCR 489.

²² (2001) 52 NSWLR 492.

²³ (2010) 109 NSWLR 39.

²⁴ (2010) 243 FLR 177.

²⁵ [2020] FCA 1846, affirmed on other grounds by the Full Court of the Federal Court in *Instagram Inc v Dialogue Consulting Pty Ltd* [2022] FCAFC 7.

²⁶ (2000) 203 CLR 503.

in his introduction to Professor Yeo's monograph, which was in turn quoted by Spigelman CJ in *Murakami*:²⁷

“ ... the precepts and principles which inform the ‘conscience’ of the defendant and give the plaintiff the necessary ‘equity’ are framed, not with a view to the responses of the man on the Clapham omnibus, but in overriding and universal terms. This consideration tends to support the notion (which Professor Yeo does not favour) that the question of whether such an equity exists is not to be determined by a consideration of foreign law despite connecting factors with other legal systems.”

- 19 The Hon Richard White, formerly a judge of appeal of the Supreme Court of New South Wales, in an oft-cited scholarly article published almost 40 years ago, linked the *jurisdictional rules* of the Court of Chancery with the application of the *lex fori*.²⁸ Chancery required a sufficiency of connection with England for jurisdiction to be asserted over a foreign defendant, and once there was that sufficient connection, it was unobjectionable to apply English law.
- 20 But Mr White (as he then was) also pointed out that English law was often applied, *not* as the law of the forum but as the proper law of the contract in cases where a party's equity arose from a contractual source. Thus he referred to *In re Smith; Lawrence v Kitson*²⁹ where the Court enforced an equitable mortgage over land in the West Indies, explaining that the “agreement to execute a legal mortgage was governed by English law, and, being capable of specific performance, it took effect as an equitable mortgage personally binding on the mortgagor”. This was so even though that was not a form of security recognised by the *lex situs*.³⁰
- 21 The intellectual fascination and demands of private international law are, if anything, magnified, in the context of equitable claims and equitable remedies in respect of disputes which typically arise in the auxiliary jurisdiction or are

²⁷ *Murakami* (n 5) [135].

²⁸ White (n 8).

²⁹ [1916] 2 Ch 206.

³⁰ White (n 8) 107.

otherwise connected with property, real and personal, movable and immovable. Throw in the law of trusts, express and implied, constructive and resulting, institutional and remedial, and one has the ingredients for a most stimulating discussion.

22 It therefore gives me great pleasure formally to open this Conference.