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Equity and conscience¹

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1. I would like to talk today about equity and conscience.
2. There are important areas of current equity jurisprudence where a specific ingredient of unconscionability (or unconscionableness, as Lord Walker has called it²) is required. To name but some: receipt of trust property with knowledge it was transferred in breach of trust; receipt of a mistaken payment with knowledge of the mistake; rescission in equity of a unilateral transaction; and proprietary estoppel. I will elaborate in due course on these, and examine the continuing appropriateness in modern law of the unconscionability ingredient, but for the moment I would like to look more generally at the relationship between equity and conscience.
3. The Anglo-Saxon concept of equity derived from the Aristotelian virtue of “epieikeia”, which was in Latin “aequitas”. This was a willingness to refrain

¹ I am grateful to Nick Piska for his constructive critical comments on an earlier version of this paper.

² *Pitt v Holt* [2013] 2 AC 108 at [124], [126]/

from insisting on the full measure of one's legal rights.³ Aristotle saw equity as perfecting the justice of the positive law.⁴

4. Equity developed as a moral and legal basis for avoiding the strict requirements of the common law. Common law remedies were available as of right. Chancery's intervention was exceptional. Historically, judicial equity was intended to mitigate the rigour of the strict common law, to be responsive to the particular circumstances of individual cases.⁵
5. By the 15th century the clerical chancellors were able "to satisfy the demands of conscience even though their action involved a dispensation with the rigid rules of law".⁶ They acted by reference to "the principles of scholastic philosophy, and to the rules of the civil and canon law".⁷
6. AWB Simpson described in the following way the role of "conscience" in the 15th century Court of Chancery:

"For to a fifteenth-century ecclesiastic, sitting as a judge of conscience, in a court of conscience, to apply the law of conscience "for the love of God and in way of charity", "conscience" did not connote, though it included, some principles of injurious reliance or good faith. It connoted what we now call the moral law as it applied to particular individuals for the avoidance of peril to the soul through mortal sin".⁸

7. Simpson offers the example of the Chancellor – Archbishop Morton – who in 1491 gave as one of the grounds of his granting a remedy that, unless the

³ P.A. Keane, 'The 2009 WA Lee Lecture in Equity: The Conscience of Equity' (2010) 10(1) QUTLJJ 106-131, 109/

⁴ Aristotle, *Nicomachean Ethics* (Rev edn, Roger Crisp ed, Cambridge: CUP 2014); D.R. Klinck, 'Lord Eldon on "Equity"' (1999) 20(3) *Legal History* 51-74, 59.

⁵ D.R. Klinck, 'Lord Nottingham's "Certain Measures"' (2010) 28(3) *Law & Hist. Rev.* 711-748.

⁶ W.S. Holdsworth, *A History of English Law: Vol. IV* (London: Methuen & Co Ltd 1924) 279.

⁷ *Ibid.*, 276.

⁸ AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press 1975) 398 (emphasis in the original).

respondent made amends, “he [would] be damned in Hell, and to grant a remedy in such a case ... is to do well in accordance with conscience”.⁹

8. By the early 16th century, however, this approach to an unconstrained morality-based approach to judicial decision making was encountering criticism. Christopher St Germain sought to meet that criticism with an analysis of conscience in relation to equity in his work “A Little Treatise Concerning Writs of Subpoena” and then also in his work “Doctor and Student”. He emphasised the objectivity of the standard against which conscience is assessed and that the standard is to be identified with “law”, including human laws. His thesis was, in substance, that the function of conscience was to relate general precepts to particular situations.¹⁰ For St Germain, one aspect of conscience was the doing of equity (in the Aristotelian sense of “epieikeia”) in the application of general rules to the specific case.¹¹
9. This marked an important shift in secularising the concept of conscience and a recognition of it being more fully implicated in human law. The shift may be described as moving from courts of conscience to courts of equity, in which the role of the Chancellor was “to soften and mollify the Extremity of the Law” rather than simply “to correct Mens Consciences for Frauds...”.¹²

⁹ D.R. Klinck, ‘The Unexamined “Conscience” of Contemporary Canadian Equity’ (2001) 46 McGill LJ 571-614, 577.

¹⁰ D.R. Klinck (2001) (n 9), 579

¹¹ D. Ibbetson ‘A House Built on Sand: Equity in Early Modern English Law’ in E. Koops and W.J. Zwalve (eds), *Law and Equity: Approaches in Roman Law and Common Law* (Leiden: Martinus Nijhoff 2014).

¹² See Lord Ellesmere’s description of the two offices of the chancellor in *The Earl of Oxford’s Case* (1615) 1 Ch Rep 1.

10. At the same time, the regular reporting of Chancery cases after 1660, with the consequent emergence of a body of precedent, assisted in the reduction of equity to a system of principles.¹³
11. In the medieval period, “conscience formed the basic authority for the chancellor’s jurisdiction”.¹⁴ As late as the 17th century, Lord Nottingham¹⁵, the “father of modern equity” was still regularly invoking conscience, and referring to Chancery as a “court of conscience”.¹⁶
12. The important issue, which persists to this day, is whether a remedial jurisprudence based on conscience is sufficiently compatible with the need for certainty and predictability, which is the hallmark of the rule of law. The development of the study and analysis of unjust enrichment in the last 50 or so years has called into question the appropriateness of conscience as a legal standard or touchstone for the enforcement of rights. A common law claim in unjust enrichment is part of the law of obligations. Liability turns on four basic questions: (1) Has the defendant benefited or been enriched? (2) Was the enrichment at the expense of the claimant? (3) Was the enrichment unjust? (4) Are there any defences?¹⁷ It is usually said that such liability does not turn on the court’s discretion or create a judicial licence to meet the perceived requirements of fairness on a case by case basis.¹⁸ As Lord Neuberger has said,

¹³ J.H. Baker, *An introduction to English Legal History* (4th edn, London: Butterworths 2002) 110. M. MacNair in “Arbitrary Chancellors and the Problem of Predictability” in Koops and Swalve, op cit., considers that it was the appointment of Sir Thomas Egerton (later Lord Ellesmere) as Master of the Rolls (in 1594), as Lord Keeper (in 1595) and as Lord Chancellor (in 1603-1617) that marked the beginning of a consistent practice of recording and publishing precedents which shaped the jurisprudence of the court of conscience or equity.

¹⁴ N. Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge: CUP 1990) 132.

¹⁵ Heneage Finch, 1st Earl of Nottingham (1621-1682).

¹⁶ D.R. Klinck (2001) (n 9), 574 .

¹⁷ *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [43], [110]; *Investment Trust Companies v Revenue and Customs Cmrs* [2017] UKSC 29, [24].

¹⁸ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578; *Banque Financiere de la Cite SA v Parc (Battersea) Ltd* [1999] AC 221, 272; *Investment Trust Companies v Revenue and Customs Cmrs* [2017] UKSC 29, [39]; *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 785, [116]-[118]

in relation to the third question, “unjustness in the context of unjust enrichment is not ... of the palm tree variety. It must be based on some principle”.¹⁹

13. John Selden²⁰ famously observed that equity – in the sense of conscience – is a “[r]oguish thing”.²¹ Selden contrasted the common law and equity in the following way: “for Law [that is, common law] we have a measure, know what to trust to”, while

“Equity is according to the conscience of him that is Chancellor, and as that is larger or narrow, so is Equity. ‘Tis all one as if they should make the standard for the measure we call a ‘foot’ a Chancellor’s foot; what an uncertain measure would this be!”²²

14. An important historic change relevant to that issue took place in the time of Lord Nottingham, who was Lord Chancellor from 1673 to 1681. Although he referred to his court as a “court of conscience” and frequently invoked conscience in his decision making²³, he made a clear distinction between private and public conscience.
15. In *Cook v Fountain* he said that the “conscience” by which he must proceed was “*civilis et politica* and tied to certain measures”; that the court has “nothing to do” with “a conscience which is only *naturalis et interna*”: this is a matter “between a man and his confessor”; and following it would mean that men might “lose their estates by the mere fancy and imagination of a chancellor”.²⁴
16. In *Earl of Feversham v Watson*, Nottingham asserted that:

“equity itself would cease to be Justice if the rules and measures of it were not certain and known. For, if conscience be not

¹⁹ *Swynson Ltd v Lowick Rose LLP*, [116]

²⁰ 1584-1654

²¹ Sir F. Pollock (ed), *Table Talk of John Selden* (London: Selden Society 1927) 43.

²² *Ibid.*

²³ D.R. Klinck (2001) (n 9), 584

²⁴ (1733) 3 Swans. 585; D.R. Klinck (n 16) 585-6.

dispensed by the rules of science, it were better for the subject that there were no Chancery at all than that men's estates should depend upon the pleasure of a Court which took upon itself to be purely arbitrary".²⁵

17. Professor Dennis Klinck explains that in this context a rule is a measure, a standard against which something else is to be assessed; and that implicit in the characterisation of rules (with its then primary meaning of a "ruler" or device for making physical measurements) as measures is that there might be a quasi-mathematical or geometric precision about them, that they might be "certain" in a rather exact way.²⁶

18. In his *Prolegomena of Chancery and Equity*, Nottingham explains:

"for if equity be tied to no rule, all other laws are dissolved and everything becomes arbitrary".²⁷

19. Similar developments can be seen in the views of Sir Matthew Hale²⁸, Nottingham's contemporary. As Chief Baron of the Court of Exchequer (from 1660-1671), Hale presided over a court exercising equitable jurisdiction and frequently assisted the Lord Keeper or Lord Chancellor in Chancery. He was described in the following way by his first biographer, Gilbert Burnet:

"He did look upon Equity as part of the Common Law, and one of the Grounds of it; and therefore as near as he could, he did always reduce it to certain Rules and Principles, that Men might Study it as a Science, and not think the Administration had anything arbitrary in it".²⁹

20. Hand in hand with this approach, is Nottingham's professed deference to precedent.³⁰ I say "professed" because he was not always consistent in applying

²⁵ D.E.C. Yale (ed), *Lord Nottingham's Chancery Cases* (London: Selden Society 1957) Vol. 2, 739.

²⁶ D.R. Klinck (2010) (n 5), 715

²⁷ D.E.C. Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge: CUP 1965).

²⁸ 1609-1676.

²⁹ G. Burnet, *The Life and Death of Sir Matthew Hale* (London 1700) 91.

³⁰ D.R. Klinck (2010) (n 5), 728-729. See, e.g., *Thornborough v Baker* (1675) 3 Swans 628.

precedent when he felt that was warranted by “conscience”.³¹ This ambivalence in practice is unsurprising bearing in mind that Nottingham, like Hale, was playing a formative role and feeling his way at a time of marked transition to modern principles of equity. As Klinck puts it, “What in the end confines him is the imperative of his own conscience”.³²

21. The subjecting of discretion and untrammelled conscience in equity to precise rules and principles continued, particularly during the chancellorship of Lord Eldon.³³ Lord Eldon’s inclination to procrastination was notorious and earned the Court of Chancery an enduring bad name, widely promoted through the ages by Charles Dickens’ brilliant portrayal in *Bleak House*. Jeremy Bentham referred to him as “Lord Endless”.³⁴ Lord Eldon emphasised the importance of principle and precedent in the operation of Chancery. He famously said in *Gee v Pritchard*:

“The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles ... Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor’s foot”.³⁵

22. By 1878, Sir George Jessel MR was emphatic in saying that the Chancery Division is “not a Court of Conscience, but a Court of law”.³⁶
23. The position by the end of the 19th century must not, however, be over-stated. Lord Eldon, like Lord Hardwicke³⁷ before him, distinguished cases which involved contractual and property matters, requiring adherence to strict

³¹ D.R. Klinck (2010) (n 5), 736ff.

³² D.R. Klinck (2010) (n 5), 745.

³³ From 1801-1806 and 1807-1827.

³⁴ F. Burns, ‘The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion’ (2000-2001) 21 U. Queensland LJ 198-219, 200.

³⁵ (1818) 2 Swans 402, 414.

³⁶ *Re National Funds Assurance Co* (1878) 10 Ch.D. 118, 128

³⁷ Philip Yorke, 1st Earl of Hardwicke, Lord Chancellor 1737-1756

precedent, from those which involved allegations of fraud or breach of confidence or the protective jurisdiction of equity in relation to vulnerable persons such as infants and the mentally ill.³⁸ So, in the 19th century Chancery laid the foundations for undue influence, breach of confidence and fiduciary obligations (including equitable tracing). Even in relation to business and property matters, equity was not entirely straightjacketed by precedent. There were important developments in protecting business interests (including the tort of passing off) and the regulation of land dealings (including restrictive covenants).³⁹

24. I want to turn now to the modern era and see how this historic unfolding dialogue between discretion and conscience in equity, on the one hand, and the call for certainty and predictability, on the other hand, plays out today.
25. The first point is that equity has continued to produce important new remedies which engage judicial discretion, including powers of entry to search property for the purpose of taking and preserving items pending trial (so-called *Anton Piller* orders⁴⁰), interim injunctions against the distribution of world wide assets (originally called *Mareva* injunctions⁴¹, and now called freezing orders), and orders for the disclosure of information held by persons that is relevant to a cause of action against, but prior to commencement of proceedings against, other third parties (*Norwich Pharmacal* orders).⁴² As I point out later, these are modern remedies which, far from being inimical to modern enterprise

³⁸ F. Burns, op cit., 207-209.

³⁹ Ibid., 211ff.

⁴⁰ *Anton Piller K.G. v Manufacturing Processes Ltd* [1976] Ch 55.

⁴¹ *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1980] 1 All ER 213.

⁴² *Norwich Pharmacal Co v Customs and Excise Cmrs* [1974] AC 133. In the words of Lord Reid at 174: “if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he becomes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers”.

because they involve an element of discretion, respond to contemporary requirements to tackle fraud, both commercial and otherwise.

26. Secondly, the language of conscience as a touchstone of equity has remained strong in the mouths of some equity judges. A classic example would be the continuing jurisdiction to set aside a transaction for unconscionability where the defendant has unconscionably taken advantage of some disability or particular disadvantage suffered by the claimant.⁴³ The defendant's conduct in that cause of action must have amounted to equitable or constructive fraud; it must have been unconscionable in the sense of morally reprehensible.
27. *Riverlate Properties Ltd v Paul*⁴⁴ is a modern example of conscience being used in a different way, as a kind of cross-check on the appropriateness of equitable relief. In that case, a lessor claimed rectification or rescission of a lease which, the lessor maintained, due to the mistake of both parties or the lessor alone, had failed to impose an obligation on the tenant to reimburse the lessor for the half of the costs of the exterior and structural repairs. The Court of Appeal rejected that equitable relief because there was nothing unconscionable in the lessee retaining the advantage of the lessor's oversight. Russell LJ giving the judgment of the Court said:

“If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and

⁴³ *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125; *Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 182.

⁴⁴ [1975] Ch 133.

would be venturing upon the field of moral philosophy in which it would soon be in difficulties”.⁴⁵

28. Leaving aside such cases where the court is using unconscionability as a kind of cross check for the appropriateness of applying an equitable remedy, there are, of course, causes of action in which the defendant’s unconscionability or unconscionableness is an essential prerequisite.⁴⁶ I have already mentioned the equitable jurisdiction to set aside a transaction where the claimant has unconscionably taken advantage of a disability of the defendant. I referred to some others earlier, and it is timely to describe them in more detail now.
29. The first is liability for “knowing receipt”. A person who receives misapplied trust property for his own benefit with knowledge of its improper provenance, or who receives such property innocently but later acquires knowledge of its improper provenance while the property or its traceable proceeds are still in his hands, holds the property on constructive trust for the beneficiaries.⁴⁷ The cause of action extends to property transferred in breach of duty by a fiduciary, other than a trustee, such as a company director or an agent. In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*,⁴⁸ Nourse LJ, with whom the other two members of the Court of Appeal agreed, said that the test for knowledge for knowing receipt is that the recipient’s state of knowledge

⁴⁵ [1975] Ch 133, 141.

⁴⁶ There is an important and illuminating discussion of the different meanings of “conscience” and “unconscionability” as used in the decided cases, including an analysis of objective and subjective interpretations of unconscionability, in G. Virgo, ‘Whose Conscience? Unconscionability in the Common Law of Obligations’ in A. Robertson and M. Tillbury (eds), *Divergences in Private Law* (Oxford: Hart Publishing 2016). He examines, among other things, whether “unconscionability is a state of mind or does it relate to a normative standard for evaluating conduct, morality or simply a sense of guilt”.

⁴⁷ D. Hayton, P. Matthews and C. Mitchell (eds), *Underhill and Hayton: Law of Trusts and Trustees* (18th edn, London: Lexis Nexis 2010) 1239.

⁴⁸ [2001] Ch 437.

must be such as to make it unconscionable for him to retain the benefit of the receipt.⁴⁹

30. Many commentators have criticised that test as being too unclear and uncertain. Some commentators have suggested that recipients of assets transferred by a trustee in breach of trust should owe a strict personal liability in unjust enrichment (subject to the change of position defence) direct to the trust's beneficiaries without any unconscionability or fault requirement.⁵⁰ The test in *Akindele* has, however, been re-affirmed by the Court of Appeal on several occasions.⁵¹
31. Second, in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*,⁵² Gouling J held that the defendant bank held on constructive trust for the claimant bank any traceable proceeds of a payment made by mistake by the claimant bank. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,⁵³ Lord Browne-Wilkinson said that, while he did not accept the reasoning of Gouling J, *Chase Manhattan* may well have been rightly decided on the facts. He said that although the mere receipt of money, in ignorance of the mistake, gives rise to no trust, the defendant bank knew of the mistake by the paying bank within two days of receipt of the money and at that point the recipient bank's "conscience" was affected and that may well have given rise to a constructive trust.⁵⁴

⁴⁹ At 455E-F.

⁵⁰ See the discussion in C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones, The Law of Unjust Enrichment* (9th edn, London: Sweet & Maxwell 2016) para 8-196ff

⁵¹ For example,

Armstrong DLW GmbH v Winnington Networks Ltd [2013] Ch 156 and *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30

⁵² [1981] Ch 105.

⁵³ [1996] AC 669.

⁵⁴ At 714C-715C. Lord Sumption's obiter statements in *Angove's Pty Ltd v Bailey* [2016] UKSC 47 did not negate the possibility of a constructive trust in some cases of mistaken payments, although we can see clearly from his judgment, with which all the other members of the Supreme Court agreed, an

32. Again, commentators, particularly restitution scholars, have criticised Lord Browne-Wilkinson's introduction of an additional requirement of unconscionability.⁵⁵ Lord Browne-Wilkinson's analysis of *Chase Manhattan* has not, however, so far been authoritatively overruled; and, in any event, as I have argued elsewhere, the addition of a requirement of unconscionability in respect of a mistaken overpayment may be appropriate to give rise to a proprietary remedy as distinct from an ordinary personal remedy for unjust enrichment.⁵⁶
33. In *Pitt v Holt*⁵⁷ the claim was to set aside a trust on the grounds of a unilateral mistake. The claim could only be advanced in equity because there was no basis for setting aside the transaction at common law, it being a purely voluntary transaction and there being no fraud or other vitiating factor recognised by the common law.
34. The basis of the claim was essentially that the trust gave rise to a present and future liability to inheritance tax which could have been easily avoided by creating a settlement with different provisions.
35. In his judgment, with which all the other members of the Supreme Court agreed, Lord Walker set out the following criteria for the exercise of the equitable jurisdiction to grant rescission for a causative spontaneous mistake in the case of a unilateral (that is to say, voluntary or non-contractual) transaction: (1) the mistake must take the form of an incorrect conscious belief or an incorrect tacit assumption (as distinct from mere ignorance or disappointed expectations); (2) the mistake must be of sufficient gravity as to

unwillingness to accept unconscionability on its own as basis for a right, and a rejection of the remedial constructive trust.

⁵⁵ A. Burrows, *A Restatement of The English Law of Unjust Enrichment* (Oxford: OUP 2012) 164; *Goff & Jones*, para 9.156 and Ch 37.

⁵⁶ T. Etherton 'The role of equity in mistaken transactions' (2013) 27(4) *Tru. L.I.* 159-171.

⁵⁷ [2013] 2 AC 108

make it unconscionable and unjust to leave the transaction uncorrected; (3) that test will not normally be satisfied unless the mistake was either as to the legal character or nature of the transaction or as to some matter of fact or law which is basic to the transaction; and (4) unconscionability and injustice in this context are to be evaluated objectively by looking in the round at the degree of centrality of the mistake to the transaction in question and the seriousness of its consequences.

36. The criterion of unconscionability in this area has been powerfully criticised as introducing too much vagueness and judicial discretion.⁵⁸ It has been said that Lord Walker's use of the word "unconscionableness" interchangeably with that of "justice" and "unfairness" means that "the test of gravity appears to turn simply upon an assessment of fairness determined through the exercise of judicial discretion ... and judicial whim".⁵⁹ Its use in *Pitt v Holt* has been described as an example of "a rhetorical device which the judge could hide behind to exercise discretion without reference to principle" and as essentially involving an assessment of the facts and circumstances to determine the appropriateness of equitable relief, but without reference to any distinct principles.⁶⁰
37. Finally, there is proprietary estoppel. This is a large and complex topic.⁶¹ In broad terms, the claimant may be entitled to proprietary relief where, in relation to land, the defendant has made a representation or assurance to the claimant, which has been relied upon by the claimant and the claimant has thereby suffered detriment in consequence of his reasonable reliance.⁶² The classic case, which is characterised as acquiescence, is where the claimant

⁵⁸ P. Davies and G. Virgo, 'Relieving Trustees' Mistakes' (2013) RLR 74-85.

⁵⁹ *Ibid.*, 82; G. Virgo, *op cit.*, 201-202.

⁶⁰ G. Virgo, *op cit.*, 298.

⁶¹ B. McFarlane, *The Law of Proprietary Estoppel* (Oxford: OUP 2014).

⁶² *Thorner v Major* [2009] 1 WLR 776 at [29], per Lord Walker; McFarlane at paras 5.33 and 5.38ff.

builds on land mistakenly believing it to be his own and the defendant, who is the true owner, knowing of the claimant's mistake and of his own title, fails to correct the defendant's mistake and assert his own title. In *Cobbe v Yeoman's Row Management Ltd*⁶³ Lord Walker said that "unconscionability" plays a very important part in the doctrine of equitable estoppel in unifying and confirming the other elements. He said that "If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again".⁶⁴

38. So, the question is whether it is appropriate that in the 21st century rights of citizens should depend upon the views of a judge about what is and is not unconscionable.
39. There are two overriding issues here. First, is the concept of conscience, or conscionability or conscionableness as a criterion for legal rights and defences consistent with the rule of law? Secondly, even if it is consistent with the rule of law, is it undesirable in a commercial context where it is usually said that certainty is critical and, indeed, that the certainty in English common law is one of the main reasons for the attractiveness of English law as the law of choice in many international commercial contracts.
40. To expand on the first point, there are certain qualities that it is desirable that law or legal rules should have. Probably the best known description of those qualities is that of the late Professor Lon Fuller, who said that rules should be general, made known and available, prospective and not retroactive, clear and understandable, free from contradictions, should not require what is

⁶³ [2008] 1 WLR 1752.

⁶⁴ [2008] 1 WLR 1752 at [92]

impossible, should not be too frequently changed, and should in practice be complied with by officials.⁶⁵

41. The critical point here, which is both a philosophical and a practical point, is that laws which satisfy these conditions better enable citizens to arrange their lives within the legal limits imposed upon them. This is what some legal philosophers say is the inherent moral value of law itself, that is to say it defines the scope within which citizens can act freely, in the sense of independence from the power of another (whether another person, or an institution or indeed the Government).⁶⁶

42. This is not just a philosophical point. It is recognised in the jurisprudence of the European Court of Human Rights, as appears from the following passage cited by one of our own Supreme Court Justices, Lord Anthony Hughes, in *Beghal v DPP*:⁶⁷

“The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and

⁶⁵ L. Fuller, *The Morality of Law* (1969) 41ff. A law that is fully compliant with Fuller’s eight “desiderata” is described by Professor Simmonds as “the archetype of law”: N. Simmonds, *Law as a Moral Idea* (Oxford: OUP 2007) 53. These factors are said by Fuller to reflect the idea of “fidelity to law”; that is to say, in seeking to identify, in Lon Fuller’s words, “the inner morality of law”, a point also supported by other prominent legal philosophers: L. Fuller, ‘Positivism and Fidelity to Law – a Reply to Professor Hart’ (1958) 71(4) *Harvard Law Review* 630-672..

⁶⁶ N. Simmonds, *ibid.*, 100, 119 and 141. In his words, at 189:

“The idea of law is the idea of a domain of universality and necessity within human affairs, making it possible to enjoy a degree of freedom and independence from the power of others, in the context of a life within a political community.”

Cass Sunstein also considers that rules operate to constrain the exercise of arbitrary power and that they create a space in which people can act free from fear of the state. While a rule is on the books, everyone subject to state power may invoke its protections and disabilities: C.R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: OUP 1996) 193.

Simmonds argues that, to the extent that Fuller’s eight “desiderata” are complied with, citizens will enjoy domains of optional conduct within which they enjoy some degree of protection against the forcible interference of other citizens; what he calls “domains of liberty”: N. Simmonds, *Central Issues in Jurisprudence* (3rd edn, London: Sweet & Maxwell 2008) 264, 265 and 273.

⁶⁷ [2016] AC 88.

accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.”

43. Professor Graham Virgo’s analysis of the different meanings of conscience or unconscionability to be discerned from the case law is helpful here, and particularly the distinction between unconscionableness viewed from the perspective of the defendant’s state of mind – what the defendant knew (subjective) or ought to have known (objective) – and unconscionableness as a standard applied by the court to mark its moral disapprobation of the transaction in question.⁶⁸ The point he and others make is that such disapprobation is unacceptable unless it is both principled and transparent in the criteria being applied.
44. I do not disagree with that approach but would make the following points on it. First, even where the defendant’s subjective state of mind is critical, equity’s assessment of unconscionableness is essentially objective in reflecting a societal norm for acceptable and unacceptable conduct. Secondly, the identification of such a norm is assisted by the precedents set by decided cases. Thirdly, even where the defendant’s subjective state of mind is not critical to the cause of action, it may well be a material consideration in determining whether objectively the defendant’s conduct was unconscionable. Fourthly, I consider that criticism of *Pitt v Holt* as an example of judicial use of unconscionability or unconscionableness as no more than a device to satisfy the judge’s sense of justice but without any attempt to explain or justify it, is an unwarranted description of a legitimate adjudicative approach. In such cases, the court is describing an acceptable or unacceptable societal norm in the light of all the circumstances. So, in *Pitt v Holt*, Lord Walker’s criteria for the

⁶⁸ G. Virgo, *op cit*.

exercise of the equitable jurisdiction included the requirement that unconscionability is to be evaluated objectively by looking in the round at the degree of centrality of the mistake to the transaction in question and the seriousness of its consequences.

45. I do not accept that the use of conscience in that way means that the concept is arbitrary or turns on “judicial whim”. Reference is sometimes made in this connection to the description by Scrutton LJ in *Holt v Markham*⁶⁹ as giving rise to “a history of well-meaning sloppiness of thought” Lord Mansfield’s description in *Sadler v Evans*⁷⁰ of the action for money had and received as:

“a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money”.

46. The criticism of conscience as an adjudicative principle is often associated in modern times with scholars of unjust enrichment, a subject which has assumed a great significance since the first publication of Goff & Jones’ “The Law of Restitution” in 1966. As I have said earlier, a distinction is usually made between, on the one hand, equitable relief which turns on unconscionability or judicial discretion, and, on the other hand, the common law cause of action for restitution for unjust enrichment in respect of which liability turns on the four basic questions I set out earlier.
47. The study and exposition of the principles of restitution for unjust enrichment as a distinct subject since the middle of the last century has been of immense importance in the development of our civil law for it has enabled a scholarly spotlight to be focused on weaknesses and inconsistencies within and across

⁶⁹ [1923] 1 KB 504, 513.

⁷⁰ (1766) 4 Burr 1984, 1986.

what had previously been considered separate areas and disciplines. It has introduced a highly desirable rigour into legal analysis.

48. The concept of conscience is not, however, wholly absent even from the principles of common law unjust enrichment. The very same concept of unconscionability is at the heart of the defence of change of position, that is to say in the need to show that the circumstances of the change of position are such that it would be inequitable to require the defendant to make restitution to the claimant. Tellingly, in that context too, the notion of what is inequitable does not confer a *carte blanche* discretion.⁷¹
49. To place this issue in a wider jurisprudential and societal context, the absence of hard-edged certainty in relation to conscience and conscionability in the *Pitt v Holt* type of context is no less true of other central concepts of our adjudicative processes, such as the common law's "reasonable person" or reasonableness, the public law concept of proportionality and the touchstone of "common sense" beloved by judges. Indeed, it may be said that the principles which lie at the heart of a liberal western democracy, such as ours, are those very principles of reasonableness, proportionality and conscience. If "unconscionability" in this context is to be labelled as discretionary, it is what the late Professor Peter Birks described as "weakly discretionary".⁷²
50. In the case of all those concepts, the adjudicative process is objective rather than subjective. The concepts are coloured by accepted societal norms rather than the individual predilections and idiosyncrasies of the judge. In the context of conscionability, there is a clear sense of that in the judgment of Russell LJ in *Riverlate v Paul*, which I have quoted earlier, where he contrasts "the attitudes of much the greater part of ordinary mankind (not least the world of

⁷¹ Goff & Jones, *op cit.*, para 27-02.

⁷² P. Birks, 'Rights, Wrongs and Remedies' (2000) 20(1) *Oxford Journal of Legal Studies* 1-37, 23.

commerce)”, as an acceptable point of reference, with “the field of moral philosophy”, which is not.

51. Peter Birks once said that “conscience of the intuitive kind is ... antithetical to the rule of law”.⁷³ If “conscience of the intuitive kind” is equated with an unfettered judicial discretion, I could see the force of that point. There is no such thing, however, as an unfettered judicial discretion, and it is simply inconceivable that the application of a principle of “unconscionability”, woven into our law over centuries, would be regarded by any judge of the UK or the European Court of Human Rights or the Court of Justice of the European Union as *carte blanche* for unconstrained and unprincipled judicial decision-making inconsistent with the rule of law. We can look back over the centuries of refinement of equity and see clearly that there is no place today in judicial decision making for the unrestrained application by judges of their inner morality.
52. The binding nature of precedent has much to do with this. For equity as much as the common law, the development of the law through precedent is the genius of our legal system for it enables the law to develop from generation to generation adapting to new societal conditions. Precedents provide guidance for what may be considered to be reasonable, proportionate and unconscionable in particular factual situations while acting as a litmus test for changes in attitudes within our society.⁷⁴
53. I turn, finally, to the point about the importance of certainty in a commercial context. English law is very frequently chosen in international commercial, financial and trade transactions where only one or even none of the parties is

⁷³ P. Birks, ‘Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment’ (1999) 23(1) *Melb U.L Rev* 1, 22, quoted in D.R. Klinck (2001) (n 9), 575.

⁷⁴ In *Re Hallett’s Estate* (1880) 13 Ch D 696, 710 Jessel MR refers to “the modern rules of Equity” as refined by precedent.

based in the UK. That is usually said to be because of the clarity, consistency and certainty of our laws. Disputes in such cases are determined by arbitration or very often, by choice of the parties, in the UK courts, especially in the courts in the Rolls Building in London, which houses the London centre of the Business and Property Courts of England and Wales, comprising the Commercial Court and the Technology and Construction Court of the Queen's Bench Division and also the Chancery Division.⁷⁵ This is of huge importance to our economy.

54. The aphorism that commerce requires certainty in the law is plainly true in a sense. It is, however, misguided as a basis for the suggestion that there should be no scope for the concept of unconscionability or for equitable relief involving judicial discretion in business law. As I have said, many equitable principles involving discretion are vital to, and have indeed been formulated in response to, the requirements of business: injunctions, including against disposal of assets, processes for seizure and search of the defendant's property, the obtaining of documents from third parties about the identity of fraudsters, the protection of confidential information and tracing in equity, to name but a few.
55. What businesses, as much as everyone else in our society, are entitled to expect, as a basic ingredient of the Rule of Law, is certainty as to the legal principles applicable in particular circumstances. Unconscionability, like dishonesty, is not a concept lacking in principle or certainty merely because it depends on the court's perception and application of an objective societal norm to the particular facts of the case. The principle is clear and certain even if its application to particular facts is contested and uncertain. The same may equally be said about the contested interpretation of contracts, which are at the

⁷⁵ The Business and Property Courts are also situated in five additional major centres across England and Wales.

very core of business and trade, but frequently depend upon different judges' perception of what is objectively reasonable or so-called commercial "common" sense.⁷⁶

56. It has been said that equity strengthens the law through its protection of the law against opportunists.⁷⁷ That is something of as much importance to those in business and trade as to others. It is entirely consistent with the concept of the Rule of Law.⁷⁸ It requires, however, the law to have a degree of flexibility to meet new situations not covered directly by precedent and where the obvious touchstone is an objective principle of unconscionability according to contemporary norms.
57. Compliance with the rule of law does, of course, require a sufficient explanation of the reasoning underpinning a judicial decision. The judge who applies an objective principle of unconscionability must explain those facts and matters leading to the conclusion that the conduct of the defendant or the nature of the transaction is unconscionable. That is, however, a quite different issue from whether the enforcement of rights by reference to an objective test of unconscionability according to the judge's assessment of contemporary norms is wrong or at least undesirable in principle.
58. In conclusion, there is still a legitimate role in our jurisprudence for the role of "epieikeia" or "aequitas", transported from the philosophy of Aristotle to medieval England. On the footing that conscience is one of the pillars of equity,

⁷⁶ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50. A recent example of a contract interpreted by different courts in different ways according to their perception of objective commerciality is *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited* [2017] UKSC 59, in which the meaning given by the Supreme Court can hardly be said to have been predictable or obvious.

⁷⁷ H.E. Smith, 'Property, Equity and the Rule of Law', and D. Klimchuk, 'Equity and the Rule of Law', in L.M. Austin and D. Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: OUP 2014).

⁷⁸ M. Harding, 'Equity and the Rule of Law' (2016) 132 *Law Quarterly Review* 278.

I can do no better than quote the great 20th century American legal scholar

Roscoe Pound:⁷⁹

“Law must be tempered with equity, even as justice with mercy. And if, as some assert, mercy is part of justice, we may say equally that equity is part of law, in the sense that it is necessary to the working of any legal system.”⁸⁰

Terence Etherton

25.10.2017

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⁷⁹ A distinguished American legal scholar who was Dean of Harvard Law School from 1916 to 1936.

⁸⁰ R. Pound, ‘The Decadence of Equity’ (1905) 5(1) Colum L Rev 20-35, 35.