
The application of statutory time limitation provisions by analogy to claims in equity's exclusive jurisdiction

Adrian O'Dea and Philippa O'Dea*

*In an action brought in equity's exclusive jurisdiction, where the defendant seeks to rely by analogy on a statutory limitation period, does the court have a discretion to decline the application of the analogous time bar to the equitable proceeding? The question arose in *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 and was answered in the negative. This article discusses the principles on which an analogous time bar is applied to an action in equity's exclusive jurisdiction, and suggests that this complex area is one which warrants further attention.*

INTRODUCTION

Consider the scenario where there is a cause of action at law and a corresponding action in equity's exclusive jurisdiction arising from the same facts and circumstances. Assuming the cause of action at law is statute barred, how does one ascertain whether the claim in equity's exclusive jurisdiction¹ is time barred?

The first line of inquiry is to consider any applicable statutory provision. As Gageler J has observed: "Most cases in most courts in Australia are cases in which all or most of the substantive and procedural law that is applied by the court to determine the rights of the parties who are in dispute has its source in the text of a statute".²

Historically, limitation periods were imported into the common law by statute to restrict the bringing of common law actions.³ Meanwhile, courts of equity developed limitation periods of their own to govern actions in equity's exclusive jurisdiction.⁴ Some statutory limitation provisions do however apply directly to a claim in equity's exclusive jurisdiction. For example, the *Limitation Act 2005* (WA) incorporates all claims (whether legal or equitable) into the limitation regime.⁵ Writing extra-judicially, Leeming J has provided another example: s 8 of the *Trustee Act 1888* (UK) which

* Adrian O'Dea BEc, LLB (Hons) is a partner of Carroll & O'Dea Lawyers Sydney, and an accredited specialist in commercial litigation. Philippa O'Dea BA, LLB (Hons) is a barrister at the NSW Bar and an accredited mediator NMAS.

¹ The scope of this article is limited to claims brought in equity's exclusive jurisdiction (such as for breach of trust or breach of fiduciary duty). This article does not examine in detail the law relating to claims brought in equity's concurrent or auxiliary jurisdictions which operate where the right in question is recognised by both equity and common law or where equity will give better protection for the infringement of a purely common law right (eg an action for specific performance which is a claim brought in aid of a legal right).

² Gageler S, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37(2) *Monash University Law Review* 1.

³ See Handford P, *Limitation of Actions* (3rd ed, Thomson Reuters, 2012) at [5.10.270].

⁴ See Brunyate J, *Limitation of Actions in Equity* (Stevens & Sons, 1932).

⁵ See Skead N, "Limitation Act 2005 (WA) and Equitable Actions: A Fatal Blow to Judicial Discretion and Flexibility – How Other Australian Jurisdictions Might Learn from Western Australia's Mistakes" (2009) 11 *UNDALR* 1, in which the author has observed: "[T]he 2005 Act reflects the trend towards subjecting all claims for equitable relief to a statutory limitation regime. This trend embodies the policy that, in the face of the fusion of the common law and equity, common law and equitable actions and remedies should be assimilated as far as possible: if the legislation applies to common law actions and remedies there is no good reason why it should not apply to equitable actions and remedies." See also Handford P, "A New Limitation Act for the 21st Century" (2007) 33 *UWALR* 387, in particular at 400-402.

made all limitation defences applicable to claims brought by a beneficiary against a trustee of an express trust for breach of trust, except where the claim was founded on "any fraud or fraudulent breach of trust".⁶

In New South Wales, s 23 of the *Limitation Act 1969* (NSW) provides that: "Sections 14, 16, 17, 18, 20 and 21 do not apply, except so far as they may be applied by analogy, to a cause of action for specific performance of a contract or for an injunction or for other equitable relief".⁷ The words of this statute "except so far as they may be applied by analogy" raise questions as to when and why statutory limitation provisions which do not apply directly to a claim in equity's exclusive jurisdiction may be applied by analogy to the equitable claim.

Such questions arose in the context of the *Corporations Act 2001* (Cth) in *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 and subsequently on appeal in *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181.

PROCEEDINGS BEFORE THE PRIMARY JUDGE

Three brothers (the Geraces) were the only directors and shareholders of a company which imported hair colour products named Auzhair Supplies Pty Ltd. In 2002 and 2003, Mr and Mrs Greenaway loaned Auzhair Supplies \$600,000 on terms that required the principal to be repaid in 2007 and interest to be paid at a rate of 10% per annum. In about February 2005, with the agreement of the Greenaways, the Geraces transferred the assets of Auzhair Supplies to a new company, Auzhair 1 Pty Ltd, a company in which the Geraces as well as the Greenaways were shareholders. In February 2005, one of the brothers, Mr Roy Gerace, applied for Auzhair Supplies to be de-registered, declaring in the application that Auzhair Supplies had no liabilities. The primary judge found that Mr Gerace believed (albeit incorrectly) that the liability to the Greenaways had been assigned along with the assets and undertaking. Auzhair Supplies was subsequently de-registered in June 2005. The Greenaways received payments of interest on their loan in varying amounts from July 2003 to September 2009, notwithstanding that Auzhair Supplies was deregistered from June 2005. The principal was not repaid. In 2010, the Greenaways successfully applied for Auzhair Supplies to be re-instated. Ward J ordered that Auzhair Supplies be wound up in insolvency, and that a liquidator be appointed.⁸

Auzhair Supplies, then in liquidation, brought a claim in equity's exclusive jurisdiction for equitable compensation for breach of fiduciary duty. No statutory remedy under the provisions of ss 180, 181, 182 and/or 183 of the *Corporations Act 2001* was pursued since more than six years had elapsed since the breach and s 1317K of the Act would operate to bar such a claim. There was no tolling provision in the Act to suspend or extend the limitation period in the event of incapacity. The claim for equitable compensation for breach of fiduciary duty, which was expressly preserved by s 185 of the Act, was not directly affected by the limitation provision in s 1317K.

The matter came before Brereton J, who found that the Geraces had breached their fiduciary duties. The Geraces sought to have s 1317K of the Act applied by analogy to the equitable claim. Brereton J stated the relevant two-staged approach:

The relevant enquiry is therefore to consider, first, whether the equitable claim and the corresponding legal right are so similar that the time limit applicable to the latter should be applied to the former; and, secondly, where such a similarity exists, whether it would nevertheless be inequitable to apply the analogous limitation period.⁹

⁶ Leeming M, "How Long is Too Long for an Equitable Claim?" (2014) 88 ALJ 621 at 622. Leeming J noted "the 1888 provision is preserved in the legislation of South Australia, and continues in modified form in other Australian States and Territories".

⁷ *Limitation Act 1969* (NSW), ss 14, 16, 17, 18, 20 and 21 deal with various causes of action including causes of action founded on contract, tort (including for damages for breach of statutory duty), a deed, or a judgment. They also include a cause of action to recover a penalty or forfeiture, a cause of action to enforce an award of an arbitrator and a cause of action for the conversion or detention of goods.

⁸ *Greenaway v Auzhair 1 Pty Ltd* [2010] NSWSC 1339.

⁹ *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [63].

Brereton J found that the statutory cause of action and the equitable claim were “not merely analogous but practically indistinguishable”,¹⁰ however his Honour held the equitable claim should not be barred by analogy because in the circumstances of the case it would be inequitable to do so. The circumstances considered by his Honour included the following:

The strength of the plaintiff’s case in this respect is that the wrongdoers remained in control of the company from the time when the cause of action arose (in or before February 2005) until they procured it to be (wrongly) deregistered (in June 2005) by a false declaration that it had no liabilities – albeit that I am unconvinced that it was knowingly false. While deregistered, the plaintiff was for all practical purposes incapable of bringing proceedings to enforce its equitable rights, and it was only upon reinstatement (which was initially, though not ultimately, opposed by the defendants) and the consequent appointment of a liquidator (which was also opposed), in November 2010, that enforcement of those rights became possible. These proceedings are taken to have been instituted in December 2011. There is no evidence of prejudice to the second, third and fourth defendants from any delay.¹¹

Brereton J further stated:

It is clear that the trigger for the reinstatement and winding-up proceedings was the non-repayment to the Greenaways of their loan, which under the 1 July 2004 agreement was repayable on 1 July 2007, although interest in respect of it continued to be paid until 2009. As I have concluded above, the Greenaways agreed to the transaction that is now said to constitute a breach of the directors’ duties – the effect of the evidence before me being that the directors and the Greenaways agreed to the establishment of Auzhair 1, in which they were to have a stake, and the transfer to it of the assets and undertaking of Auzhair Supplies. However, that does not amount to knowledge of their rights for the purposes of the law of laches: the Greenaways themselves had no right to commence proceedings against the directors. Even if it might be said that the Greenaways knew the facts that are now said to amount to a breach of the directors’ duties from their occurrence, they did not know – and did not have the means to know – that they had rights to complain of any such breach, because they themselves had no such rights. They could not reasonably have been expected to commence antecedent proceedings for reinstatement and winding-up until they learned that the company had been deregistered and had ceased to make payments in respect of their loan.

Accordingly, while I accept that the knowledge of the Greenaways is a relevant consideration, they could not themselves have commenced proceedings against the directors for breach of duty, and I do not accept that it has been shown that they had the requisite knowledge to warrant the commencement of the antecedent proceedings for reinstatement and winding-up before interest payments ceased in September 2009. There was, as a matter of practical reality, no means by which the company could bring proceedings against the directors until those steps had occurred. It would not do so while it remained under the control of the wrongdoers. It could not do so while deregistered. Thus the control and acts of the wrongdoers rendered it practically impossible for the company to enforce its equitable claim against them, until it was reinstated.

In those circumstances, despite the close analogy with the statutory cause of action, I conclude that it would be inequitable to apply the analogous limitation period. That is because while that limitation period prima facie informs the application of the doctrine of laches, equity would not bar the proceedings on account of laches where the plaintiff was not able to enforce its rights, as from the time when the cause of action arose until the company was reinstated and a liquidator appointed, it was rendered unable to do so – initially because it remained under the control of the wrongdoers, and subsequently because it had been wrongly deregistered at their instance – and the present proceedings were instituted in December 2011, promptly after those conditions came to an end. That is all the more so in the absence of evidence of prejudice to the defendants from any delay.¹²

PROCEEDINGS IN THE COURT OF APPEAL

The Geraces appealed to the New South Wales Court of Appeal. The Court of Appeal found that the primary judge erred in finding that where equity applied the statute of limitations by analogy, it did so

¹⁰ *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [76].

¹¹ *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [84].

¹² *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [88]-[90].

as an aspect of the doctrine of laches. More controversially, the Court of Appeal found that the primary judge had no discretion to decline to apply the analogous s 1317K limitation period.¹³ Meagher JA, in the leading judgment, formulated:

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. The description of such a ground, or the conduct giving rise to or constituting it, as unconscionable or unconscientious leaves to be identified the principles according to which equity justifies that conclusion: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199 at [45] (Gleeson CJ) and *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; 214 CLR 51 at [41]-[42] (Gummow and Hayne JJ).¹⁴

According to Emmett JA, “fraudulent concealment or other conduct that made the appellant’s reliance on the statutory bar unconscionable” are the exceptions to the rule that equity will apply the bar by analogy.¹⁵

Auzhair Supplies unsuccessfully sought special leave to appeal to the High Court of Australia.

THE ORIGINS OF THE RULE

The practice of equity applying an analogous statutory time bar was recognised by Lord Camden in *Smith v Clay* (1767) 3 Bro CC 646; 29 ER 743. Lord Camden is reported as having stated:

[A]s often as parliament had limited the time of actions and remedies, to a certain period, in legal proceedings, a Court in Chancery adopted that rule, and applied to similar cases in equity. For when the Legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation), to countenance laches beyond the period, that law had been confined to by parliament. And therefore in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar.¹⁶

In the same case, Lord Thurlow is reported as having stated:

What limitation of time will bar a suit where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore cannot be made on demurrer.¹⁷

In *Sterndale v Hankinson* (1827) 1 Sim 393; 57 ER 625 the Vice-Chancellor stated:

The other fallacy is, that the statute bars the suit in Equity; which it does not. But, as Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years, in analogy to the statute; and pleas of the statute are admitted in these Courts by analogy only. When the circumstances of a case are such as to make it against conscience to apply the rule founded upon this analogy, the Court will not enforce it.¹⁸

The Vice-Chancellor’s statement in *Sterndale v Hankinson* was cited with approval by Jessell MR in *Re Greaves; Bray v Tofield* (1881) 18 Ch D 551 at 553.

As identified by Meagher JA in *Gerace*: “The most often cited statement concerning equity’s treatment of limitation statutes is that of Lord Westbury in *Knox v Gye* (1872) 5 LR HL 656 at 674”.¹⁹ In *Knox v Gye*, a case which did not concern an action in equity’s exclusive jurisdiction but rather an

¹³ *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [70] (Meagher JA, with whose reasons Beazley P and Emmett JA agreed).

¹⁴ *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [70].

¹⁵ *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [105].

¹⁶ *Smith v Clay* (1767) 3 Bro CC 646; 29 ER 743 at 744.

¹⁷ *Smith v Clay* (1767) 3 Bro CC 646; 29 ER 743 at 746.

¹⁸ *Sterndale v Hankinson* (1827) 1 Sim 393 at 398.

¹⁹ *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [20].

equitable action in equity's concurrent jurisdiction, Lord Westbury stated:

[W]here the suit in Equity corresponds with an action at law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its *own rule of procedure*. (emphasis added)

In Australia, the starting point is the decision of *R v McNeil* (1922) 31 CLR 76, in which Isaacs J emphasised that *equity is free* in its exclusive jurisdiction to decline to apply the analogue:

Where a Court of equity finds that a legal right, for which it is asked to give a better remedy than is given at law, is barred by an Act of Parliament, it has no more power to remove or lower that bar than has a Court of law. *But where equity has created a new right founded on its own doctrines exclusively, and no Act bars that specific right, then equity is free*. It usually applies, from a sense of fitness, its own equitable doctrine of laches and adopts the measure of time which Parliament has indicated in analogous cases, but, when a greater equity caused by fraud arises, it modifies the practice it has itself created and gives play to the greater equity.²⁰

Isaacs J did not confine equity's freedom to decline to apply the analogous time bar to circumstances which come within exceptions to a prescribed rule. Isaacs J employed the word "usually", just as Brereton J in *Re Auzhair Supplies Pty Ltd (in liq)* employed the words "ordinarily"²¹ and "prima facie"²² to reflect equity's usual practice that prima facie, equity will follow the law by applying the analogous statutory time bar. This usual practice does not however curtail equity's "freedom" or "discretion" not to apply the analogous time bar where the facts and circumstances of the case make it unjust to do so. Using the language of Isaacs J, the analogous time bar will not be applied where a "greater equity" outweighs it. The "greater equity caused by fraud" is illustrative rather than definitive of the exceptional circumstances in which equity will not apply the analogue.

In *Motor Terms Co Pty Ltd v Liberty Insurance Ltd* (1967) 116 CLR 177, Kitto J stated:

The case of *Sterndale v Hankinson* ... is cited in one of the judgments below as authority for the proposition that "the Court will apply the Statute (of Limitations) in Equity by analogy, but where the circumstances make it against conscience to apply the rule founded on this analogy the Court will not enforce it". That is, and was laid down as, a principle of general Equity jurisprudence only. The judgment of Sir John Leach shows, and ample other authority for it might be cited, that the analogy of the statute is used in a suit for equitable relief as affording a prima facie proper standard by which to decide whether the relief should be refused on the ground of the staleness of the claim.²³

In *Bennett v Minister of Community Welfare* (1993) 176 CLR 408, McHugh J stated that if the exclusive equitable jurisdiction "to enforce compensation for breach of a fiduciary obligation" had been invoked "there would be much to be said for the view that the Minister could not escape liability to compensate the appellant".²⁴ The dicta of McHugh J suggests that in his Honour's view, the limitation period would not have barred, by analogy or otherwise, the equitable claim.

In *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, Kirby P (with whom Priestley JA expressed agreement), was of the opinion that the application of the statute "by analogy" does not lead to the automatic application of the statutory limitation to the equitable claim.²⁵

In *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229, Young JA (with whom Macfarlan and Hodgson JA agreed) indicated that in *Mathas v Slater* [2009] NSWSC 1397, Rein J was entitled to take the view that it would be unconscionable to apply the *Limitation Act 1969* by analogy.²⁶

²⁰ *R v McNeil* (1922) 31 CLR 76 at 100 (Isaacs J).

²¹ *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [64].

²² *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [91].

²³ *Motor Terms Co Pty Ltd v Liberty Insurance Ltd* (1967) 116 CLR 177 at 184 (Kitto J).

²⁴ *Bennett v Minister of Community Welfare* (1993) 176 CLR 408 at 426 (McHugh J).

²⁵ *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 509-510.

²⁶ *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229 at [104] and [106]; and see *Mathas v Slater* [2009] NSWSC 1397 at [105] (Rein J).

In *The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 415, Doyle CJ stated at [135] that “before applying the statutory time limit by analogy, I must be satisfied that in all the circumstances it is just to do so”. Doyle CJ’s decision was upheld on appeal by the Full Court: *Barker v Duke Group Ltd (in liq)* (2005) 91 SASR 167; [2005] SASC 81. Perry J (with whom Duggan and White JJ agreed) stated at [115]:

It is the defendants who seek to rely on the limitation by analogy. It was for the defendants to satisfy the court that the analogy should be applied. In the course of determining the matter, it was incumbent on Doyle CJ to consider whether it would be just and equitable to apply the statute by analogy. He did not err in his approach to this question. In addressing the question which he posed, namely, whether it was just in all the circumstances to apply the statutory time limit, he necessarily had regard to the same considerations as it would have been necessary to address if he had posed the question in terms of whether there was anything in the circumstances which might render it unjust to do so.

In *Hewitt v Henderson* [2006] WASCA 233, Buss JA stated that the authorities “support the proposition that equity will not apply a limitation period by analogy where there are circumstances which make the application of the statute unconscionable”. Buss JA did not think it appropriate “to determine whether equity retains a broader discretion as to whether the statute should apply; for example, by reference to any exceptions that are allowed in the law of laches”.²⁷

In *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; [2012] WASCA 157, the Court of Appeal found that the trial judge, who had determined that insufficient analogy between the nature of the claims in equity and an action in tort had been demonstrated, but in any event, had also determined that it would not be just in all the circumstances to apply such a bar to the foregoing equitable claims,²⁸ had undertaken a “careful analysis of principle and his consideration of relevant facts showed no error in his application of the law nor in the exercise of his discretion”.²⁹ The Court of Appeal of the Supreme Court of Western Australia clearly accepted that there was a discretion to decline the application of the analogue.

In England, the Court of Appeal in *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112 endorsed the view that in cases in equity’s exclusive jurisdiction there is a discretion not to apply the statute by analogy if to do so would be unjust. In *P&O Nedlloyd BV v Arab Metals Co* [2007] 2 All ER (Comm) 401 the English Court of Appeal expressly recognised the discretion.³⁰

The Supreme Court of the United States, in *Gardner v Panama Railroad Co* 342 US 29 (1951) stated:

Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.³¹

In Canada, La Forest J in *KM v HM* (1993) 96 DLR (4th) 289 held that even if statutes of limitation are applicable by analogy in the exclusive jurisdiction of equity, the analogy will be governed by the parameters of the equitable doctrine of laches, and equity retains a “residual discretion” as to whether the statute should apply.³²

THE RATIONALE FOR THE RULE

In *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102, Edelman J observed: “The reason why a statutory limitation period is applied to a circumstance which was not recognised

²⁷ *Hewitt v Henderson* [2006] WASCA 233 at [25] (Buss JA, with whom Steytler P and Pullin JA agreed).

²⁸ *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1; [2008] WASC 239 at [9294] (Owen J).

²⁹ *Westpac Banking Corporation v The Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1; [2012] WASCA 157 at [1188]-[1189].

³⁰ *P&O Nedlloyd BV v Arab Metals Co* [2007] 2 All ER (Comm) 401 at [48] (Bick LJ, with whom Buxton and Jonathan Parker LJ agreed).

³¹ *Gardner v Panama Railroad Co* 342 US 29 (1951) at [30]-[31].

³² *KM v HM* (1993) 96 DLR (4th) 289 at [332]-[333].

in the terms of the statute has never been clearly explained”.³³ His Honour speculated:

One possibility is that the application of a limitation period by analogy is an example of the first limb of the controversial doctrine of the equity of the statute: cases, thus out of the letter [of the statute], are often said to be within the equity.³⁴

The application of a limitation period by analogy has variously been described as a rule of procedure;³⁵ as an aspect of the doctrine of laches;³⁶ as taking on the character of laches;³⁷ as “affording a prima facie proper standard”³⁸ and as the “doctrine of application by analogy”.³⁹ Recently, Leeming J has referred to it as the doctrine of applying a statute of limitation by analogy.⁴⁰

In *Gerace*, Meagher JA stated:

In applying the statute by analogy, equity gives effect to the maxim that it follows the law and acts on the basis that “laches is presumable in cases where it is positively declared at law”: *Story’s Commentaries on Equity Jurisprudence*, First English Edition (1884) at [64a].⁴¹

Meagher JA continued:

If equity retains a residual discretion not to apply a limitation statute by analogy in circumstances where there would not be a defence of laches, it would not truly be acting by analogy and following the law.⁴²

Must equity follow the law? Not “slavishly or always”.⁴³ As suggested by Mason CJ and McHugh J in *Corin v Patton* (1990) 169 CLR 540, it would be a mistake to set too much store by a maxim, its precise scope being “necessarily ill-defined and somewhat uncertain”.⁴⁴ American Professor of Law, Kevin Kennedy has suggested:

It is frequently true that the maxims of equity are not very useful analytical tools. Take for example, the maxim, “Equity follows the law.” This maxim states a truism and beyond that, little more. It is obviously true that a court sitting in equity cannot depart from substantive rules of law when rendering a decision.⁴⁵

As Kennedy suggests, maxims are meant to be illustrative, not dispositive.⁴⁶

Equity is not compelled to follow the law. As observed in *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4th ed):

³³ *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1; [2014] WASC 102 at [207].

³⁴ Blackstone W, *The Commentaries on the Laws of England*, Kerr RM (ed) (7th ed, Book III, 1775), p 431; *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1; [2014] WASC 102 at [207].

³⁵ *Knox v Gye* (1872) LR 5 HL 656 at 674 (Lord Westbury).

³⁶ *Re Auzhair Supplies Pty Ltd (in liq)* (2013) 272 FLR 304; [2013] NSWSC 1 at [53]. See also *R v McNeil* (1922) 31 CLR 76 at 100 (Isaacs J).

³⁷ *KM v HM* (1993) 96 DLR (4th) 289 at 332.

³⁸ *Motor Terms Co Pty Ltd v Liberty Insurance Ltd (in liq)* (1967) 116 CLR 177 at 184 (Kitto J).

³⁹ *Commonwealth v Cornwell* (2007) 229 CLR 519; [2007] HCA 16 at [51] (Callinan J).

⁴⁰ Leeming, n 6 at 623.

⁴¹ *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [71].

⁴² *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [74].

⁴³ Cardozo J in *Graf v Hope Building Corporation* 171 NE 884 (1930) at 887 as cited by Burchett AJ in *Young v Waterways Authority (NSW)* [2002] NSWSC 612 at [26]; *The Bell Group Ltd (in liq) v Westpac [No 9]* (2008) 39 WAR 1; [2008] WASC 239 at [9268] (Owen J), which was upheld on appeal.

⁴⁴ *Corin v Patton* (1990) 169 CLR 540 at 557 (Mason CJ and McHugh J).

⁴⁵ Kennedy K, “Equitable Remedies and Principled Discretion: The Michigan Experience” (1996-1997) 74 *University of Detroit Mercy Law Review* 609 at 617.

⁴⁶ Kennedy, n 45 at 617.

[Equity] would not apply the Statute of Limitations by analogy if there were clear fraud involved, or if to do so would lead to an inequitable result: *Gibbs v Guild* (1882) 9 QBD 59 ... Indeed, if equity always followed the law in all respects it is not easy to see how it could ever have become a distinct jurisprudence.⁴⁷

The fifth edition of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* contains the additional sentence: "To follow the law in everything would foreclose equitable intervention altogether".⁴⁸

That equity follows the law is not, in itself, a sufficient explanation as to why a statutory limitation period is applied to a circumstance which was not recognised in the terms of the statute. Whether or not the application of a limitation period by analogy is described as a rule, or as a doctrine, it is suggested that practitioners across Australia could benefit from a clear elucidation of the rationale for applying statutory limitation periods by analogy to actions in equity's exclusive jurisdiction.

DIFFICULTIES WITH THE COURT OF APPEAL'S DECISION IN GERACE

Some of the difficulties posed by the leading judgment in *Gerace* are canvassed by White J in his interlocutory judgment in *Issa v Issa*. White J stated:

With respect to his Honour's observations at [70] it is not at all clear that the authorities to which his Honour referred show that when a claim is brought in equity's exclusive jurisdiction to which no statutory limitation period is directly applicable, but where there is an analogous claim to which a statutory bar is applicable, the bar will always be applied by analogy unless reliance by the defendant on the statute would in the circumstances be unconscionable, as distinct from doing so unless the application of the statute by analogy would be unjust. The decision in the High Court in *R v McNeil* (1922) 31 CLR 76, and in particular the judgment of Isaacs J at 100 does not say that.⁴⁹

White J continued:

The observations of Isaacs J concerning the role of a court of equity in acting in its exclusive jurisdiction were obiter. But in any event, Isaacs J did not say that the only circumstance in which equity, when acting in its exclusive jurisdiction, would not apply a statute of limitations by analogy, was where there was a greater equity caused by fraud. The sentence his Honour emphasised was that where equity created a new right found on its own doctrines exclusively that was not barred by statute, then "equity is free".⁵⁰

Additional authorities are cited by Meagher JA at [32] and [33] however it is respectfully suggested that the authorities cited do not support the conclusion at [34]. In equity's exclusive jurisdiction, the requirement that there be an "equitable ground" before the application of the analogue is excepted does not appear to feature in Dr Spry's work.⁵¹ Dr Spry's view appears to be consistent with the discretion: "a court of equity will ordinarily act upon [the statutory bar] by analogy but ... will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so".⁵² Secondly, reliance on the statement by Lord Bingham in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 at 115 appears to be misplaced. The passage quoted from Lord Bingham's judgment was not his Honour's own observation but rather a summary of one of the arguments of the plaintiffs, an argument which Lord Bingham decided "should not prevail".⁵³ The issue before Lord Bingham was one of statutory construction – whether the plaintiffs could rely on a statutory provision to overcome a statutory bar otherwise applicable to their claim.

⁴⁷ Meagher R, Heydon D and Leeming M, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, LexisNexis, 2002) at [3-045].

⁴⁸ Heydon JD, Leeming MJ and Turner PG, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th ed, LexisNexis, 2014) at [3-040].

⁴⁹ *Issa v Issa* [2015] NSWSC 112 at [56].

⁵⁰ *Issa v Issa* [2015] NSWSC 112 at [58].

⁵¹ Spry ICF, *Equitable Remedies* (5th ed, LBC Information Services, 1997).

⁵² Spry, n 51, pp 419-420.

⁵³ *Sheldon v RMH Outhwaite (Underwriting Agencies) Ltd* [1996] 1 AC 102 at 115.

Another difficulty with the Court of Appeal's decision, as identified by White J in *Issa v Issa*, is the absence of any discussion by the Court of Appeal as to "whether its conclusion that the claim was barred by analogy was consistent with the statutory purpose of s 1317K when read with s 185 [of the *Corporations Act 2001*]"⁵⁴.

Precisely what constitutes an equitable ground for the purposes of Meagher JA's formulation may cause uncertainty for practitioners, as may what constitutes conduct that makes reliance on the statutory bar unconscionable for the purposes of Emmett JA's formulation. For example, how are the factors of (i) a plaintiff's lack of capacity or inability to bring the proceedings, and (ii) absence of prejudice on the part of the defendant, considered using these formulae? If such factors are not accommodated by the formulae, is equity to disregard these factors? Are circumstances which do not come within defined exceptions to the rule to be ignored? Is equity to disregard the particular circumstances of the case in favour of the mechanical application of a rule?

The question of an applicant's incapacity to bring the proceedings arose in the NSW Court of Appeal in *Cassegrain v Gerard Cassegrain Pty Ltd* (2013) 281 FLR 409; [2013] NSWCA 454. The Court of Appeal dealt with the issue of incapacity by finding that it was open to the trial judge to find that the period of receivership ought to be ignored for the purposes of determining the expiry of an analogous limitation period.⁵⁵ A just result was achieved through the suspension of the statute. However in *Gerace*, unlike *Cassegrain*, there was no disability provision in the *Corporations Act 2001* which allowed for the suspension of the limitation period. There was no option available to the court within the statute itself to ameliorate the effect of an analogous application of s 1317K in the event of an incapacitated plaintiff. The need for the discretion in such circumstances was manifest. Moreover, its existence is entirely consistent with the legislative intention recorded in s 185 of the *Corporations Act 2001*.

In *Short v Crawley (No 30)* [2007] NSWSC 1322, White J expressed the view at [583] that prima facie, a claim for breach of fiduciary duty would not be barred by the analogical application of a statute of limitations or by laches, where the defendant is unable to show a fully informed consent to the transaction because of the non-disclosure of excessive interest payments, and non-disclosure of the fact that the mortgage advances had been repaid. His Honour stated: "Before equity applies a statutory time limit by analogy, the Court must be satisfied that it is just to do so".⁵⁶ Adopting either the formulation of the rule expressed by Meagher JA or that expressed by Emmett JA, how could equity achieve a just result in the circumstances of material non-disclosure? Is non-disclosure an equitable ground within the meaning of Meagher JA's rule? Would non-disclosure constitute conduct which makes the appellant's reliance on the statutory bar unconscionable within the meaning of Emmett JA's rule?

The previous decision of the NSW Court of Appeal in *Simpson v Donnybrook Properties Pty Ltd* which affirmed the decision of Rein J in *Mathas v Slater* took a different approach to that taken in *Gerace*. The case involved, inter alia, a dispute concerning an investment of \$350,000 made on 11 June 1999 and whether a claim for breach of fiduciary duty (commenced on 6 May 2006) relating to that investment was out of time. The defendant argued that the claim in equity was out of time because the analogous statutory time limitation of six years under s 14 of the *Limitation Act 1969* (NSW) should be applied by analogy. Rein J found that s 14 of the Act ought not be applied by analogy because, having regard to the particular circumstances of the case, it would be against conscience or unjust to do so. Rein J stated:

⁵⁴ *Issa v Issa* [2015] NSWSC 112 at [46].

⁵⁵ *Cassegrain v Gerard Cassegrain Pty Ltd* (2013) 281 FLR 409; [2013] NSWCA 454 at [156] (Beazley P, with whom Macfarlan JA agreed on this issue) at [201].

⁵⁶ White J cited *The Duke Group (in liq) v Alamain Investments Ltd* [2003] SASC 415 at [114]; *Barker v Duke Group Ltd (in liq)* (2005) 91 SASR 167; [2005] SASC 81 at [84]; *Hewitt v Henderson* [2006] WASCA 233 at [25]; *Brightwell v RFB Holdings Pty Ltd (in liq)* (2003) 171 FLR 464; [2003] NSWSC 7 at [63].

In circumstances where the plaintiffs did not know until 2004 that they would not recover their capital and where in 2003 Mr Simpson offered to repay that capital to them, I do not think that s 14 of the *Limitation Act* can, or ought be, applied by analogy.⁵⁷

Rein J did not find that the conduct of the defendant was unconscionable or that there existed an equitable ground which justified the analogy not being applied because reliance by the defendant on the statute would in the circumstances be unconscionable. The test stated by Rein J was whether “having regard to all the circumstances it is against conscience or unjust” for equity to apply the analogy.⁵⁸

The defendant appealed to the NSW Court of Appeal. In *Simpson v Donnybrook Properties Pty Ltd*, Young JA (with whom Macfarlan and Hogson JJ agreed) affirmed the approach of Rein J and stated: “The primary judge said that, because of Mr Simpson’s offer to repay the \$350,000 in June 2003, it was unconscionable to apply the *Limitation Act 1969* by analogy”.⁵⁹ Young JA concluded that: “In my view the primary judge, in dealing with a claim in equity, was entitled to take this view”.⁶⁰ The focus was not on whether the conduct of the defendant was unconscionable, but rather whether it would be unconscionable to apply the statute by analogy.

Likewise, in the early English decision of *Sterndale v Hankinson*, the inquiry to be made by the court was “whether the circumstances of a case are such as to make it against conscience to apply the rule founded upon this analogy.”⁶¹ In *Issa v Issa*, White J set out a summary of the decision in *Sterndale v Hankinson*:

Sterndale v Hankinson concerned a bill filed by a creditor for the administration of a deceased estate. The deceased died on 27 June 1810. A bill for administration was filed by a creditor on 5 May 1812. The decree for administration was not made until 14 April 1818. On the taking of accounts the Master disallowed the claims of creditors whose claims would have been barred by the statute of limitations if actions at law had been brought to enforce them at the time of the decree. An exception to the Master’s report was allowed. It was then the practice that a creditor’s claim for administration of a deceased estate was brought on behalf of creditors generally. It was in that context that Sir Anthony Hart V-C (not Sir John Leach V-C as stated in *Re Greaves, deceased*; he had been appointed Master of the Rolls the previous month) said (at 398, 627):

It has been said that if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from this proposition; for I think that the Court would protect a creditor against any accident of that kind. I have no doubt that if a creditor files a bill, and it appears that the rule adopted by analogy to the statute would affect his demand, but that a bill had been before filed by another creditor, and that the Plaintiff in the second suit had, in confidence that the former suit would be prosecuted, abstained from filing his bill, the Court would not apply its rule.

There was no question of the defendants acting unconscionably.⁶²

HAS “THE DISCRETION” SURVIVED?

White J has observed in *Issa v Issa*:

Prior to the Court of Appeal’s decision in *Gerace v Auzhair Supplies Pty Ltd* ... there was authority that equity had a discretion as to whether to apply a statute of limitations by analogy to a case within its exclusive jurisdiction, and would not do so if in the circumstances of the case it would be unjust or unconscionable to do so (*The Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 415; (2003) 232 LSJS 58 at [114]; *Barker v Duke Group Ltd (in liq)* [2005 SASC 81; (2005) 91 SASR 167

⁵⁷ *Mathas v Slater* [2009] NSWSC 1397 at [106]

⁵⁸ *Mathas v Slater* [2009] NSWSC 1397 at [105].

⁵⁹ *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229 at [104].

⁶⁰ *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229 at [106].

⁶¹ *Sterndale v Hankinson* (1827) 1 Sim 393, approved by Jessel MR in *Re Greaves*; *Bray v Tofield* (1881) 15 Ch D 551 at 553.

⁶² *Issa v Issa* [2015] NSWSC 112 at [77].

at [84]; *Hewitt v Henderson* [2006] WASCA 233 at [25]; *Brightwell v RFB Holdings (In Liq)* (2003) 171 FLR 464 at [63]; *Short v Crawley (No. 30)* [2007] NSWSC 1322 at [583].⁶³

White J referred to *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th ed) at [36-085]:

[T]he learned authors say that *Gerace v Auzhair Supplies Pty Ltd* has held that equity does not retain a discretion to decline to apply a statute of limitations by analogy and the view that there was such a discretion is inconsistent with elements of the reasoning in *Gibbs v Guild* which had been endorsed in the High Court in *R v McNeil*.⁶⁴

White J continued:

As to the former observation, for the reasons above it is arguable that the Court of Appeal's conclusion is not part of the ratio of *Gerace*. As to the latter observation, it is arguable that *R v McNeil* does not provide such support. Knox CJ and Starke J referred (at 97) to *Gibbs v Guild* and *Trotter v Maclean* as well as *Bulli Coal Mining Co v Osborne* as cases in which equity was prepared to consider "repelling the application of the statute" (quoting Fry J in *Trotter v Maclean* at 584). Their Honours observed that the court could not repel the clear words of s 37 of the *Crown Suits Act 1898* (WA) because that would be to give effect to an equity for which the statute did not provide. The judgment of Knox CJ and Starke J did not address the question of whether in its exclusive jurisdiction equity had a residual discretion not to apply the statute of limitations if to do so would be unjust and for the reasons above (at [57] and [58]) Isaacs J's judgment, if anything, supports the existence of such a discretion.⁶⁵

However in *Shiu Shing Sze Tu v Lowe* [2014] NSWCA 462, Gleeson JA, with whom Meagher and Barrett JJA agreed, stated:

Gerace may also be taken to establish (at [74]) that where a limitation statute applies by analogy, equity does not retain a general residual discretion to decline to apply it: cf *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 at 509; *Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 415. It follows that Smart AJ erred in taking the contrary approach (at [499] May Judgment) relying upon those authorities.⁶⁶

Where the circumstances of the case make it unjust to apply an analogous time bar to a claim in equity's exclusive jurisdiction, post-*Gerace*, how will equity courts approach the issue? If the facts and circumstances of a case come within the exceptions formulated by the Court of Appeal, namely where there is an equitable ground such as fraudulent concealment or other conduct which makes the appellant's reliance on the statutory bar unconscionable, the court may clearly decline to apply the statutory analogue. But where there is no "equitable ground" such as fraudulent concealment, or where there is no conduct which makes the reliance on the statutory bar "unconscionable", it may be difficult for the court, in its exclusive jurisdiction, to do equity, curtailed instead by a rule of mechanical application.

Perhaps the following passage of White J in *Issa v Issa* offers a way forward:

If the circumstances of the case make it unjust to apply the statute of limitations by analogy to prevent a plaintiff from obtaining an equitable remedy arising from the defendant's breach of fiduciary duty so that it would be against conscience for the court to apply a rule founded on the analogy, it is arguable that it would be unconscientious for the defendant to rely on the analogical application of the statute.⁶⁷

A very different way forward is offered, extra-judicially, by Leeming J:

[T]he 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 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 it was not in *Gerace*, where the equitable claims were close to identical with the

⁶³ *Issa v Issa* [2015] NSWSC 112 at [42].

⁶⁴ Cited by White J in *Issa v Issa* [2015] NSWSC 112 at [74].

⁶⁵ *Issa v Issa* [2015] NSWSC 112 at [74].

⁶⁶ *Shiu Shing Sze Tu v Lowe* [2014] NSWCA 462 at [365].

⁶⁷ *Issa v Issa* [2015] NSWSC 112 at [79].

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.⁶⁸

Leeming J's article recognises that a statutory time bar will not be applied by analogy where there is concealed fraud but it does not recognise the additional exception to the rule carved out by the Court of Appeal, namely that where the defendant's conduct (other than fraudulent concealment) makes the appellant's reliance on the statutory bar unconscionable, the analogy will not be applied. According to Leeming J, the statute is to be applied subject to any "discretion" contained in the statute, as occurred in *Cassegrain*. Where no tolling provision can be applied, on Leeming J's approach there is no room for the exercise of a "discretion" to extend or suspend the limitation period.

There is nothing controversial about the first step in Leeming J's approach: Does some limitation statute apply directly? Nor is the second step controversial: Does the equitable claim "correspond" to a legal claim to which a limitation statute applies? It is suggested that the ongoing controversy relates to whether the court has a discretion to decline to apply to the analogous statutory time bar where the circumstances of the case make it unjust or unconscionable to do so. It is respectfully suggested that the difficulty with Leeming J's extra-judicial approach is that it is premised on an acceptance that Meagher JA's reasons in *Gerace* are correct; that they demonstrate that Doyle CJ in *Duke Group Ltd (in liq) v Alamain Investments Ltd* and "many other decisions, including in 'New South Wales, Victoria and Western Australia' do not accord with principle or High Court authority, notably *R v McNeil*".⁶⁹

CONCLUSION

An equity court's power to do justice in a particular case, by exercising discretion in a principled way, is the very hallmark of equity. If *Gerace* has removed the court's discretion to decline to apply a statute of limitations by analogy, then the analogy of the statute has moved from "affording a prima facie proper standard"⁷⁰ as equity's "own rule of procedure",⁷¹ and has become a rule of mechanical application: hard, fast and legal in its application.

In *Meagher, Gummow and Lehane* (4th ed), the authors refer to a "fusion philosophy"⁷² as articulated by Professor Burrows in his article, "We Do This at Common Law But That in Equity".⁷³ In the article, Professor Burrows argued:

[T]o support fusion seems self-evident, resting, as it does, on not being slaves to history and on recognizing the importance of coherence in the law and of "like cases being treated alike" ... on the assumption that fusion is a good thing, we as academics, judges, legislators and practitioners are simply not doing enough to eradicate the needless differences in terminology used, and the substantive inconsistency, between common law and equity. In other words, to use a rather hackneyed phrase, I am calling on all lawyers to take fusion seriously.⁷⁴

A difficulty arises when one assumes that in all instances fusion is a good thing. The warning and questions posed in *Meagher, Gummow and Lehane* (4th ed) are salient, in particular the questions:

⁶⁸ Leeming, n 6 at 623.

⁶⁹ Leeming, n 6 at 623.

⁷⁰ *Motor Terms Co Pty Ltd v Liberty Insurance Ltd* (1967) 116 CLR 177 at 184 (Kitto J).

⁷¹ *Knox v Gye* (1872) 5 LR HL 656 at 674 (Lord Westbury).

⁷² Meagher, Heydon and Leeming, n 47 at [2-320].

⁷³ Burrows A, "We Do This at Common Law But That In Equity" (2002) 22 *Oxford Journal of Legal Studies* 1.

⁷⁴ Burrows, n 73 at 4-5.

[W]hat compelling reason requires this program to be attempted (all that is certain is that it will be to the heavy costs of litigants involved in the reformulation of doctrine), and by what authority are the courts to grant themselves such a radical law reform brief?⁷⁵

In *Gerace*, where there was no challenge to the primary judge's finding that Auzhair Supplies was rendered unable to enforce its rights from the time the cause of action arose until the company was reinstated and a liquidator appointed; where there was no legislative provision that suspended or extended the limitation provision for an incapacitated plaintiff; where as a matter of practical reality, there was no means by which the company could bring proceedings against the directors until the company had been reinstated; and where there was no evidence of prejudice to the defendants, one might query whether justice was done by the application of a statutory limitation provision, which parliament had not sought to apply to equitable actions, to bar the equitable claim.

In light of the divergent approaches that courts within Australia and overseas have taken when asked to apply statutory time limitation provisions by analogy to claims in equity's exclusive jurisdiction, it is respectfully suggested that this complex area warrants the attention of the High Court of Australia or a full bench of five judges of the New South Wales Court of Appeal.

⁷⁵ Meagher, Heydon and Leeming, n 47 at [2-320].