EQUITABLE DEFENCES: AN OVERVIEW

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I INTRODUCTION

Equity's maxims are as mysterious and fraught with conjecture as the identity of that once famous, white-helmeted test track driver on a now defunct BBC television program about cars. Some say there a dozen maxims, some say 14, and yet others as many as 181.[1] Some say the maxims have existed since time immemorial and form the very foundations of equity, while others consider the origins to be somewhat less romantic.[2]

Whatever the truth of the matter, the maxims and the equitable doctrines they have accompanied form an integral part of jurisprudence and legal practice. Consequently, an appreciation of equitable defences is essential to an understanding of modern legal practice and effective commercial litigation.

This paper discusses the more commonplace equitable defences — laches, equitable set-off, and release and waiver — providing both an overview of their origins and their requisite elements, as well as some observations about their application in a commercial context.

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[1] See J D Heydon, M J Leeming and P G Turner (eds), *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 68 [3.005] and the sources cited therein.

[2] Ibid.

II EQUITABLE SET-OFF

The defence of equitable set-off has arisen through a combination of statutory principles and the courts' equitable jurisdiction. Two statutes enacted the right to obtain set-off during the 18th century, while equitable principles appear in judicial decisions during a similar period.[3]

In order to make good a claim for equitable set-off, there must be both a cross-demand in the proceeding and an equitable basis on which the party claiming the set-off seeks to resist an opponent's claim. An equitable set-off may be raised in answer to an equitable or common law claim.

In the case of *Walker v Secretary, Department of Social Security*,[4] an appeal from a decision relating to fraudulent claims for social security benefits, Drummond J neatly articulated the issue before the Federal Court as involving a set-off. The question was whether

> the Commonwealth [that is, the respondent] would be entitled to treat its right to recover the debt due to it in respect of the benefits overpaid to the appellant as an equitable set-off against the appellant's statutory right to payment to him [by way of sickness benefits] …[5]

Drummond J went on to cite the dictum of Lord Cottenham LC in *Rawson v Samuel,*[6] a seminal decision in the doctrine of equitable set-off. In that case, Lord Cottenham LC stated:

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[3] Ibid 1102 [39.045], providing an overview of the earliest identifiable cases.

[4] (1995) 56 FCR 354 ('*Walker*').

[5] Ibid 363.

[6] (1841) Cr & Ph 161.

> We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient …[7]

The Lord Chancellor added that a set-off can be made good where 'the equity of the bill [has] impeached the title to the legal demand'.[8] While the expression 'equitable ground' and the concept of 'impeachment' may have eluded definition, subsequent decisions of the courts have offered some guidance.

A *Two Key Concepts*

What constitutes an 'equitable ground' as a necessary ingredient to the equitable set-off is not the subject of any general rule. There must at the least be some unjust or inequitable quality in permitting a party to proceed with its claim against an opponent seeking to raise the set-off. In allowing the appeal in *Walker*, Cooper J, with whom the majority agreed, cited the failure of the Commonwealth to 'point to any relevant equity of the type necessary to sustain a defence of equitable set-off. Merely to point to the cross-claims is not of itself sufficient'.[9]

As to the concept of 'impeachment', something effectively impeaches a claim where it acts as a bar to the opponent's action but is other than a counterclaim or cross-claim in the true sense.[10] Recently, the Victorian Court of Appeal has considered that impeachment requires

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[7] Ibid 178.

[8] Ibid 179.

[9] *Walker* (1995) 56 FCR 354, 375.

[10] *McDonnell v McGregor* (1936) 56 CLR 50, 58.

that the set-off go to the 'root' of the opponent's claim.[11]

Impeachment has arisen, for example, in a dispute concerning a building contract where a party sought to offset an unliquidated claim for damages for breach against a claim for money due under that contract.[12] On the other hand, it was absent in a situation where a property developer had overpaid amounts to a lender and then sought to offset those amounts against the lender's claim for contribution from the developer under a profit-sharing agreement.[13] As the learned authors note in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, '[t]he nature of the impeachment requirement depends as much on cases in which that requirement was not found as it does on cases where it was discovered'.[14]

B *Other Considerations*

In addition to the key factors of an equitable ground and impeachment, a number of considerations relevant to a claim for an equitable set-off have emerged from decisions of the courts.

First, mere connection, even inseparable connection, between the principal claim and the claim of set-off is not enough to establish an equitable set-off.[15] As the authorities make clear

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[11] *Ozkan Ozden v R* [2014] VSCA 127, [85].

[12] *D Galambos and Son Pty Limited v McIntyre* (1974) 5 ACTR 10; see also *HP Mercantile Pty Ltd v Dierickx* [2013] NSWCA 479, [137] where Emmett JA discusses this and a number of other hypothetical scenarios.

[13] *Equititrust Ltd v Franks* (2009) 258 ALR 388. In that case, Macfarlan JA, with whom Ipp JA and Handley AJA agreed, held at [61] that '[t]he debts are in my view separate and distinct'.

[14] J D Heydon, M J Leeming and P G Turner (eds), above n 1, 1114 [39.085].

[15] See, eg, *Walker* (1995) 56 FCR 354, 375.

following the decision in *Rawson v Samuel*, more is required in the form of an equitable ground and impeachment of the opponent's claim.

Second, in the absence of some equitable ground a cross-demand will not qualify as a set-off unless it could, were it brought alone, represent an actionable debt. In the Federal Court case of *J & S Holdings Pty Ltd v NRMA Insurance Ltd*,[16] the appellant sought to recover from the respondent an amount of interest it had paid on a loan in circumstances where it was liable for default under that loan but where, as the evidence suggested, such interest had been paid 'under protest'. The Court held that the appellant was not entitled to recover the interest, noting:

> There is nothing in the circumstances of the present case which … entitles J & S, as a matter of general principle, to recover from NRMA the excess interest which it paid during the currency of the loan. There has been no suggestion of mistake or ignorance of fact. … It is not suggested that any fiduciary relationship existed between the parties. Nor is it suggested that the payment was induced by fraud or misrepresentation on the part of NRMA or that, in a situation where what was involved was a commercial transaction … there was any overbearing by one party of the other or that the mistake was other than mutual.[17]

Although such considerations are relevant to establishing a common law set-off (the differences between common law and equitable set-off are discussed below), they are worth bearing in mind where a party seeks to establish a set-off either at equity or at common law.

Third, even where the claim and set-off arise from similar subject matter or the same

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[16] (1982) 41 ALR 539.

[17] Ibid 551–2.

transaction, in determining whether to award a set-off a court may have regard to the parties' conduct. In *D Galambos and Son Pty Limited v McIntyre*,[18] Woodward J held that:

> Claims for money due under a contract and damages for breach of the same contract … may be set-off against each other where the equity of the case requires that it should be so. This will depend upon how closely the respective claims are related, particularly as to time and subject-matter. *The general conduct of the respective parties will, as always, be relevant to the granting of such equitable relief*.[19]

Woodward J did not elaborate on what was meant by the 'general conduct of the respective parties'. Arguably it is something that feeds into a court's general discretion in exercising equitable jurisdiction and appears to honour the equitable maxims that 'those who seek equity must do equity' and that 'those who come into equity must come with clean hands'.

Fourth, so far as quantification of an equitable set-off is concerned, the approach has been held to be 'a flexible one, and determined by the circumstances of the case'.[20] Any applicable interest is calculated by reference to the net of the claim and the set-off.[21]

C *Equitable Versus Common Law Set-off*

At common law, where a plaintiff sues for a debt due under a contract for the performance of work and labour and where the defendant alleges the plaintiff's breach of that contract, the

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[18] (1974) 5 ACTR 10.

[19] Ibid 26 (emphasis added).

[20] *Gilsan (International) Limited v Optus Networks Pty Limited [No 3]* [2005] NSWSC 518, [51].

[21] Ibid [59].

defendant may be entitled to offset the damages against the amount of the debt.[22] The case of *Mondel v Steel* is authority for the proposition that:

> [I]t is competent for the defendant … not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has maintained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract …[23]

This principle extends, by way of statute, to contracts for the sale of goods under warranty.[24]

A key difference between equitable set-off and its common law equivalent lies in the way in which a claim of equitable set-off is instituted. In particular, whereas a set-off seeks to impeach the opponent's claim — this being a threshold requirement for the defence — a counterclaim may not necessarily do so.[25] Similarly, while an equitable set-off must go to the root of the opponent's claim in the sense that the party claiming the set-off must show some equitable basis for protection against the claim, at common law this is not necessary.

It follows that, at its inception, it may be more difficult to establish an equitable set-off than a common law equivalent. Once the threshold requirements are met, however, the operation of the set-off at equity is broader than at common law. Assuming an element of impeachment and an equitable ground exist, one example of the way in which an equitable set-off operates

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[22] *Mondel v Steel* (1841) 8 M & W 858; see also *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717.

[23] (1841) 8 M & W 858, 871–2.

[24] *Goods Act 1958* (Vic) s 59(1).

[25] *Re KL Tractors Ltd* [1954] VLR 505, 508.

more broadly than its common law cousin is in relation to the identity of the parties. An equitable set-off need not be mutual, in that the parties to the claim and the set-off need not be the same; '[e]quitable doctrine … does not require that an identity should exist between the parties to the set-off and the parties to the action'.[26]

Another example of the broad operation of an equitable set-off is in relation to the liquidity of the claim; at common law, a set-off can only be made against a liquidated claim or debt whereas, at equity, both liquidated and unliquidated claims can be met with a set-off.[27]

D *Can Parties Exclude the Possibility of an Equitable Set-off?*

Parties may by express agreement exclude the possibility of an equitable set-off. In *Hong Kong and Shanghai Banking Corporation v Kloeckner & Co AG*,[28] a case involving a dispute about a bill of lading, the contract between the parties included an undertaking that the defendant would pay in full an invoice in relation to the bill 'without any discount, deduction, offset, or counterclaim whatsoever'. The parties' assent to that term was not in issue. The Court held that, contrary to views in academia at the time, it was good law that parties could exclude or waive a right of set-off.[29]

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[26] *Sidney Raper Pty Ltd v Commonwealth Trading Bank of Australia* [1975] 2 NSWLR 227, 255 (Glass JA).

[27] *Walker* (1995) 56 FCR 354, 367.

[28] [1990] 2 QB 514.

[29] Ibid 521.

E *Joint Claims*

Just as a contract between parties may operate to exclude an equitable set-off, it may also have the effect of extending the scope of one. In the Victorian appeal case of *Riboni v Tropeano,*[30] an issue arose as to the status of joint plaintiffs to an equitable set-off. The facts concerned the purchase of a suburban accountancy practice. The appellant as purchaser had executed a contract of sale with the respondents for a fixed price. The appellant paid more than half the purchase price upon taking possession of the practice and promised, by a term of the written agreement and also by way of a promissory note, to pay the balance by a particular date. The appellant ultimately failed to do so, and the respondents sued for the balance plus interest pursuant to the agreement, and alternatively on the basis of the promissory note.

The appellant raised a number of defences and claims, including equitable set-off. Specifically, the appellant sought to offset any damages recoverable for the respondents' breach of the terms of the agreement against the balance of the purchase price. It was critical to the appellant's claim for equitable set-off that only one of the respondents was found by the primary judge to have breached terms of the agreement.

Buchanan and Nettle JJA in a joint decision considered the wording of a number of clauses of the agreement. One such clause provided a restraint of trade against future practice by the respondents as accountants for particular clients. The other material clause provided that 'all covenants and agreements by the respective parties if consisting of more than one person or

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[30] [2007] VSCA 99.

company shall be deemed to mean and include such persons jointly and each of them severally'.

The Court permitted a set-off against the respondents' joint claim in the proceeding. Buchanan and Nettle JJA, with whom Ashley JA agreed, concluded that:

> [B]oth respondents were jointly and severally liable for any breach by one or other of them of the covenant not to carry on practice and hence both were jointly and severally answerable for the damages to which the appellant was held entitled for breach of that covenant.[31]

It follows that joint claims may successfully be met by a claim of set-off where the parties to an agreement have contemplated joint and several liability for breach. The upshot of this is that the claim of one party, brought in unison with another party, might be endangered where a court finds that one of the parties has come within the ambit of an equitable set-off.

III LACHES

The term 'laches' derives from the Old French word *laschesse*, meaning 'slackness'. The equitable defence of the same name seems to have arisen from the maxim that 'equity aids the vigilant, not those who sleep on their rights'.[32] The defence arises where a plaintiff seeks equitable relief but has, though inaction, placed another party (whether a defendant or third party) in a situation in which it would be inequitable and unreasonable to place that other

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[31] Ibid [45].

[32] Or, in the old tongue, *vigilantibus non dormientibus aequitas subvenit*.

party were the plaintiff to later assert a right to relief.[33] The defence sits outside the ambit of statutory limitations, as the *Limitation of Actions Act 1958* (Vic) s 31 states that '[n]othing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise'.

The case of *Orr v Ford* provides a good example of an application of laches.[34] That case involved a contract for sale of a plot of grazing land known as 'Cockatoo'. The purchaser, Stone, was an uncle of the wife of Orr. The purchase price was $156,000, towards which Orr contributed $30,000. Stone and Orr agreed that Orr could live at Cockatoo and work on the property in partnership with Stone. This never eventuated; Stone operated a number of grazing properties including Cockatoo on his own accord, and at no stage did Orr contribute to its running or upkeep.

Later, the ageing Stone devised a will — unbeknownst to Orr — which stipulated that Cockatoo and the other properties were to be bequeathed other than to Orr. Upon discovering this, Orr took steps to claim a beneficial interest in Cockatoo. In doing so, Orr's solicitors penned a letter to the Public Trustee claiming a resulting trust on the basis of his initial contribution to Cockatoo's purchase price.

Orr took no further steps beyond that letter until some eight years later when he commenced proceedings in the Queensland Supreme Court against the executors of Stone's estate. By that time, persons who might have been witnesses had passed away. The trial judge found an

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[33] *Orr v Ford* (1989) 167 CLR 316, 341; see also *Lindsay Petroleum Co v Hurd* (1874) 5 PC 221, 239–40 (Lord Selborne LC).

[34] (1989) 167 CLR 316.

express trust of one half interest in Cockatoo had been created in favour of Orr, albeit which trust was unenforceable by reason of applicable statute.

On appeal, the majority of the High Court found that Orr's inactivity did not disentitle him under the express trust. Although in dissent, it was Deane J's careful consideration of the doctrine of laches that has proven helpful in understanding the equitable defence. In first addressing certain issues surrounding the terminology of laches, his Honour (with whom Mason CJ agreed) considered that:

> There has, over the years, been considerable criticism of the loose use of the word 'acquiescence' as a broad conjunctive or disjunctive companion to 'laches' … . Such criticism has obvious force in that, so used, the word has a chameleon-like quality which adds little besides confusion to an already vague area of equity doctrine.[35]

Deane J went on to hold that:

> The ultimate test effectively remains that enunciated by Lord Selborne LC … speaking for the Privy Council, in *Lindsay Petroleum Co v Hurd*, namely, whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable 'to place him if the remedy were afterwards to be asserted' …[36]

In finding the existence of laches so as to defeat Orr's claim for a half interest in the property,

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[35] Ibid 337.

[36] Ibid 341.

Deane J noted that Orr, 'instead of acting promptly … did nothing to assert his claim'.[37] His Honour also found that Orr stood by in a manner 'deliberate and calculated' in order to later attempt to reap the benefits of the increased value of the property.[38] It was unjust, his Honour considered, for a claim to be made which related to contributions Stone had made to the upkeep of the property in circumstances where Stone later became deceased.[39]

A *Key Considerations*

A few points arise from Deane J's judgment that are key to an understanding of the doctrine of laches. First, while both a claim for laches and a claim for equitable estoppel both involve a representation that results in a particular course of action being taken, only the latter requires that the representation have been clear.[40]

Second, whether a defence of laches can be made out depends on nature of the claim it seeks to meet. It cannot be raised as a defence to a legal claim.[41] While his Honour noted that some authorities have suggested that a case of 'gross laches' will suffice to meet a legal claim, Deane J could not find a satisfactory formulation of this. Instead, his Honour considered that:

> [T]he preferable approach is to treat the phrase … as an intentionally imprecise one which involves not merely considerations of the period of the relevant delay but which invokes the

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[37] Ibid 343.

[38] Ibid 346.

[39] Ibid 345.

[40] Ibid 339.

[41] Ibid 340.

> traditional notions of equity and good conscience which are the general determinants of whether a plaintiff should be refused relief by reason of laches in the circumstances of a particular case.[42]

Third, 'unreasonable delay' in bringing proceedings may be sufficient to found laches. What constitutes a delay which is 'unreasonable' depends on the circumstances of the case, and includes 'the nature of the claim and the conduct of the parties'.[43] The length of delay alone, however, may not be determinative. In fact, mere delay may be insufficient to found a claim of laches. In the case of *Fitzgerald v Masters*,[44] the High Court ordered specific performance of a contract notwithstanding that there had been a delay of more than a quarter century. In that case, Dixon CJ and Fullagar J jointly found that, except for the fact of the delay, there was no identifiable prejudicial change in position of the defendant and no third parties whose interests could be said to have been affected by the plaintiff's conduct.[45]

Fourth, as Deane J held in *Orr v Ford* and which was apparent in *Fitzgerald v Masters*, it is relevant to consider the prejudice to any third parties in permitting the plaintiff to claim the relief sought.[46] Especially is this the case where the interests of third parties would be directly affected by the conduct of the plaintiff.

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[42] Ibid 340–1.

[43] Ibid 341.

[44] (1956) 95 CLR 420.

[45] Ibid 433.

[46] *Orr v Ford* (1989) 167 CLR 316, 342.

B *The Plaintiff's Knowledge*

Laches requires that the plaintiff know of its rights and the facts upon which those rights depend, but does not require knowledge of the legal conclusions that could be drawn from those facts. The High Court case of *Hourigan v Trustees Executors and Agency Co Ltd*[47] concerned a deceased estate which provided, amongst other things, that the residue of the estate was to be vested in the deceased's wife and to be used at her 'discretion' in 'educating and providing for' the deceased's two sons. The appellant, as the only surviving son, commenced action in the Supreme Court suing for an account of the deceased estate and claiming a declaration that he was beneficially entitled to the estate property.

In his Honour's judgment, Rich J held that the appellant was debarred from claiming the relief he sought due to laches. His Honour considered that the appellant had 'long slept' on his rights in circumstances where he was 'fully acquainted with all the facts'.[48] It was relevant that the appellant was a solicitor and was responsible for conveyance under the will. Rich J considered that the appellant was in a prime position to consider the wording of the will and, if necessary, to make known his own interpretation. Instead, the appellant 'resolved to raise no question and to concede without dispute the correctness of his mother's position. By doing so he encouraged her to conduct her affairs … on the footing that the property was hers'.[49] Rich J considered that the appellant's claim was of such nature that '[a]fter 37 years

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[47] (1934) 51 CLR 619 ('*Hourigan*').

[48] Ibid 627.

[49] Ibid 628.

have elapsed from his decision to concede that the property was his mother's he now seeks to subvert all these arrangements'.[50] His Honour held that:

> If a party in a position to claim an equitable right which is not undisputed lies by and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourages the party in possession to so deal with his own affairs that it would be unfair to him and to others claiming under him to tear up the transactions and go back to the position which might originally have obtained, the Court of equity will not, even where the claim is that an express trust is created, disregard the election of the party not to institute his claim and treat as unimportant the length of time during which he has slept upon his rights and induced the common assumption that he does not possess any.[51]

The separate decision of Dixon J sheds further light on the kind of knowledge a claimant is to have in order that laches might then operate to bar a claim. Constructive knowledge about the relevant right will suffice. His Honour, in citing the decision in *Stafford v Stafford*,[52] held of the appellant that:

> It is true that he did not 'know' his rights in the sense that he knew what interpretation would be judicially given to the will. But 'generally, when the facts are known from known from which a right arises, the right is presumed to be known'. *He knew as much as was required in order to form a decision as to what he should do*.[53]

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[50] Ibid 629.

[51] Ibid 629–30.

[52] (1857) 44 ER 697.

[53] *Hourigan* (1934) 51 CLR 619, 651 (emphasis added).

C *Delay After Commencing Proceedings*

Whereas under common law principles a proceeding can be dismissed for want of prosecution, the equitable defence of laches may apply to the delay in bringing an action once it has been constituted. In the case of *Lamshed v Lamshed*,[54] an action for specific performance of a contract, there was no undue delay in commencing proceedings. However, the High Court held that delay in prosecution of a proceeding once instituted triggered laches and disentitled the plaintiff to the equitable relief sought.

In *Lamshed*, the contract the subject of the dispute was formally repudiated in September of one year and a writ issued in April of the following year. Pleadings closed that year, after which no further step was taken until more than four and a half years later when the plaintiffs took measures to have the proceeding set down for trial. The plaintiffs attributed the delay to their standing by in the hope that the defendant would perform the contract in preference to being sued. Material to this hope was the fact that the defendant was brother of one of the plaintiffs.

Kitto J, in holding that the respondents (the plaintiffs) were guilty of laches, held that:

> The fact that the appellant might either have got rid of the action without a trial or have forced it to trial is a circumstance to be considered, no doubt, but the conclusion does not necessarily follow that during the four years and eight months in question the appellant was not prejudiced by reason of uncertainty as to whether or not he would be required to perform the contract which the respondents said he had made. He was faced with the most emphatic form

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[54] (1963) 109 CLR 440 ('*Lamshed*').

> of assertion that the contract existed. Yet he found that for some reasons not disclosed to him his opponents seemed unwilling to proceed to a hearing.[55]

His Honour found that the mischief lie in a situation with a plaintiff 'leaving a defendant in such a state of uncertainty for months and years, and then, when it please[d] him, asking the court to decide the issue he … allowed to become stale and grant the remedy of specific performance'.[56] His Honour considered it relevant in the circumstances that the plaintiffs had not in the interim sough an injunction against the sale of the property the subject of the dispute, nor taken steps to lodge a caveat over the property.[57] Prejudice to the interests of third parties was also relevant; on the facts, the purchaser of the property was a third party.

IV RELEASE AND WAIVER

The equitable concepts of release and waiver appear closely related to one another and to other concepts such as equitable estoppel. Indeed, in a number of cases release and waiver are raised and considered simultaneously,[58] and in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* the learned authors state concisely that '[i]n equity, waiver and release may be different names for the same doctrine; to waive an equitable right is to release it'.[59]

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[55] Ibid 454.

[56] Ibid 455.

[57] Ibid.

[58] See, eg, *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539.

[59] J D Heydon, M J Leeming and P G Turner (eds), above n 1, 1083 [37.040].

The apparent similarities and shared qualities of these concepts has been a source of conjecture for the courts,[60] and it is difficult to find consensus on their boundaries. Nonetheless, this paper will cite cases where release and waiver proved pivotal to a dispute and in doing so attempt to identify their salient features.

A *Release*

The equitable defence of release arises in circumstances where a plaintiff has released a defendant from an obligation which, if breached, would otherwise give the plaintiff a right to relief either at law or in equity. As such, the doctrine of release can function as a defence against both legal and equitable claims.[61]

A number of key elements should be satisfied in order to make good the defence. First, insofar as the release is from an obligation relating to an equitable right, the act of the release may be oral or in writing, and may be express or implied. The party seeking to prove the release must show some 'fixed, deliberate and unbiased determination that the transaction should not be impeached',[62] in other words, that the relevant right would not be enforced. On the other hand, a release of a legal right must be for consideration or by a deed of release.[63]

Second, consistent with the onus of proof of release being on the party seeking to rely on the defence, the party must also show that the opponent was cognisant of the circumstances of

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[60] See especially *Commonwealth v Verwayen* (1990) 170 CLR 394.

[61] *Steeds v Steeds* (1889) 22 QBD 537.

[62] *Wright v Vanderplank* (1856) 44 ER 340.

[63] See, eg, *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539, 567.

the release, such circumstances encompassing both the facts of the transaction and the right the opponent otherwise would have had to relief in equity.[64]

Third, the release cannot take the form of a promise or a representation as to future affairs; it must refer to a present situation. In the Federal Court case of *Avtex Airservices Pty Ltd v Bartsch*,[65] Hill J held that there was nothing in an agreement made between the parties that created a 'present fixed intention' to release one party from an obligation to account for profits.[66]

Where persons are jointly subject to an obligation and the requirement of one of those persons to perform the obligation is released then, subject to statute, the other will also be released.[67] In Victoria, an applicable provision is the *Wrongs Act 1958* (Vic) s 24AA.

B *Waiver*

The first thing to understand about the equitable defence of waiver is that it probably does not exist, at least not in a form that is settled and recognised at Australian law.

The High Court considered the status of the doctrine of waiver in the case of *Agricultural and Rural Finance Pty Ltd v Gardiner*.[68] There, a lender had sought to recall amounts lent under

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[64] *Allard v Skinner* (1887) 36 Ch D 145.

[65] (1992) 107 ALR 539.

[66] Ibid 567.

[67] *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

[68] (2008) 238 CLR 570 ('*Gardiner*').

financing arrangements in circumstances where there was an alleged waiver of a term requiring punctual payment. Gummow, Hayne and Kiefel JJ in a joint decision described the 'uncertainties and difficulties' surrounding waiver.[69] Their Honours observed that the alleged waiver on the facts had been used to 'denote three different principles', namely 'election, forbearance and abandonment or renunciation'.[70] Kirby J similarly noted that:

> Some of [the] confusion and the resulting criticism is because 'waiver' has been variously understood as including instances of estoppel; election; deliberate forbearance of insistence upon rights; and conscious abandonment or renunciation of rights.[71]

Gummow, Hayne and Kiefel JJ held that, on the facts, an act of 'waiver' had not occurred whether by reference to election or any other pattern of conduct raised in the case. Without quite shutting out the possibility for recognition of waiver as a discrete defence in Australia, their Honours did note that:

> [D]ecisions in other jurisdictions lend weight to the observation of Lord Wilberforce, in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia*, that 'the word "waiver", like "estoppel", covers a variety of situations different in their legal nature, and tends to be indiscriminately used by the courts as a means of relieving parties from bargains or the consequences of bargains which are thought to be harsh or deserving of relief'.[72]

Kirby J opined that the present case was 'not … an occasion to determine precisely the ambit

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[69] Ibid 587.

[70] Ibid 588.

[71] Ibid 612.

[72] Ibid 602.

of "waiver"'.[73] Similarly to the joint decision, his Honour noted that:

> I am inclined to accept that such a principle exists in the common law as a reflection, in appropriate cases, of the 'simple instinct of fairness'. The law of estoppel is itself also based on this instinct, but, where it applies, it is treated separately.[74]

The best way to understand the concept of 'waiver', it seems, is as something that responds to the unfairness of a case and as a factual conclusion rather than a distinct defence. Rather than having its own constituent elements that must be borne out on the facts — as a defence would have — waiver should be regarded as the *consequence* of a pattern of conduct, such conduct satisfying the elements of a defence in its own right. Like estoppel, for example, waiver conceivably arises where there has been a representation that is later sought to be reneged upon and which in the interim has brought about a course of action. In such a situation, however, 'waiver' describes the effect of what occurred.

Given that it is best considered a consequence or effect of a pattern of conduct, parties should contemplate this when entering commercial dealings. This could take place, for example, when drafting a contract so as to define the manner in which waiver can validly occur. Should a party to that contract seek to rely on the conduct of another as evidencing waiver, it be may be necessary to look to the wording of the contract to determine whether the conduct has amounted to waiver.[75]

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[73] Ibid 605.

[74] Ibid.

[75] See *Franklin v Manufacturers Mutual Insurance* (1935) 36 SR (NSW) 76, 81, where the Court compared the conduct said to have constituted waiver with what the contract permitted.

V CONCLUSION

Equity can provide useful and flexible — albeit discretionary — roads to relief for parties in litigation. The same is true of its defences. While the principles underlying some equitable defences are clearer than in others, an overview of a number of key judicial decisions provides some essential navigation to assist litigants and their advisors in considering the concepts of equitable set-off, laches, release and waiver.

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