Journal of Equity (JOE)

Volume 15 Part 1

(editorial and articles included in this part are linked to the LexisNexis platform)

CONTENTS

One of the apparent ironies of equity's regulation of business associations over the last half century is that, in an age of growing apostasy, courts have been increasingly disposed to apply and extend equitable principles grounded in ecclesiastical conceptions of conscience to a range of novel commercial contexts. This article examines the historical development of equity's intervention in and regulation of trusts, corporations and other business associations, such as partnerships and joint ventures. This includes the way in which, by process of analogy, equity extended the trustee's obligations of trust and confidence to other fiduciaries in emergent commercial relationships during the 18th and 19th centuries. The analysis will reveal links with developments over recent decades and demonstrate how the historically derived ethical quality of equity, first imported into English law when the Chancellors were clerics, provides a sound basis for flexible, principled further evolution.

Corporate attribution is the process by which acts and states of mind are attributed to companies to establish their rights, duties and liabilities. Ever since *Meridian Global Funds Management Asia Ltd v Securities Commission*, it has been widely accepted that corporate attribution is highly context-specific. While a growing literature has been produced on the attribution rules which apply to statutes and in the common law, very little is known about equity's attribution rules. This article examines equity's attribution rules in three areas: dishonest assistance, knowing receipt and bona fide purchase. Equity's rules are then compared with those emerging from the common law cases. The article concludes that equity's attribution rules are, perhaps surprisingly, just the same as the common law's. It also explains why that is so.

This article considers the role of intentionality in establishing unconscionable conduct contrary to statute. Sections 21 and 22 of the Australian Consumer Law do not expressly require proof of predatory intention, deliberate advantage-taking or knowledge of disadvantage. Nonetheless, courts tend to treat such markers of culpability as inherent in the idea of behaving 'unconscionably'. These concepts have proved difficult to apply when the misconduct involves the business system of a corporation, as opposed to a 'rogue' trader or individual 'snake oil merchant'. We argue that courts applying the statutory prohibition have begun to develop a powerful concept of 'systems unconscionability', which recognises intentionality, and thus culpability, expressed through purposive systems. This profound insight has significance not only for statutory unconscionability, and its equitable relation, but for the effective regulation of broader corporate and commercial misconduct.

Most Australian charities are incorporated. Yet most directors, legal advisers and commentators are hard pressed to articulate a fairly fundamental obligation of charity directors: to act in good faith in the best interests of their corporation. At a time when shareholder primacy is being increasingly questioned for for-profit corporations and consideration of stakeholders or purposes is being written into corporations legislation in other jurisdictions, there is even greater need to think about what interests ought to be considered by charity directors. We argue that to act in the best interests of an incorporated charity means to act in a way that the directors genuinely believe will advance its purposes. As this is still a fairly amorphous standard, we suggest that it can be given content by means of directors' obligations to give genuine consideration in the exercise of their powers in seeking to advance the corporation's purposes.

This article probes the apparent incoherence created by the fact that breach of the statutory directors' duties in the Corporations Act 2001 (Cth) cannot be ratified or authorised by shareholders. This was recently affirmed by the Full Federal Court in *Cassimatis v Australian Securities and Investments Commission*. This contrasts with the equivalent general law duties, breach of which can be ratified or authorised, subject to important limitations. This contrast also raises the issue of the 'publicness' of the statutory directors' duties, which also came to the fore in the *Cassimatis* litigation. The article argues that the incongruity is not as significant as it first appears and stems to a large extent from Australia's unique corporate law enforcement regime.