



**MONASH** University

**CLEAN HANDS: IMMEDIACY, NECESSITY, DEPRAVITY**

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requirement for the Degree of Doctor of Juridical Science at  
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*The most amusing maxim of equity is 'He who comes into Equity must come with clean hands.' It has given rise to many interesting cases and poor jokes.*

Chafee,  
*Coming Into Equity with Clean Hands*,  
 (1949) 47 Mich. L Rev. 877

*[T]he maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise.*

Spry, *Equitable Remedies* (9<sup>th</sup> ed)

*[T]he maxim, He who comes into a Court of equity must come with clean hands ... although not the source of any distinctive doctrines, ... furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights.*

Pomeroy,  
*Equity Jurisprudence*  
 (5<sup>th</sup> ed. Vol 2) §398

*I have not found the resolution of the issue of unclean hands easy.*

*Kation Pty Ltd v Lamru Pty Ltd*  
 (2009) 257 ALR 336, 339 [2] (Allsop P)

## Abstract

One of the earliest formulations, and a broadly accepted expression, of the clean hands maxim in the law of equity is that in *Dering v Earl of Winchelsea* [1775-1802] All ER Rep 140; (1787) 1 Cox Eq Cas 318; 29 ER 1184, where it was held:

*[A] man must come into a court of equity with clean hands, but when this is said it does not refer to a general depravity; it must have an immediate and necessary connection to the equity sued for; it must be a depravity in a legal as well as in a moral sense.*

As equity has matured, and the body of equitable precedent has developed, numerous inclusionary and exclusionary sub-rules and interpretations have been expressed that purport to refine and constrain the circumstances in which the clean hands maxim will apply. An analysis of the sub-rules and interpretations reveals that they are frequently too restrictive, and at times inconsistent with the principle underlying the clean hands maxim. Further, it is apparent that the framework that has been built around the *Dering* formulation does not adequately house all aspects of clean hands.

This thesis proposes that the *Dering* formulation is not suitable as a complete expression of clean hands and that many of the sub-rules and interpretations are of limited value, if any, in guiding judicial decision making. This thesis further proposes a more modern formulation of

circumstances in which clean hands applies that is consistent with the discretionary nature of the defence, the variety of circumstances in which clean hands applies, and the maxim's underlying principle.

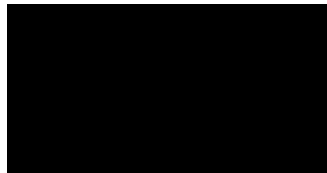


## Certification of Compliance

This thesis contains no material that has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

This thesis does not incorporate work which was previously submitted for any of the four LLM coursework units which contributed to the coursework component. If it does incorporate any such coursework, the coursework has been fully disclosed in the thesis.

Candidate's signature:



Date:

6 June 2016

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## Outline of Thesis

Maxims of equity are broad statements of principle that guide the exercise of equitable discretion. The clean hands maxim or defence, in its briefest form, is that a person must come to equity with clean hands. It is derived from the underlying principle that a court will not assist a person to take advantage of his or her own wrong. The importance of the clean hands maxim is demonstrated by its prominence in recent cases at trial and appellate level, and by the persistence of the underlying principle throughout history.

This thesis examines the history, scope and content of the clean hands maxim and demonstrates that the generally accepted formulation of clean hands in the 1787 decision of *Dering v Earl of Winchelsea* does not accommodate all aspects of the defence. This thesis further examines numerous sub-rules and interpretations of clean hands, and demonstrates that they are frequently too restrictive, at times inconsistent with the principle underlying the clean hands maxim, and of limited, if any, value in guiding judicial decision making. Finally this thesis proposes a formulation of clean hands that accommodates all of its applications more consistently with its underlying principle and the conscience of equity.

Chapter 1 contains a statement about methodology and concerns particular to an historical analysis of clean hands.

Chapter 2 identifies the principle underlying the clean hands maxim and traces it through history from the *exceptio doli* in Roman law, to recrimination in Canon law, with a side trip to medieval China, and into courts of equity. The development of equity as a court of conscience is considered, followed by the birth of the clean hands maxim more specifically. It is in *Dering* that the elements of clean hands crystallised in a form that persists today, that is, the conduct in question must have an immediate and necessary connection to the relief sought (the nexus requirement), and it must involve legal and moral depravity (the depravity requirement).

Chapter 3 identifies and discusses the conscience of equity and specific moral norms that guide the exercise of discretion in relation to clean hands.

Chapter 4 identifies, in outline, the boundaries of clean hands by reference to various descriptions and refinements of the maxim. They include: broad descriptions that suggest clean hands has no operative role; sub-rules of the nexus requirement expressed in mandatory terms (which are dealt with in greater detail in chapter 5); and rules stating the circumstances in which clean hands is said not to apply (which are dealt with in greater detail in chapter 9).

Chapter 5 considers the nexus and depravity requirements of clean hands as defined in *Dering*. A detailed analysis of the sub-rules of the nexus requirement demonstrates that while they are expressed as necessary requirements, in fact they are not necessary requirements, are frequently problematic and unduly constrain the requisite discretion. An analysis of

the recent intermediate appellate decision of *Kation v Lamru* is undertaken which brings into focus the disjunction between the nexus requirement as expressed in *Dering* on the one hand, and the conscience of equity and the underlying principle on the other. The conclusion is reached that the nexus requirement in *Dering* fails to give effect to the underlying principle and the conscience of equity and a more appropriate formulation of the nexus requirement is proposed. Chapter 5 also analyses the *Dering* requirement of legal and moral depravity, identifying the difference between the two and determining the outer limits of each concept.

Chapter 6 analyses in detail the specific application of clean hands in situations where the misconduct in question is constituted by misleading or attempting to mislead the court. The analysis demonstrates that, in addition to an apparent lack of consistency in application, this aspect of clean hands, which is well established, does not fit readily within the *Dering* formulation.

Chapter 7 critically examines the circumstances in which clean hands can be washed. This analysis reveals that mandatory rules in this context also are overstated and do not, or should not, represent necessary requirements of the effective washing of unclean hands.

Chapter 8 critically examines general discretionary considerations to illuminate more fully the way in which the underlying principle and the conscience of equity operates in a clean hands context. This analysis also demonstrates that commentators have erroneously formulated a rule that 'mitigating factors' are not relevant to the exercise of discretion in the clean hands context.

Chapter 9 critically examines the five categories of cases identified as areas in which clean hands is said not to apply. It is demonstrated that they are not all sustainable.

Chapter 10 considers a prominent attack on the clean hands defence by American jurist Roscoe Pound. Though overstating his criticism, Pound correctly identified the risk of elevating the expression of a maxim, such as that in *Dering*, to the level of a strict rule. The validity of this criticism is borne out by recent Australian authorities such as *Kation v Lamru*, and supports the conclusion that a formulation more closely aligned with the principle underlying clean hands is called for.

Chapter 11 is the conclusion.

## 1 Methodology

In examining clean hands, this thesis will adopt a conventional doctrinal approach of critically analysing relevant authorities and commentary. That analysis reveals, amongst other things, the principle underlying clean hands and the forces of conscience that guide equitable jurisdiction. This thesis proceeds on the basis that the extent to which any expressions of the clean hands defence, or its limitations, are normatively justified, will depend upon how consistent they are with the underlying principle and the conscience of equity. It is proposed that such an approach is preferable to the unduly rigid rule based framework courts have frequently applied.

Two specific matters should be born in mind when relying on authorities, some many years old, to determine the scope and content of clean hands.

First, general equitable principles have, in particular instances coalesced into substantive rules of equity, such as laches and estoppel.<sup>1</sup> Early cases in which clean hands was applied may involve circumstances which today would not appropriately be dealt with by a general maxim like clean hands but rather would come within specific substantive equitable claims or defences.<sup>2</sup>

Notwithstanding its shrinking ambit, it remains a force in equity, as demonstrated by the prominence of the maxim in recent decisions.<sup>3</sup> As Campbell J held in *Black Uhlands*:

That someone who comes to equity must have clean hands is an equitable maxim. Such a maxim provides an explanation for the circumstances in which equity recognises rights, and confers remedies, across a broad range of equity's jurisdiction. The approach to the recognition of rights and conferring of remedies which the maxim articulates has resulted in various specific principles of law which are recognised as part of the substantive law of equity. The law of promissory estoppel provides one example. However, the maxim remains of ongoing importance, as a guide to how cases not governed by specific rules of substantive law ought be decided, or as a guide to how specific rules of substantive law ought be extrapolated.<sup>4</sup>

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<sup>1</sup> Spry, *The Principles of Equitable Remedies* (Thomson Reuters, 9<sup>th</sup> ed, 2014) 175 n2,  
<sup>2</sup> Spry, above n 1, 175, cites *Sydney Consumers' Milk and Ice Co Ltd v Hawkesbury Dairy and Ice Society Ltd* (1931) 31 S.R. (N.S.W.) 458, 469, as an example of case decided by application of clean hands which should properly have been decided by fraud or misrepresentation.

<sup>3</sup> See below n 7 and *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick* [2004] VSCA 167; (2004) 50 ACSR 679, [36]; *Carr v Resource Equities Limited* [2010] NSWCA 286; (2010) 275 ALR 366.

<sup>4</sup> *Black Uhlands Inc v NSW Crime Commission* [2002] NSWSC 1060, [158].

Secondly, the content of clean hands is informed largely by the conscience of equity.<sup>5</sup> The conscience of equity is, to an extent, based on the contemporary values of society. Those values change with time and accordingly determinations as to what amounts to clean hands should not be bound by answers given in a different time and within a different moral framework. That however, does not detract from the legitimacy of courts applying the conscience of equity, however that manifests itself at a particular time, as the guiding principle for the clean hands maxim.<sup>6</sup>

## 2 History

The maxim that a party seeking equitable relief must have clean hands describes a defence available to resist equitable claims where the plaintiff's conduct breaches equitable standards. The maxim, so-called, has been referred to and applied broadly from the 18<sup>th</sup> century to the present day.<sup>7</sup>

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<sup>5</sup> See below chapter 3.1.

<sup>6</sup> It was argued by the plaintiff in *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd* (1934) 35 SR(NSW) 108, 119 ('*Kettles*') that 'the modern trend is to relax the severity of the old equity maxim and to consider whether the trade is an honest one.' Long Innes J (at 129) rejected that submission by reference to *Cochrane v Macnish & Son* [1896] AC 225.

<sup>7</sup> *Dering v Earl of Winchelsea* [1775-1802] All ER Rep 140; (1787) 1 Cox Eq Cas 318; 29 ER 1184 ('*Dering*'); *Meyers v Casey* [1913] HCA 50; (1913) 17 CLR 90, 123-4 ('*Meyers v Casey*'); *Moody v Cox* [1917] 2 Ch 71, 87-88; *Loughrin v Loughrin* (1934) 292 US 216, 229; *Argyll v Argyll* [1967] Ch 302, 331-2; *R v Bridges* (1990) 78 DLR (4<sup>th</sup>) 529; *Seagirt Realty Corporation v Chazanof* (1963) 13 NY 2d 282, 196 NE 2d 254 (U.S.); *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316; *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 ('*Nelson*'); *Kation v Lamru* [2009] NSWCA 145; [2009] 257 ALR 336 ('*Kation*'); *FAI Insurances Ltd v Pioneer Concrete Services Pty Ltd* (1987) 15 NSWLR 552 ('*FAI Insurances*'); *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328; [2013] 1 CLC 596, [158] ('*Royal Bank of Scotland*'). See generally Spry, above n 1, 423-429; Heydon, Leeming and Turner, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (Lexis Nexis, 5<sup>th</sup> ed, 2015) 80-84 [3-090]-[3-120] ('*MGL*'); Young, Croft and Smith, *On Equity* (Thomson Reuters, 2009) 180-184, [3.320]-[3.370] ('*On Equity*'); Ben Macfarlane, 'The Maxims of Equity' in John McGhee (ed), *Snell's Equity* (Sweet and Maxwell, 33<sup>rd</sup> ed, 2015) 91-91 [5-010] ('*Snell*'); John Pomeroy, *A Treatise on Equity Jurisprudence* (Bancroft Whitney Company, 5<sup>th</sup> ed, 1941) vol 2, 90-143 §397-404 ('*Pomeroy*').



However, the principle underlying clean hands can be traced back further at least to Roman law.

## 2.1 General Principle: the Court Will Not Assist a Person to Take Advantage of Their Wrong

If the clean hands maxim can be justified by reference to any broadly accepted, historically ubiquitous and less colourfully expressed principle, it is that a court will not assist a person to take advantage of their own wrong.<sup>8</sup> That principle finds expression in various forms throughout history in various legal systems: from Roman law to ecclesiastical law to equity, the common law and civil law.

## 2.2 Roman Law

The underlying principle finds expression in Roman law in the *exceptio doli*<sup>9</sup> which was an equitable defence introduced into Roman law shortly after 66 BC.<sup>10</sup> It operated as a defence to a transaction where the transaction was tainted by fraud. In such circumstances a defendant could raise the *exceptio*, and

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<sup>8</sup> *Meyers v Casey*, above n 7, 124 quoted in *FAI Insurances*, above n 7, 560C-D. Ralph A Newman, *Equity and Law: A Comparative Study* (Oceania Publications Inc, 1961) 19, described the emergence and eminence of the principle underlying clean hands, distilled from basic generally accepted moral standards, as being that 'the law should not aid the unscrupulous in carrying out their plans.'

<sup>9</sup> From the Latin *exceptio* ('exception') and *dolus* ('trickery, deception').

<sup>10</sup> R W Lee, *Elements of Roman Law* (Sweet & Maxwell, 4<sup>th</sup> ed, 1956), 450 ('Lee'); *FAI Insurances* above n 7, 558. George Spence, *The Equitable Jurisdiction of the Court of Chancery* (Stevens & Norton, 1846) vol 1, 421-422 ('Spence') notes also that 'there were numberless cases allowed by the Praetors as sufficient, by way of exception or plea, to avoid a demand which would not have availed to give a man an action, legal or equitable ... as plaintiff.'

[t]he judex [would] not condemn the defendant unless there ha[d] been no fraud on the part of the plaintiff, or unless there ha[d] not been an agreement not to sue.<sup>11</sup>

The similarities between the *exceptio doli* and the clean hands maxim are evident. The *exceptio*, like clean hands, was available to a defendant and operated as a defence to the claim based on the plaintiff's improper conduct. Also, in Roman law, the distinction was drawn between an exception based upon an initial fraud known as 'exception doli specialis (or preateriti)' and an exception based upon the fraudulent conduct of the plaintiff in bringing the action known as 'exceptio doli generalis (or praesentis).'<sup>12</sup> This is consistent with the present day application of the clean hands maxim in a substantive as well procedural sense. As noted by Spry, cases demonstrating the proper application of the clean hands maxim fall into two main categories: first,

where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so ...<sup>13</sup>

and secondly,

where the grant of relief that the plaintiff seeks would enable him to achieve a dishonest purpose and where in all the circumstances it appears to the court to be inequitable to grant the particular relief in question.<sup>14</sup>

Further, Buckland states that the *exceptio* covered not only the fraud in the transaction 'but anything that made bringing the action inequitable,'<sup>15</sup>

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<sup>11</sup> *Lee*, above n 10, 438.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Spry*, above n 1, 254.

<sup>14</sup> *Ibid.*

provided it was 'material.'<sup>16</sup> This suggests that matters equity considers relevant such as laches, acquiescence or undue influence<sup>17</sup> may have sustained such a defence.

It appears from this analysis that the ethical principle underlying the clean hands maxim, that a person should not take advantage of their own wrong, was recognised in Roman law. It was recognised in a similar way to that in which it is recognised today, and was likely a direct antecedent to the clean hands maxim. Both then, and now, a person's improper conduct would operate as a bar to the relief where the effect of the granting of relief would be to enable the plaintiff to benefit from their own wrongdoing.

### 2.3 Chinese Customary Law

The general principle is not limited to western legal traditions. Newman cites two examples from Chinese customary law from the 10<sup>th</sup> and 11<sup>th</sup> centuries which also reflect this underlying principle.<sup>18</sup>

The first example is *Per Chang Hsi-ch'ung*<sup>19</sup> from the 10<sup>th</sup> century in which an adopted son had been sent away because he was 'wayward and disobedient.' Upon his father's death he sought to obtain his deceased father's estate by claiming he was the eldest legitimate son. The factual

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<sup>15</sup> William Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 1963) 655.

<sup>16</sup> William Buckland, *Equity in Roman Law* (1911) 35.

<sup>17</sup> Ibid 32.

<sup>18</sup> Ralph A Newman, *Equity and Law: A Comparative Study* (Oceania Publications Inc, 1961) 250 citing Van Gulik, *Under the Pear-Tree* 97, case 15B [trans of: *T'ang-yin-pi-shih*, a 13<sup>th</sup> century casebook for district magistrates] ('Newman').

<sup>19</sup> Van Gulik, *Under the Pear-Tree* 97, case 55 from the 10<sup>th</sup> century.

question whether he was the eldest son could not be determined but the case was dismissed anyway because ‘even if the plaintiff was really the eldest son, he was guilty of rebellious behavior,’ and therefore gravely offended against Confucianist ethics.

The second is *re Cheng Tse* from the 11<sup>th</sup> century. In that case a prefectural judge stationed in a remote province petitioned for examination for a promotion. At the time officials in mourning were compelled to resign for three years. Unknown to the judge, his father had died. It was held that ‘although not a case of concealment of the parent’s death to retain office, the petitioner’s failure to inquire after his father for three years was unfilial behavior which required his dismissal from office.’ From what little is known of this case, it appears that legal recourse was precluded because of the petitioner’s moral shortcoming. This perhaps extends further than the modern day clean hands doctrine which requires both moral and legal transgression. However, it is not too far removed from the high-water mark reached by clean hands in the 16<sup>th</sup> century.<sup>20</sup>

## 2.4 Ecclesiastical and Matrimonial Law

A similar principle applied in the ecclesiastical and matrimonial courts<sup>21</sup> in the form of the doctrine of recrimination which operated to preclude a person from being entitled to relief if they were guilty of a breach of the

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<sup>20</sup> See chapter 2.6 nn 56-60 below.

<sup>21</sup> The ecclesiastical courts include a number of courts which prior to 1857 exercised jurisdiction, based on canon law, in matrimonial matters. The jurisdiction of the ecclesiastical courts over matrimonial matters was transferred to the Court of Divorce and Matrimonial Causes which was created by the *Matrimonial Causes Act 1857*. See Sir William Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1937) vol 15, 205 (*‘Holdsworth’*).

matrimonial contract.<sup>22</sup> So in *Otway v Otway*<sup>23</sup> a husband and wife petitioned for divorce on ground of adultery by the other, and the wife also petitioned on ground of cruelty. At first instance it was held that the wife's adultery did not bar her petition for divorce on grounds of cruelty. The husband appealed and argued that only the innocent can have recourse to the Matrimonial Court and the wife's adultery was sufficiently tainted conduct to bar her from relief.

On appeal it was held that the Matrimonial Court operated on the same principles that governed the old ecclesiastical courts, that is, that where the wife herself was guilty of a breach of the matrimonial contract, she was not entitled to relief.<sup>24</sup> This is so even though, as argued on her behalf, the court should have discretion which should be exercised in cases where to fail to grant her petition on the ground of cruelty (as here) would leave her and her children in danger. Thus in *Otway* the wife's infidelity was sufficiently tainted to bar her relief based on the husband's cruelty.

In *FAI Insurances*<sup>25</sup> Young J cites *Otway* as authority that the ecclesiastical law 'developed the conception of clean hands in matrimonial causes by allowing the defence of recrimination.'<sup>26</sup> However Young J then proceeds to state that the recrimination defence was narrower than sometimes expressed and that it was only where the nature of the transgressions was the same that the defence applied. In doing so Young J cites a passage from Cotton LJ's decision in which Cotton LJ cites the dictum of Lord

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<sup>22</sup> *Spence*, above n 10, 422 describes recrimination as an 'illustration of the rule [he who seeks equity must do equity] adopted by our ecclesiastical Courts.'

<sup>23</sup> *Otway v Otway* (1883) 13 PD 141 ('*Otway*').

<sup>24</sup> *Ibid* 146 and 150 (Cotton LJ), 151 (Fry LJ), 152 (Lopes LJ).

<sup>25</sup> Above n 7.

<sup>26</sup> *FAI Insurances*, above n 7, 558B.

Stowell in *Chambers v Chambers*.<sup>27</sup> Based on that reference, Young J reasoned the wife's adultery would not avail the husband of a defence in proceedings brought by her based on his cruelty because the transgressions were not of the same kind.<sup>28</sup> Young J thought that this was 'significant when considering the equitable doctrine of clean hands.'<sup>29</sup>

However, Young J's interpretation of *Otway* is wrong. Cotton LJ rejected the passage Young J relies on to support his conclusion that the parties must have transgressed in the same way for the defence to apply. It may be that Young J considered the similarity of the transgressions as being important to the nexus between the transgressions and the defence of recrimination. However, it is apparent from *Otway* and the cases relied on in it, that the doctrine of recrimination operated broadly so that any transgression of the matrimonial contract was sufficient to preclude relief. This represents a slightly different approach to the clean hands principle than would be adopted in a court exercising equitable jurisdiction outside of matrimonial causes. That difference may be accounted for by the different philosophical underpinnings of ecclesiastical/matrimonial jurisdiction on the one hand, and equitable jurisdiction on the other. The former, based largely on canon law, and governing matters of the soul, might be expected to sanction moral failure more readily and broadly than courts exercising equitable jurisdiction which were concerned with a broader conception of fairness and justice than that applied in matrimonial causes. Equity ameliorated the rigidities of the common law;

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<sup>27</sup> *Chambers v Chambers* (1810) 1 Hagg. Consist. 439

<sup>28</sup> *FAI Insurances*, above n 7, 558B.

<sup>29</sup> *Ibid* 558C.

recrimination was a part of the ecclesiastical law which was steeped in its own moral rigidities.

Cases discussed above demonstrate that high standards of behaviour were required of litigants in ecclesiastical, matrimonial and Chinese customary law and that under those systems, the misconduct need not have been causally connected to the relief sought. A similar approach was taken by the Chancery during the reign of Elizabeth in the 16<sup>th</sup> century.<sup>30</sup> These approaches differ from the modern day approach which requires an 'immediate and necessary' connection between the misconduct and the relief sought. Despite those differences, the broad similarities between the two place them in the same basket of principle by which plaintiffs were barred from relief by their own wrongdoing, and the differences are a reminder that the application of such principles is not static over time.

In the context of equity, the application of the underlying principle changed as the jurisdiction matured from that exercised by the Chancellor personally on a case-by-case basis, to that exercised by the Chancery Court informed by the weight of accumulated precedents.

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<sup>30</sup> See below chapter 2.6 nn 56-60.

## 2.5 The Emergence of Equity

To obtain an understanding of the emergence of the distinct clean hands maxim in equity, a brief excursus into the development of the common law and equity is necessary.<sup>31</sup>

Common law developed after the ascendancy of William the Conqueror (1066-87) and his appointment of the Chief Justiciary, essentially the High Court of the King (later the King's Bench).<sup>32</sup> Originally common law courts could only exercise jurisdiction where there was an offence against the King.<sup>33</sup> The writ system grew out of this, nominating the particular offences (against the King) over which it had jurisdiction. At the same time local aristocratic courts exercised jurisdiction over other rights.<sup>34</sup>

The writ system was limited, however it grew rapidly during the reign of Henry II (1133-1189) with the development of jurisdiction of the King's Court based on matters affecting the King's peace.<sup>35</sup> Henry II introduced the Magistrates' Courts to deal with the workload. From 1189 when there were 39 writs, the number grew to more than 400 by 1307 as more and more writs were developed for the protection of rights or interests recognised by the royal courts.<sup>36</sup>

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<sup>31</sup> Extensive background on this stage of development is provided by *Holdsworth*, above n 21, vol 1, 395-476. See also, *MGL*, above n 7, 5-12; *On Equity*, above n 7, 16-32; David Fox, 'The Nature, History and Courts of Equity' in John McGhee (ed), *Snell's Equity* (Sweet and Maxwell, 33<sup>rd</sup> ed, 2015), 5-9 [1-005].

<sup>32</sup> *Holdsworth*, above n 21, vol 1, 218-226; *On Equity*, above n 7, 17 [1.150].

<sup>33</sup> *On Equity*, above n 7, 17 [1.150].

<sup>34</sup> *On Equity*, above n 7, 18 [1.160].

<sup>35</sup> *Ibid.*

<sup>36</sup> In the late thirteenth century St. Westminster 2, 13 Ed. I, c.24 was enacted by Edward I that formalised the Chancellor's role; see also James Barr Ames 'Law and Morals' (1908-1909) 22 *Harvard Law Review* 101.



The common law administered in accordance with particular writs focussed on rights and, with its emphasis on formalities, could be harsh. If a writ did not apply, or applied harshly, people could petition the King directly as the fountainhead of justice. Such petitions were administered by the Chancellor who was a royal official, holder of the great seal and head of the King's secretariat.<sup>37</sup> From 1350 the Chancellor ran his own court with power not only to issue writs, but also to exercise all of the King's feudal rights and jurisdiction.<sup>38</sup> By 1400 the Court of Chancery had been established with its own distinct procedures and jurisdiction. This crystallised equity as a distinct and legitimate branch of the English legal system and the courts of common law and equity developed thereafter side by side.<sup>39</sup>

The Chancellor exercised his jurisdiction to ameliorate the rigidity and harshness of the common law by reference to general notions of justice.<sup>40</sup> This role 'reflects the Aristotelian view of equity as "a rectification of law where the law falls short by reason of its universality."' <sup>41</sup> The Court of Chancery was guided by various sources, including the Canon Law, Roman law, the jurisprudence and morals constructed by the publicists of the Low Countries, and by analogy with the common law.<sup>42</sup>

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<sup>37</sup> Petitions were directed to the Chancellor from at least 1280: *On Equity*, above n 7, 19 [1.170].

<sup>38</sup> *On Equity*, above n 7, 19 [1.170].

<sup>39</sup> *Ibid* 20 [1-180].

<sup>40</sup> *Ibid* 21 [1.200].

<sup>41</sup> *Ibid*.

<sup>42</sup> Sir Henry Sumner Maine, *Ancient Law* (John Murray, 1906). There is much writing on the topic of the influence of Aristotle and Thomas Aquinas and the Canon Law on the development of equity. See also Holdsworth, above n 21, vol 4, 278-283.

It is difficult to gauge precisely what governed the decisions of the Chancellors in the early years of exercising jurisdiction in equity<sup>43</sup> although the fact that Chancellors were drawn from ecclesiastic ranks supports the view that the justice to be applied was governed by concepts of God's will. Newman notes that 'up to the time when Thomas More occupied the woolsack the Chancellor had almost always been a high ecclesiastical dignitary, and from 1330 to 1515 at least 15 chancellors had studied either canon or Roman law.'<sup>44</sup>

Critics of equity point to decisions in equity being made in 'the formless void of individual moral opinion.'<sup>45</sup> Lord Seldon famously and critically observed that the measure of Chancery relief is 'the Chancellor's Foot.'<sup>46</sup> The early moral framework may have had as its backdrop aspects of 14<sup>th</sup> century Roman Catholicism but between 1400 and 1600 Chancellors were less frequently drawn from the ranks of ecclesiastics and more from the ranks of barristers, including those practising in the common law. This was a phase of the development of equitable precedent and principle which challenged the common law.<sup>47</sup>

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<sup>43</sup> See Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) for a detailed examination. See also *On Equity*, above n 7, 105-109 [2.290]-[2.340].

<sup>44</sup> *Newman*, above n 18, 27. See also James Edelman and Simone Degeling, 'Fusion: The Interaction of Common Law and Equity' (2004) 25 *Australian Bar Review* 195, 199 where it is noted that Thomas More was the 'first legally educated appointment since the 14<sup>th</sup> century.'

<sup>45</sup> *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, [9] (Deane J) citing *Carly v Farrelly* (1975) 1 NZLR 356, 367; *Avondale Printers & Stationers Ltd v Haggie* (1979) 2 NZLR 124, 154.

<sup>46</sup> Although it has more recently been observed by Bagnall J in *Cowcher v Cowcher* [1972] 1 WLR 425, 430 that 'in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement.'

<sup>47</sup> See *MGL*, above n 7, [1-055]-[1-065]. The authors of *MGL* note that prior to the 14<sup>th</sup> century there was 'no real discord between the Court of Chancery and the traditional courts of common law': see *MGL*, [1-040]. The conflict appears to have arisen as a result of the expansion of equitable precedent and the common law.

The common law and equity courts battled for supremacy until *Earl of Oxford's case* in 1615 where Lord Ellesmere said of equitable jurisdiction

The cause why there is a Chancery is, for that men's actions are so divers and infinite, That it is impossible to make any general law which may aptly meet with every Act, and not fail in some Circumstances.<sup>48</sup>

After that James I decreed that where equity and law are in conflict, equity prevails.<sup>49</sup> However, it was not thereafter simply a case of parallel development and application, there were areas in which the common law, in the process of its incremental development, incorporated equitable principles.<sup>50</sup> Steps were taken to minimise problems associated with dual administration of courts of law and courts of equity with the passing of the *Common Law Procedure Act* 1854 (UK) which enlarged the jurisdiction of the common law courts. A procedural synthesis was finally achieved by the introduction of the *Judicature Act* of 1873 and 1875 after which equity and the common law could be pursued in the one forum.

There has been debate over the years about whether law and equity should be fused, and also about whether the *Judicature Acts* of 1873 and 1875 (and their local equivalents)<sup>51</sup> actually fused them.<sup>52</sup> In Australia they continue to exist as distinct sets of rules and principles.<sup>53</sup>

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<sup>48</sup> *The Earl of Oxford's Case* [1615] 1 Ch Rep 1; 21 ER 485. See MGL, above n 7, [1-065].

<sup>49</sup> *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 205; MGL, above n 7, [1-065].

<sup>50</sup> See discussion in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 205, [55] (French CJ, Gummow, Crennan, Kiefel and Bell JJ) concerning the adoption of equitable principles into the common law between 1688 and the introduction of the *Common Law Procedure Act* 1854 (UK). See also, MGL, above n 7, 24-29 [1-205]-[1-275].

<sup>51</sup> See MGL, above n 7, [2-100].

## 2.6 The Emergence of Clean Hands

The clean hands maxim, being an expression of the principle that a person should not be permitted to take advantage of his or her own wrong, developed in equity. As was said by the High Court in *Meyers v Casey*<sup>54</sup> in relation to clean hands:

No court of equity will aid a man to derive advantage of his own wrong, and that is really the meaning of the maxim.<sup>55</sup>

Spence traces the closely related maxim that 'he who seeks equity must do equity' from the Roman Praeters power in relation to exceptions based on the conduct of a plaintiff, to recrimination in ecclesiastical Courts. Spence describes this principle as having been 'transmitted from the earliest times [and] acted upon in the Court of Chancery in the present day.'<sup>56</sup>

Spence cites various examples of early appearances of the policy underlying the clean hands maxim, or at least of the importance of the good conscience of the plaintiff, to relief in equity. Although Spence does note that during the reign of Elizabeth and her immediate successors the

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<sup>52</sup> See *MGL*, above n 7, 47-66 [2-130]-[2-400]. See also James Edelman and Simone Degeling, 'Fusion: The Interaction of Common Law and Equity' (2004) 25 *Australian Bar Review* 195; M Kirby, 'Equity's Australian Isolationsim' (2008) 8 *QUT Law Review* 444; P A Keane, 'The Conscience of Equity' (2009) 10 *QUT Law Review* 106.

<sup>53</sup> See *MGL*, above n 7, where at [2-375] the authors state 'no one today seriously asserts that the Judicature legislation itself effected a substantive fusion of equity and common law.'

<sup>54</sup> *Meyers v Casey*, above n 7, 124.

<sup>55</sup> Cf *Spry*, above n 1, 424.

<sup>56</sup> *Spence*, above n 10, 422 fn (f).

principle reached a high water mark by enforcing ‘moral duties,’ from which it has since receded.<sup>57</sup> The examples from the 16<sup>th</sup> century include:

- A 1586 decision where the Master of the Rolls made an order dependent on ‘the son behaving obediently to his mother.’<sup>58</sup>
- A decision by Sir N. Bacon LK that ‘[i]f the plaintiff and his wife will recall some slanderous words uttered by them as regards the defendant, their suit may be referred to men of understanding to be indifferently chosen; if they refuse, their bill is to be dismissed and they may get what they can at common law.’<sup>59</sup>
- A suit ‘by a daughter against her mother, for a legacy, [in which] it was ordered that the plaintiff in an humble manner seek the favour and friendship of the defendant, her mother; and then the defendant was ordered to pay 150 marks to the plaintiff.’<sup>60</sup>

A very early appearance of the clean hands maxim, although in slightly different terms, surfaces in Francis’ *Maxims of Equity*, published in 1728,

He that hath committed iniquity shall not have equity.<sup>61</sup>

This has frequently been cited as the first appearance of the clean hands maxim, even though not using those terms. It has been suggested,

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid, cited as ‘B 1586, fol. 662.’

<sup>59</sup> Ibid, cited as ‘5 & 6 Eliz. Fol. 519.’

<sup>60</sup> Ibid, cited as ‘A 1573, fol 135.’

<sup>61</sup> Francis, *Maxims of Equity, Collected from and proved by Cases out of the Books of the best Authority, in the High Court of Chancery* (1728, 2<sup>nd</sup> ed, 1739, 3<sup>rd</sup> ed, 1751, 4<sup>th</sup> ed, undated) (‘Francis’).

disparagingly by some,<sup>62</sup> that Francis made up the maxim and that no previous cases, including those explicitly relied on by him, express it.<sup>63</sup> It appears that in fact there was no judicial use of the term ‘clean hands’ prior to 1786, however, it is not accurate to say that earlier cases did not apply the principle. In fact the cases of *Jones v Lenthall*<sup>64</sup> and *Rich v Sydenham*<sup>65</sup> upon which Francis relies, both state the principle that ‘he who has committed Iniquity, shall not have Equity.’<sup>66</sup>

The express phrase ‘clean hands’ was first judicially conceived on 5 May 1786 in *Fitzroy v Gwillim*, where Lord Mansfield CJ said that in equity a plaintiff must

[c]ome with clean hands according to the principle that those who seek equity must do equity.<sup>67</sup>

It has been noted that Lord Mansfield CJ confuses two maxims, and also, by way of explanation, that equity was not his strong suit.<sup>68</sup> Despite its fumbling conception, the maxim was born fully fledged, nine months later on 8 February 1787, delivered by Lord Chief Baron Eyre, in *Dering*<sup>69</sup>, in the following terms:

[A] man must come into a court of equity with clean hands, but when this is said it does not refer to a general depravity; it must have an immediate

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<sup>62</sup> Zechariah Chafee, ‘Coming to Equity with Clean Hands’ (1949) 47 *Michigan Law Review* 877, 881 (‘Chafee’).

<sup>63</sup> Pound, ‘On Certain Maxims of Equity’ *Cambridge Legal Essay* 259, 263, 264, 269 (1926) (‘Pound’); Holdsworth, above n 21, vol 12, 188.

<sup>64</sup> *Jones v Lenthall* (1669) 1 Chan. Cas. 153; 22 ER 739.

<sup>65</sup> *Rich v Sydenham* (1671) 1 Chan. Cas. 202; 22 ER 762.

<sup>66</sup> Compare Pound, above n 63, 264; Chafee, above n 62, 881.

<sup>67</sup> (1786) 1 TR 153, 154; 99 ER 1025, 1026.

<sup>68</sup> MGL, above n 7, [3-090].

<sup>69</sup> Above n 7.

and necessary connection to the equity sued for; it must be a depravity in a legal as well as in a moral sense.<sup>70</sup>

### 2.6.1 Clean Hands in the England

The *Dering* formulation has been adopted by the House of Lords,<sup>71</sup> the Privy Council,<sup>72</sup> the Court of Appeal<sup>73</sup> and in trial decisions<sup>74</sup> as well as by leading commentary.<sup>75</sup> As stated recently in the Court of Appeal of England and Wales by Aikens LJ in *Royal Bank of Scotland*:<sup>76</sup>

There is no dispute that there exists in English law a defence to a claim for equitable relief, such as an injunction, which is based on the concept encapsulated in the equitable maxim 'he who comes into equity must come with clean hands'.<sup>77</sup>

### 2.6.2 Clean Hands in Australia

The elements of the clean hands defence as identified in *Dering* have been almost invariably accepted and applied in Australia.<sup>78</sup> In the 1913 High

<sup>70</sup> Ibid All ER 142, Cox Eq Cas 319-320, ER 1185.

<sup>71</sup> *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40; [2002] All ER (D) 355, [70] ('*Grobbelaar*').

<sup>72</sup> *Sang Lee Investment Co Ltd v Wing Kwai Investment Co. Ltd* [1983] UKPC 11, 11; [1983] HKLR 197 (PC) ('*Sang Lee*'). In *Sang Lee* the Privy Council was exercising jurisdiction as the highest appellate court for Hong Kong which was at the time a British territory.

<sup>73</sup> *Royal Bank of Scotland*, above n 7, [159].

<sup>74</sup> See especially *Fiona Trust & Holding Corporation v Privalov* [2008] EWHC 1748 ('*Fiona Trust*').

<sup>75</sup> *Snell*, above n 7, 91-93 [5-010].

<sup>76</sup> Above n 7, [158], more recently cited with approval in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615, [702].

<sup>77</sup> Specifically adopting the *Dering* formulation at [89] and [159].

<sup>78</sup> See High Court *Meyers v Casey*, above n 7; *Nelson v Nelson*, above n 7; Victorian Court of Appeal: *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick*

Court case of *Meyers v Casey*, for example, Isaacs J adopted the whole *Dering* formulation without limitation as follows:

[T]he maxim ... has not an unrestricted application. In the leading case of *Dering v Earl of Winchelsea* Lord Chief Baron Eyre, ... said:- 'It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be that a man must come into a Court of equity with clean hands; but when this is said, it does not mean general depravity; it must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as a moral sense.'<sup>79</sup>

Then, having considered the facts, Isaacs J found that

[i]t is therefore impossible to say, in Lord Chief Baron's words, that [the plaintiff's] misconduct has 'an immediate and necessary relation to the equity sued for,' or that it was 'a depravity in a legal as well as a moral sense.'<sup>80</sup>

The High Court has not departed from the clean hands principle as expressed in *Meyers v Casey*. In *Nelson v Nelson*,<sup>81</sup> a case more concerned with illegality, Dawson J adopted the 'immediate and necessary relation'<sup>82</sup> requirement of *Dering* albeit not commenting on requirement for legal and moral depravity.

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[2004] VSCA 167; (2004) 50 ACSR 679; [36]; New South Wales Court of Appeal *Carr v Resource Equities Limited* [2010] NSWCA 286; (2010) 275 ALR 366, 387 [119] (Spigelman CJ with whom Macfarlan JA and Sackville AJA agreed); *Kation* above n 7, 341 [8] (Allsop P) but cf 341 [9]; 348 [28] (Hodgson JA); 372-3 [148]-[149] (Basten JA); Court of Appeal of Queensland *Coghlan v Pyoanee P/L* [2003] QCA 146; (2003) 2 Qd R 636, [16]; Western Australian Court of Appeal *Melville v Gibbs* [2012] WASCA 207, [36].

<sup>79</sup> Above n 7, 123.

<sup>80</sup> *Ibid.*

<sup>81</sup> [1995] HCA 25; (1995) 184 CLR 538.

<sup>82</sup> *Ibid* 581.



Another frequently cited case is *FAI Insurance*, in which Young J described *Dering* as a ‘famous case’<sup>83</sup> and quoted with approval the passage above from that decision.<sup>84</sup> More recently in *Black Uhlans Inc v NSW Crime Commission* Campbell J surveyed the law on clean hands, citing numerous authorities, and adopted the *Dering* formulation without any reservation.<sup>85</sup> Ultimately Campbell J summarised the position as follows:

The two tests emerging ... from *Dering v Earl of Winchelsea* (‘immediate and necessary relation to the equity sued for’ and ‘a depravity in a legal as well as in a moral sense’) do not provide a complete guide to the circumstances in which the ‘unclean hands’ maxim will be applied to deprive the litigant with the unclean hands of a remedy. Those two tests are a necessary condition for the application of the ‘unclean hands’ maxim, but not a sufficient condition. Equitable relief is always discretionary, and other factors can influence the exercise of the discretion.<sup>86</sup>

More recently in the Court of Appeal of New South Wales in *Carantinos v Magafas*,<sup>87</sup> Hodgson, Campbell JJA and Handley AJA referred with approval to this passage from *Black Uhlans*.<sup>88</sup> In *Kation v Lamru*,<sup>89</sup> the New South Wales Court of Appeal also dealt with the question of clean hands based on the expression of principle in *Meyers v Casey* which applied

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<sup>83</sup> Above n 7, 558, cited or quoted, for example, in *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick* [2004] VSCA 167; (2004) 50 ACSR 679; *Lamru v Kation* [2004] NSWSC 1143; (2004) 214 ALR 634; *Black Uhlans Inc v NSW Crime Commission* [2002] NSWSC 1060 (‘*Black Uhlans*’); *Amcor v Barnes* [2012] VSC 434.

<sup>84</sup> *FAI Insurances*, above n 7, 559.

<sup>85</sup> *Black Uhlans*, above n 83, [164], a case which itself has been referred to many times since.

<sup>86</sup> *Ibid* [181].

<sup>87</sup> [2008] NSWCA 304 (‘*Carantinos*’).

<sup>88</sup> *Ibid* [51].

<sup>89</sup> Above n 7.

*Dering*.<sup>90</sup> As did the New South Wales Supreme Court in *Michael Wilson and Partners Limited v Robert Colin Nicholls* where Einstein J adopted the *Dering* formulation and referred with approval to *Meyers v Casey*, *Black Uhlands*, *Carantinos*, *Kation*.<sup>91</sup>

Commentary has likewise adopted the *Dering* elements of clean hands.<sup>92</sup>

### 2.6.3 Clean Hands Elsewhere

Although not the focus of this thesis, the clean hands maxim broadly equivalent to the *Dering* formulation has been adopted in New Zealand,<sup>93</sup> Canada<sup>94</sup> and the United States.<sup>95</sup>

Anenson<sup>96</sup> argues that, in America at least, the clean hands defence should be, and in fact is, available as a defence to common law claims. This

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<sup>90</sup> See *Lewis v Nortex Pty Ltd (in liq)* [2004] NSWSC 1143 where Hamilton J at [138] and [141] at first instance relied expressly on *Dering*. On appeal in *Kation*, above n 7, Basten JA quoted Isaacs J from *Meyers v Casey* who had relied on *Dering*. See also *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641, 650 (Gleeson CJ with whom Meagher JA agreed) and *Commonwealth of Australia v Sanofi-Aventis* [2015] FCA 384, [32].

<sup>91</sup> *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 721, [15]-[20] ('*Michael Wilson*'). *Michael Wilson* was appealed to the New South Wales Court of Appeal and ultimately the High Court without any challenge to Einstein J's approach in this regard.

<sup>92</sup> *MGL*, above n 7, [3-090] also citing *Dewhirst v Edwards* [1983] 1 NSWLR 34, 51; *Black Uhlands*, above n 83; *Carantinos*, above n 83; *Kation* above n 7; *Royal Bank of Scotland*, above n 7, [149]-[172]; *Spry*, above n 1, 254 also citing *Moody v Cox* [1917] 2 Ch 71; *Argyll v Argyll* [1967] Ch 302, 331-332; *Meyers v Casey*, above n 7; *On Equity*, above n 7, 181 [3-330]; *Halsbury's Laws of Australia*, [185-65]-[185-70].

<sup>93</sup> *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316.

<sup>94</sup> *R v Bridges* (1990) 78 DLR (4<sup>th</sup>) 529; J Berryman, *The Law of Equitable Remedies* (Irwin Law, 2<sup>nd</sup> ed, 2013), 18. Berryman states that the 'iniquitous conduct must relate to the very transaction in dispute and taint the appropriateness of the relief being sought' and the 'depravity must have a "necessary relation" to the equity sued for.'

<sup>95</sup> *Loughran v Loughran* [1934] USSC 99 ; 292 US 216, 229; and *Keystone Driller Co v General Excavator Co* (1933) 290 US 240, 245; *Seagirt Realty Corporation v Chazanof* (1963) 13 NY 2d 282, 196 NE 2d 254; *Precision Instrument Co v Automatic Machinery* (1945) 324 U.S. 806, 814; *Pomeroy*, above n 7, 90-143; D B Dobbs, *Law of Remedies: Damages, Equity, Restitution* (Thomson, 2<sup>nd</sup> ed, 1993) §2.4(2).

argument relies heavily on the treatment of the merger in American courts and is not readily transmissible to the Australian or English contexts which have been more circumspect in their interpretation of the *Judicature Act* 'mergers'.<sup>97</sup>

At a fundamental level, equity and the common law, as they are treated in Australia and England, continue to differ. In 2009, Keane JA (as he then was), writing extra-curially, observed:

We can readily recognise radical differences between the standard of absolute loyalty required of a fiduciary and the standard of reasonable care in negligence and reasonableness in the law of contract. These differences ought to provide a warning to resist the human urge to see patterns which suggest an underlying unity of concepts. To elide these differences in pursuit of a common standard of fair and reasonable behaviour is to fail to recognise that the rules of equity and the common law reflect radically different views of the legitimacy of human selfishness and of occasions for its control.<sup>98</sup>

Further, the common law has developed its own rules to prevent a party from taking advantage of its own wrong.<sup>99</sup> Before it is insisted that clean

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<sup>96</sup> Anenson, 'Beyond Chafee: A Process-Based Theory of Unclean Hands,' (2010) 47 *American Business Law Journal* 509-574 and 'Treating Equity Like Law: A Post-Merger Justification of Unclean Hands,' (2008) 45 *American Business Law Journal* 455-509.

<sup>97</sup> See eg, *MGL*, above n 7. Also compare O. J. Herstein 'A Normative Theory of the Clean Hands Defense' (2011) 17 *Legal Theory* 171-208 where it is argued that the clean hands defence is not fully aligned with court integrity but is explained by numerous other normative justifications.

<sup>98</sup> Keane JA, *The Conscience of Equity*, (Paper presented at the 2009 W A Lee Lecture in Equity, 2 November 2009), 10.

<sup>99</sup> The legal maxim/principle that a party 'may not take advantage of its own wrong' has been said to be 'based on elementary principles' and 'admits of illustration from every branch of legal procedure:' *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443, [21] (Giles JA with whom Santow JA and

hands should operate in response to common law claims, it might first be asked why common law policies are inadequate?

Notwithstanding the differences between Australian and English courts on the one hand and American courts on the other, American decisions on clean hands have sufficient in common that they are occasionally helpful in elucidating particular issues.

### 3 Guiding Principles

If the clean hands defence is properly expressed as the *Dering* formulation, and if that is based on the principle that a court will not assist a person to take advantage of their own wrong, the question may be asked why does equity enforce that principle? The short answer is that equity is governed by conscience and it would be against that conscience to permit a party to take advantage of their wrong. The notion of the conscience of equity is not a simple subjective conscience, but an informed conscience governed by established principles and informed legal reasoning. Particular instances of the application of clean hands can therefore be judged by reference to their consistency with such conscience.

However, notwithstanding the degree to which equity has grown into a rules based system, it retains a moral component frequently spoken of in terms of honesty, equity, conscience, good faith, justice and the like.<sup>100</sup> In

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Hunt AJA agreed). See also *Gollan v Nugent* [1988] HCA 59; (1988) 166 CLR 18, 27 (Brennan J).

<sup>100</sup> See eg *Kation* above n 7, [2].

an area such as clean hands where substantive rules of equity do not apply and the court is called upon to exercise its discretion, that moral component has more prominence. Accordingly, in order to understand what factors are relevant to the application of clean hands in any particular case, it is important to understand what moral imperatives may lie behind equity's insistence that the court should not assist a person to take advantage of their wrong. These moral imperatives are not necessarily explicit but must be gleaned from the nature of equitable jurisdiction and the competing interests in the context of clean hands.

### 3.1 The Conscience of Equity

As stated above, from its earliest times the Court of Chancery was a court of conscience. The first step in determining the proper the basis upon which clean hands is applied is to determine what is this conscience of equity, which is expressed through its substantive laws, and which governs the exercise of discretion.

The conscience of equity has undoubtedly changed over time.<sup>101</sup> It is clear enough that considerations of conscience do not permit judges the unfettered application of their own subjective morality. As early as 1676 Lord Nottingham eschewed the right of Chancellors to make decision 'by

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<sup>101</sup> See generally *On Equity*, above n 7, 105-112 [2.290]-[2.380]. Snell notes that '[i]n its earliest sense, it referred to knowledge of facts that a judge could rely upon in reaching his determination' but that the modern approach to conscience is governed more by precedent than abstract higher moral standards: *Snell*, above n 7, 6 [1-008], 9 [1-014].

the mere fancy and imagination.’<sup>102</sup> More than 300 years later, Deane J observed in *Muschinski v Dodds*:

Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law.<sup>103</sup>

Deane J then explained what, in contra-distinction to 'idiosyncratic notions of fairness and justice',<sup>104</sup> the application of conscience in equity involves. In relation to the remedial constructive trust Deane J continued:

As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles.<sup>105</sup>

According to *Pomeroy* 'conscience' is 'a juridical and not a personal conscience'.<sup>106</sup> In *ABC v Lenah Game Meats* Gleeson CJ similarly described conscience as follows 'a properly formed and instructed conscience'.<sup>107</sup>

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<sup>102</sup> *Cook v Fountain* (1676) 3 Swans. 585, 600 quoted in *Snell*, above n 7, 7 [1-005].

<sup>103</sup> *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, 616.

<sup>104</sup> *Ibid* 615.

<sup>105</sup> *Ibid*. See also Dennis R Klinck *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) 270 ('Klinck') where he observes 'Lord Nottingham's insistence that he was administering "legal and regular" equity can be seen as a direct response to' criticisms of an arbitrary conscience.

<sup>106</sup> *Pomeroy*, above n 7, vol 1, 74 cited by the High Court in *Kakavas v Crown Melbourne Limited* [2013] HCA 25; (2013) 250 CLR 392, [15] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). Klinck above n 105, 273 concludes that '[a]rguably, what the conscience of equity became was simply the sum of all the individual cases the Chancellor decided ... What it entails, its actual meaning, resides in all the details of the innumerable causes it has determined.'

<sup>107</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199, 227, [45] quoted in *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA

The application of this concept of conscience to clean hands, therefore requires consideration of conscience and good a faith, gleaned by analogy, induction and deduction, and more particularly, of the underlying principle that a court will not permit a party to take advantage of their own wrong.<sup>108</sup>

The difficulty faced in the area of clean hands is that frequently analogy is a poor guide to the appropriate application of clean hands. Cases apparently with similar facts are decided in markedly opposite ways without any apparent explanation for that difference. There are also instances where clean hands applies in circumstances where it seems a party could by the grant of relief, be taking advantage of their wrong. The prime example is cases where unclean hands are constituted by attempting to mislead the court.

A clearer rationale for the application of clean hands in such instances, or at least an explanation for particular decisions, may be obtained by having regard to the various moral imperatives justifying clean hands.

### 3.2 Specific Imperatives

A number of justifications have been proposed as motivating forces behind clean hands including: court integrity, deterrence, justice between the parties, punishment, and diminished moral authority by misconduct.

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57; (2003) 217 CLR 315, 325 [22] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) (*Tanwar*).

<sup>108</sup> The requirement of ‘moral depravity’ is discussed below at chapter 5.6.1.

The most prominent one is that it protects court integrity.<sup>109</sup> That is, the court process, and judges for that matter, would be compromised if they were seen to be vehicles through which wrongdoers legitimised or perpetuated their wrongdoing.

However, the court integrity argument is subject to an internal inconsistency. The application of the clean hands defence is predicated on an otherwise legitimate claim. That is, the defence applies where a defendant has breached some equitable principle which would entitle the plaintiff to relief.<sup>110</sup> To apply the clean hands defence in those circumstances is to permit the defendant to avoid making good that wrong. In a sense, the court is perpetuating a wrong by omission. That in itself may tend to undermine the court.<sup>111</sup> Of course it may be argued that court integrity is a greater moral imperative than the imperative of ensuring equitable rights are enforced between parties.

Another justification is that of deterrence.<sup>112</sup> Such a justification would operate more powerfully in some circumstances, such as where the misconduct is constituted by misleading the court, than it might in others, such as where the misconduct is a deceit practiced on the other party.

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<sup>109</sup> There is very little consideration of this question in Australian or English law however the general concept of a litigant's misconduct potentially compromising court integrity was accepted in *Regina v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, 60 (Lord Griffiths), 65 (Lord Bridge of Harwich) quoting the headnote to *S v Ebrahim* 1991 (2) SA 553, 555. The justification for clean has received far more prominence in America: see eg, Leigh Anenson, 'Beyond Chafee: A Process-Based Theory of Unclean Hands,' (2010) 47 *American Business Law Journal* 509 esp n 77; cf Ori Herstein, 'A Normative Theory of the Clean Hands Defence' (2011) 17 *Legal Theory* 171, esp 176-191.

<sup>110</sup> Although such an 'entitlement' may be less than certain given that equitable relief is discretionary: *Vadasz v Pioneer Concrete (SA) Pty Ltd* [1995] HCA 14; (1995) 184 CLR 102, 114 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>111</sup> See Ori Herstein, 'A Normative Theory of the Clean Hands Defence' (2011) 17 *Legal Theory* 171, esp 178-182.

<sup>112</sup> *Ibid* 203.



Courts exercising equitable jurisdiction may also be concerned to ensure justice between the parties. If the plaintiff has acted wrongly towards the defendant in a manner relevant to the dispute, the court may, particularly where exercising discretionary powers, perceive a moral imperative to act fairly as between them.

There is also an element of punishment woven into the fabric of clean hands.<sup>113</sup> The consequence for a plaintiff who has misbehaved is that they lose their rights, in sense independently from the demerits of the defendant.

Yet another justification is the intuitive moral reaction that a person who has engaged in misconduct loses the moral authority to complain of related misconduct in another.<sup>114</sup> That finds echoes in a very early form of clean hands - '[h]e that is without sin among you, let him first cast a stone at her.'<sup>115</sup>

As stated above, the degree to which these justifications do or should affect the consideration of clean hands in any particular case cannot be stated with certainty. It is clear that some justifications are more relevant to some fact situations than others. So the imperative to protect court integrity, and perhaps deterrence, are likely to feature more prominently where the unclean hands are constituted by misleading the court. However, beyond such broad assessments, the particulars of many of the clean hands decisions remain shrouded in a veil of discretion.

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<sup>113</sup> Ibid 198-203.

<sup>114</sup> Ibid 191 -198.

<sup>115</sup> The Holy Bible, Authorised King James Version (1611), 'The Gospel According to John' chapter 8, verse 3-7.

That is not to say that there is a total lack of precision in clean hands decisions, and that all is broad discretion. Courts have on occasion precisely expressed aspects of the specific content and scope of the clean hands defence. Where courts make such statements, the content of the expressions can be measured against the underlying principle, the conscience of equity, and the various justifications to determine whether they are appropriate expressions of clean hands.

#### **4 The Boundaries of Clean Hands: Dilution, Refinement, Exclusion**

While it is true the *Dering* formulation has been widely adopted as an expression of the clean hands maxim, that is an incomplete picture of the approach of courts and commentators. Some descriptions of clean hands dilute the maxim by suggesting it is not a specific rule but rather merely a summary of a broad theme. At the other end of the spectrum, there are many instances where the content of the clean hands maxim is refined by reference to specific mandatory criteria. There are also specific circumstances that have been identified as areas where clean hands can never apply. A close examination of each of these approaches reveals that generally they overstep the mark: the broad are too broad, the specific are too specific, and the mandatory too absolute. Each of these is considered further below.

## 4.1 Dilution

Occasionally the language used in describing the maxims of equity, and therefore clean hands, suggests it is little more than a broad and diluted principle without specific application. In *Corin v Patton*, for example, Mason CJ and McHugh J observed that a maxim of equity is not a specific rule or principle of law, but rather a summary statement 'of a broad theme which underlies equitable concepts.'<sup>116</sup>

In a similar vein Spry emphasises the general nature of equitable maxims as follows:

[T]he maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles.<sup>117</sup>

To the extent these comments suggest clean hands does not operate beyond well-established rules or principles such as fraud or misrepresentation, they go too far. Specific rules, such as fraud, misrepresentation, laches and acquiescence, have coalesced out of what would previously have been governed generally by clean hands, as a result of which the clean hands maxim need not, nor should it, be resorted to.<sup>118</sup> However, clean hands has a role to play where there are no such specific rules. That clean hands continues to play an independent and specific role in enforcing equitable remedies is demonstrated by its

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<sup>116</sup> *Corin v Patton* [1989] HCA 12; (1989) 169 CLR 540, 557 (Mason CJ and McHugh J) cited by *Snell*, above n 7, 87 [5-001].

<sup>117</sup> *Spry*, above n 1, 6.

<sup>118</sup> *Spry*, above n 1, 6-7, 175, 253-4.

substantial deployment in *Kation v Lamru*,<sup>119</sup> *Carantinos v Magafas*,<sup>120</sup> *Black Uhlands*,<sup>121</sup> and *Meyers v Casey*<sup>122</sup> to name a few.

These comments should also not be read as suggesting that the application of clean hands is unconstrained. The clean hands maxim as articulated in *Dering* is a rule of sorts and has been extensively applied since 1787. What such commentary does draw attention to is the need to look closely at the circumstances in which clean hands has applied to determine its range of application. As Basten JA observed in *Kation v Lamrhu*:

[W]ithout a detailed understanding of the circumstances in which it operates, it is a colourful but imprecise label.<sup>123</sup>

## 4.2 Refinement

Courts have closely examined the circumstances where clean hands has applied to determine the appropriateness of its application in given cases. That process of detailed examination has led to numerous refinements of the maxim including the following:

- the misconduct must be done to the defendant;
- a defendant must show that they have been injured by the misconduct;
- the misconduct must have been done by the plaintiff;

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<sup>119</sup> Above n 7.

<sup>120</sup> Ibid.

<sup>121</sup> Above n 83.

<sup>122</sup> Above n 7.

<sup>123</sup> *Kation*, above n 7, [148].

- there must have been a lack of clean hands in the relationship between the two parties;
- the misconduct must have arisen in the transaction between the plaintiff and defendant;
- the equity sued for must have been brought into existence by, or induced by, the misconduct;
- it must be necessary to prove, plead and/or rely on the misconduct in the proceeding.

Interpretations such as these have frequently been expressed as necessary aspects of clean hands, that is, as circumstances that must be established in order for clean hands to apply. However, as helpful as more specific refinements may be in justifying a result in a particular fact situation, there is tension between the identification of such generally applicable specific requirements on the one hand, and the fact that clean hands defence is based on broad ethical principles which do not lend themselves to 'fixed and immutable rules',<sup>124</sup> on the other. The greater the precision with which clean hands is defined, the less flexible and adaptable it is likely to be.

The dangers of generalising from the specific to the general were expressed by Jessup J in *CBA v Barker* in the context of the risk of implying broad normative terms into employment contracts:

The unwary jurist who sees nothing but wholesomeness in the term may find that the term operates in practice as a kind of Trojan Horse,

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<sup>124</sup> *Spry*, above n 1, 6.

wherefrom a miscellany of unforeseen obligations emerge to govern the ex post disposition of a dispute which has arisen in a concrete setting.<sup>125</sup>

More generally Baroness Hale of Richmond DPSC said in *Woodland v Swimming Teachers Association*:

[T]he words used by judges in explaining why they are deciding as they do are not to be treated as if they were the words of statute, setting the rules in stone and precluding further principled development should new situations arise.<sup>126</sup>

A close examination of the proposed refinements of clean hands demonstrates that some overstep the mark. They may be appropriate in each instant case, and even as generally relevant indicia of connection between misconduct and relief sought, however they do not all represent valid necessary elements of the clean hands defence, particularly having regard to the underlying principle against which conduct must be measured, that is, that a court will not assist a party to take advantage of their own wrong.

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<sup>125</sup> *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83; (2013) 214 FCR 450, [318] (Jessup J dissenting) adopted by the High Court on appeal *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 312 ALR 356, [40]-[44] (French CJ, Bell and Keane JJ); [115] (Gageler J).

<sup>126</sup> [2013] UKSC 66; [2014] AC 537, [28]. See also *Halser v Singtel Optus Pty Ltd* [2014] NSWCA 266, [66] citing *Beck v Henley* [2014] NSWCA 201; (2014) 311 ALR 494, [32] and [36] regarding similar issues for accessorial liability for breach of trust and the rule in *Saunders v Vautier*.

### 4.3 Exclusion

In addition to broad interpretations and specific refinements of clean hands, a handful of specific circumstances have been identified where, so it is said, clean hands will not apply. Those categories are:

1. In suits for cancellation and delivery up of documents;<sup>127</sup>
2. in suits for merely declaratory relief;<sup>128</sup>
3. in suits for purely statutory relief;<sup>129</sup>
4. in suits to prevent multiplicity of actions;<sup>130</sup> and
5. ‘wherever the court considers that the principles which would lead to relief in the given case outweigh the public policy that equity ought not to assist a wrongdoer.’<sup>131</sup>

Each of these categories of application, or exclusion, of the clean hands maxim will be considered below regarding their consistency with the *Dering* formulation or their legitimacy as distinct aspects of the clean hands maxim.

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<sup>127</sup> MGL, above n 7, 83 [3-120]; Michael Spence, ‘Equitable Defences’ in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook Co, 2<sup>nd</sup> ed 2003), 1023 [2934] (‘Parkinson’).

<sup>128</sup> Ibid, each citing *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300. See also *Dhami v Martin* [2010] NSWSC 770; (2010) 241 FLR 165.

<sup>129</sup> MGL, above n 7, 83 [3-120]; Parkinson, above n 127, 1024 [2934], each citing *Re the Will of FB Gilbert (decd)* (1946) 46 SR (NSW) 318 (FC).

<sup>130</sup> MGL, above n 7, 83 [3-120] citing *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43; Parkinson, above n 127, 1024 [2934] citing *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43; *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSWLR 224, 233 (Street J); *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501.

<sup>131</sup> Parkinson, above n 127, citing *Money v Money (No2)* [1966] 1 NSWLR 348, 351-352 (Jacobs J); *New South Wales Dams v Murray Goulburn Co-operative Co Ltd* (1990) 171 CLR 363.

## 5 Elements Of Clean Hands Under *Dering*

### 5.1 The Nexus Requirement: Immediacy and Necessity

As stated above, the nexus requirement expressed in *Dering*, and widely applied, is that the misconduct must have an ‘immediate and necessary connection’ to the equity sued for. This expression suggests notions of proximity and causation without describing in precise detail what is required to satisfy these terms. The simplicity of the language however, obscures many of the questions that have arisen in relation to the application of them.

The Macquarie Dictionary relevantly defines ‘immediate’ as ‘without intervening medium or agent; direct.’<sup>132</sup> The Oxford English Dictionary similarly defines ‘immediate’ relevantly as ‘direct, without intervening medium.’<sup>133</sup> Translated into the clean hands context therefore, it may be said that the misconduct must bear a direct relation to the equity sued for, or a not indirect one, although this too is imprecise.

The word ‘immediate’ has been used in a common law context to describe the nature or extent of the causal relation between a plaintiff’s negligence and the loss suffered to preclude him from relief. In that context the Full Court of Victoria in *State Electricity Commission of Victoria v Gay* stated, epithets such as ‘immediate’<sup>134</sup> ‘are no doubt convenient in seeking to describe the negligence to which the law attaches liability, but ... there is a

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<sup>132</sup> *Macquarie Dictionary* (Macquarie Dictionary Publishing, 6<sup>th</sup> ed, 2013).

<sup>133</sup> *The Compact Edition of the Oxford English Dictionary* (Oxford University Press 1971).

<sup>134</sup> Gavan Duffy J also noted that along with ‘immediate,’ conduct satisfying the nexus requirement had been described as ‘decisive,’ ‘real’ and ‘proximate.’



danger that the use of some epithets ... if unexplained, may lead' to error.<sup>135</sup> That concern applies equally to the use of 'immediate' in the context of clean hands. In that sense, it is not surprising that courts have attempted over the years to explain the nexus requirement by reference to sub-rules and equivalent formulations.

The concept of causal necessity is familiar to the law of negligence where causation has been described in terms of 'necessary preconditions'.<sup>136</sup> This has been equated with the 'but for' test. If that were transposed into the clean hands context, the question might be '[b]ut for the misconduct, would the equity have arisen?' The Macquarie Dictionary defines 'necessary' as 'that cannot be dispensed with'.<sup>137</sup> OED similarly defines 'necessary' relevantly as 'requisite.' Although requisite is little more than a synonym and, as with 'immediate' a more detailed examination of the circumstances in which clean hands has been applied is necessary to determine what it means and whether analogy with common law assists.

Dictionary definitions occasionally assist in determining the meaning of a word used in a legal context<sup>138</sup> but one should not 'make a fortress out of the dictionary'.<sup>139</sup> Just as the meaning of a word in the context of a statute should be interpreted sympathetically with the objects and purposes of the statute, so too, the nexus requirement for clean hands as expressed in

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<sup>135</sup> *State Electricity Commission of Victoria v Gay* [1951] Vic Law Rep 15; [1951] VLR 104, 105.

<sup>136</sup> *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, esp McHugh J.

<sup>137</sup> *Macquarie Dictionary* (Macquarie Dictionary Publishing, 6<sup>th</sup> ed, 2013).

<sup>138</sup> See eg, *Purvis v NSW* [2003] HCA 62; 217 CLR 92, [73] (McHugh, Kirby JJ).

<sup>139</sup> *ICAC v Cuneen* [2015] HCA 14, [76] (Gageler J) citing *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; (2000) 202 CLR 629, 644 [27] quoting *Cabell v Markham* (1945) 148 F 2d 737, 739.

*Dering* should be interpreted sympathetically with the guiding principles of equity, that is, principles of conscience.

The nexus requirement in the context of the clean hands defence has been described in both negative and positive terms. That is, descriptions have been provided of what does not, and what does, constitute an immediate and necessary connection. Those interpretations are generally consistent with the equitable principles pursuant to which they are applied, in the context of the particular case. Their vice lies in the expression of the sub-rules or reinterpretations as being of general application.

## 5.2 Negative Statement of the Nexus Requirement

Generally speaking, negative statements of the nexus requirement are of limited use. They constitute little more than a circular acknowledgement that uncleanness must not be unrelated to the relief sought in order to meet the requirement of a nexus between unclean hands and the relief sought. Such negative descriptions are not totally without merit, as they do reinforce the necessity of a nexus between the misconduct and the relief sought, however they do little to illuminate the nexus requirement.

The occasion for rendering the requirements of clean hands in negative terms arises most often where there has been obvious misconduct of some sort by a plaintiff that a defendant wishes to exploit irrespective of its tenuous links to the relief sought. The leading High Court authority on clean hands provides an example.

Almost ten years to the day after its first sitting,<sup>140</sup> the High Court of Australia delivered what has become a foundation stone of the clean hands maxim in Australian jurisprudence. In *Meyers v Casey*<sup>141</sup> a tribunal had been constituted under the rules of the Victorian Racing Club which purported to charge and discipline a member for alleged breaches of those rules. The member sought to challenge the validity of the decision on the basis that the tribunal was not properly constituted and that he was denied natural justice. The Club sought to resist the claim for declaratory and injunctive relief on the basis that the member had unclean hands, relying in that regard on the misconduct said to found the disciplinary proceedings.

The Court rejected reliance on that clean hands defence on the basis that the case was about whether the tribunal was properly constituted and whether there had been a denial of natural justice. The question whether the misconduct had been undertaken or not was not an issue the Court was called upon to determine and was not relevant to the proceedings. Accordingly the clean hands defence was not available, notwithstanding that for the purposes of the case the misconduct was to be assumed. In coming to this decision Isaacs J, in applying the *Dering* formulation, held that clean hands was not available because

the rights asserted by the appellant, namely, membership of the club and public right under the by-laws to enter the racecourse, of course exist, if at all, by reason of circumstances wholly independent of the alleged

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<sup>140</sup> The High Court of Australia was established in 1901 by section 71 of the Constitution however the first sitting did not occur until 6 October 1903 after the passage of the *Judiciary Act 1903* (Cth).

<sup>141</sup> Above n 7.

misconduct; the wrong he complains of, namely, his condemnation by an incompetent and unauthorized tribunal in the one case, and a disregard of natural justice in the other, are equally independent of any misconduct by him. It is therefore impossible to say, in the Lord Chief Baron's words, that his alleged misconduct has 'an immediate and necessary relation to the equity sued for,' or that it was 'a depravity in a legal as well as in a moral sense.'<sup>142</sup>

The finding essentially is that misconduct unrelated to the equity sued for cannot sustain a defence of unclean hands.

In *FAI Insurances Ltd* the defendant sought to amend its defence to rely on a clean hands defence.<sup>143</sup> Young J held 'general naughtiness or the desire of the court to censor the plaintiff's conduct, does not enter into the equation when one is considering whether the plaintiff should get relief'.<sup>144</sup> This approach has been expressed more recently by Allsop P in *Kation v Lamru* where he held:

The limitation of the operation of the principle to circumstances where there is the necessary connection with the equity invoked was introduced to avoid the barring of justice, through equity's orders, to persons who may not be morally or legally blameless, but whose behaviour that could be so described had no relevant connection with the equity they sought to invoke.<sup>145</sup>

In the 1934 case of *Loughrin v Loughrin* the United States Supreme Court similarly held that '[e]quity does not demand that its suitors shall have led

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<sup>142</sup> *Meyers v Casey*, above n 7, 123-4.

<sup>143</sup> *FAI*, above n 7, 561F.

<sup>144</sup> *Ibid* 554.

<sup>145</sup> *Kation*, above n 7, [2].

blameless lives.’<sup>146</sup> Pomeroy states: ‘[t]he rule does not go so far as to prohibit a court of equity from giving its aid to a bad or faithless man or a criminal.’<sup>147</sup> More colloquially it has been held: ‘Whatever the maxim does mean, it does not require that the plaintiff who comes to equity must do so with a character reference’.<sup>148</sup>

And if there were any doubt that such restraint should be exercised, Chafee provides an example that should make clear the difficulties that would follow from proceeding otherwise. Chafee suggests ‘we should not by this doctrine create a rule comparable to that by which a careless motorist would be able to defend the subsequent personal injury suit by proving that the pedestrian had beaten his wife before leaving his home.’<sup>149</sup>

It is clear why general depravity should not suffice to preclude the availability of equitable relief, for if it did, ‘almost no equitable relief would be granted as defendants excavate the remote misdeeds of the plaintiff.’<sup>150</sup> However, the questions arises, if the nexus is to be narrowed or refined in order to limit the circumstances in which the defence should be available, how should that be done?

To say that the conduct in question ‘must not be unrelated to the relief sought’ does, in a sense, express a necessary precondition to relief. It is an expression of the general principle that the requirements of good

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<sup>146</sup> 292 US 216, 229 quoted in *Black Uhlands*, above n 83 [163].

<sup>147</sup> Pomeroy, above n 7, 97 [§399].

<sup>148</sup> *Re Holk Nominees Pty Ltd v Pita Holdings Pty Ltd and Charles Ian Timothy Clifford* [1990] FCA 336.

<sup>149</sup> Quoted by the United States Court of Appeals 9<sup>th</sup> Circuit in *Republic Moulding Corporation v BW Photo Utilities* (1963) 319 F (2d) 347 and cited by Young J in *FAI Insurances*, above n 7, 561B-D.

<sup>150</sup> *MGL*, above n 7, 83 [3-115].

conscience which underpin equitable jurisdiction do not demand that suitors have led blameless lives. However it does little to elucidate the circumstances in which wrongdoing will meet the nexus requirement. For that, attention must be turned to positive explanations.

### 5.3 Positive Statements of the Nexus Requirement

If the problem with negative statements as to the requisite connection is their unhelpful breadth, the problem with positive statements is the dual risks that they will either be so broad as to be unhelpful, or too specific to be of general application. Examples of the former are that the conduct must be ‘sufficiently closely related,’ or ‘with respect to,’ or ‘directly related to’ the relief sought, or that the relief must be ‘affect[ed] by the impropriety complained of.’ It is not necessarily that these statements are wrong in principle, rather it is unclear what if anything they add to the requirement that the conduct have an ‘immediate and necessary’ relation to the equity sued for. In that sense they are of limited utility in determining whether the conduct in question is sufficiently closely related to the equity sued for to satisfy the nexus requirement.

On the other hand, while specific positive characterisations may offer a more practical guide as to the circumstances in which the defence will apply, they may in so doing unduly confine the defence. Specific positive characterisations that have been applied by the Courts include the following:

- The conduct must be ‘done to’ or ‘directed at’ the defendant;

- the conduct must have been done by the plaintiff;
- there must be a lack of clean hands in the relationship between the two parties to the proceeding;
- it must be necessary to prove, plead or rely on the questionable conduct;
- the equity must have 'arisen out of' or 'been brought into existence by' 'induced by' or 'must be made to be the very ground upon which this transaction took place, and must have given rise to this contract.'

Each of these positive specific characterisations has been applied by the courts to the question of whether the conduct in issue has an 'immediate and necessary' connection to the relief sought. As will be seen, those articulations do not necessarily lead to the wrong result, but articulating them as 'requirements' can lead to an unduly narrow approach which risks fettering the court's discretion. Gummow J has recently cautioned against the tendency to 'take passages in older decisions and apply them as if they were statutory enactments without regard to the settings in which there arose the disputes settled by those decisions.'<sup>151</sup>

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<sup>151</sup> William Gummow, 'Knowing Assistance' (2013) 87 *Australian Law Journal* 311.

### 5.3.1 Misconduct Must Be Done to the Defendant

In his *Maxims of Equity* Francis stated in relation to the clean hands maxim that ‘the iniquity must have been done to the defendant himself.’<sup>152</sup> Pomeroy expresses a similar view stating ‘the wrong must have been done to the defendant himself and not to some third party.’<sup>153</sup>

This conclusion by Francis was based on the 1669 decision of *Jones v Lenthal*.<sup>154</sup> In that case a plaintiff sought recovery of a debt owing by bond. However the plaintiff had earlier, in order to avoid separate proceedings for sequestration, sworn on oath that the debt and bond had been satisfied. The defendant resisted the claim on the basis that the plaintiff’s earlier conduct constituted unclean hands and should bar relief. The Master of the Rolls held:

For though the Rule be, That he who hath committed Iniquity (as here, in the false Answer) shall not have equity; yet it seems, that is to be understood, when the Iniquity is done to the Defendant himself: As where a Lessee is sued at Law on a Forfeiture of his Lease, for Non-payment of Rent or the like; if such Lease was obtained by Fraud or false Suggestion; Equity will not relieve ...<sup>155</sup>

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<sup>152</sup> *Francis*, above n 61, 5.

<sup>153</sup> *Pomeroy*, above n 7, §399 n 20 citing *Cochran Timber Co. v Fisher*, 190 Mich. 478, 157 N.W. 282, 4 A.L.R. 9 and other US authorities. In some respects the United States authorities on clean hands reflect the way clean hands is treated in Australia, however the application of clean hands in the United States has proved to be adventurously liberal in its extension into the common law: see Anendesen, below n 96. That liberality renders those decisions of limited use in an Australian context, however the facts of *Cochran* do form a helpful backdrop for consideration of the nexus question.

<sup>154</sup> *Jones v Lenthal* [1669] EngR 102; (1669) 1 Chan Cas 154; 22 ER 739.

<sup>155</sup> [1669] EngR 102; (1669) 1 Chan Cas 154; 22 ER 739. This decision was cited with approval in *FAI Insurances*, above n 7, 558F.



In *Cochran*,<sup>156</sup> the owner of land, Mrs Abts, conveyed the land to the complainant while under the influence of alcohol. Mrs Abts later purported to transfer the land to the defendant having disclosed the circumstances of the first transfer and claiming that it was, in the circumstances, procured by fraud. The complainant subsequently brought proceedings to exclude the defendant from the land and establish title, and the defendant pleaded a clean hands defence based on the circumstances surrounding the initial transfer.

The Court held that the first transfer was not void, but voidable at the instance only of Mrs Abts. Unless avoided by the grantor, the transfer to the complainant was effective. In dealing with whether or not the misconduct of the complainant vis-à-vis Mrs Abts assisted the defendant in proceedings brought by the complainant in relation to the land, the Court rejected the clean hands defence on the basis that

The wrong must have been done to defendant himself, and not to some third party. The power in equity to grant complete relief when jurisdiction is once taken cannot be extended to persons not parties to the suit and whose rights a party to the suit cannot take by assignment.<sup>157</sup>

This approach may be explained having regard to the fact that the first grant was voidable at the option of the grantor only. Accordingly, any relief given to the complainant in the court proceedings against the defendant would not mean the complainant is taking advantage of a wrong in the relevant sense. A transfer in those circumstances creates a

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<sup>156</sup> *Cochran Timber Co. v Fisher*, 190 Mich. 478, 157 N.W. 282, 4 A.L.R. 9, the first case on which Pomeroy relies.

<sup>157</sup> *Ibid* 484-485.

title in the complainant voidable at the instance of the grantor. The relief granted by the court as between the complainant and the defendant would not change that legal position.

In more recent times the requirement that the conduct must have been done to the defendant was applied by Einstein J at first instance in the case of *Magafas v Carantinos*<sup>158</sup> in which case the degree of connection between the conduct and the relief was a central question. The facts of *Magafas* may broadly be stated as follows.<sup>159</sup> Mr Carantinos had a graphic design business called Comunicado, and Mr Magafas had a printing business. They agreed to enter into a partnership for the development of properties. Magafas and Carantinos agreed that most of the cash flow for the property development venture would be provided by Mr Magafas's profitable printing business. It was agreed between them that the funds would be provided by Magafas to Carantinos's company Comunicado in response to invoices issued by Comunicado. In that way Magafas would be able to claim the contributions as tax deductions and Carantinos would be able to satisfy various lenders, by the elevated income levels of Comunicado, of the serviceability of various loans and further would not have to pay tax because of other tax losses.

To that end a company called Pac Com was created (as trustee of a discretionary unit trust for the benefit of their families) and each of them were appointed directors and equal 50% shareholders. During the course

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<sup>158</sup> *Magafas v Carantinos* [2007] NSWSC 416 esp at [189] although overturned on appeal on this point. The requirement was applied in *Deeson Heavy Haulage Pty Ltd v Cox* [2009] QSC 277; (2009) 82 IPR 521, [273] where McMeekin J accepted that the conduct in question had to involve 'an iniquity aimed at the defendant,' although that case did not turn on that requirement as McMeekin J found (at [274]) that the conduct was in fact 'aimed directly at the defendants.'

<sup>159</sup> The facts were largely uncontested, see *Carantinos*, above n 87, [6]-[47].

of the venture, Magafas contributed payments of \$500,000 and \$600,000 by direct payment to Pac Com, and a further \$480,000 by the fraudulent mechanism of payments through Comunicado in response to false invoices, for which payments Magafas claimed tax deductions. Various properties were purchased through the venture however, Mr Carantinos also caused property to be purchased in the names of himself and his wife rather than Pac Com and misappropriated moneys from Pac Com's bank account.<sup>160</sup> In 2005, Carantinos precipitated the disintegration of the relationship with Magafas by claiming \$2million in management fees.

Mr Magafas sought an account of profits from the partnership claiming the contributions of \$500,000 and \$600,000 as well as the \$480,000 contributed through the fraudulent scheme. In his defence, Mr Carantinos alleged that Mr Magafas had unclean hands by reason of his involvement in the fraud on the revenue and so that he was not entitled to relief sought.

In that case, Einstein J, relying on the decision of Campbell J in *Black Uhlands Inc v New South Wales Crime Commission* held that 'the so-called disentitling conduct must have been done to/directed at the defendant,'<sup>161</sup> and further that '[i]t is equally clear that in so far as Mr Magafas was one of the parties to the agreement to engage in the so-called disentitling conduct, the conduct was not directed at the defendant.'<sup>162</sup>

It is not difficult to reconcile Einstein J's acceptance of the necessity for the conduct to be 'done to or directed towards the defendant' with the

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<sup>160</sup> [2007] NSWSC 416, [6].

<sup>161</sup> [2000] NSWSC 1060, [162], although this was an incorrect interpretation of *Black Uhlands*, above n 83, as later in his decision (at [171]), Campbell J explicitly rejects this requirement.

<sup>162</sup> *Ibid* [191].

principle that ‘general depravity’ will not suffice as unclean hands. As noted by Allsop P in *Kation v Lamru*:

The ‘immediate and necessary relation to the equity sued for’ (to use the words of Eyre LCB in *Dering v Earl of Winchelsea* (citation omitted) was in contradistinction to ‘general depravity.’<sup>163</sup>

However the New South Wales Court of Appeal<sup>164</sup> overturned Einstein J. It rejected the requirement that the conduct in question must have been done to the defendant on the basis that it *Black Uhlands* was not authority for that proposition,<sup>165</sup> nor was it consistent with other authorities cited in that case.<sup>166</sup>

Einstein J’s approach was unduly rigid in that it failed to accommodate the fundamental principle underlying the clean hands defence that a party should not be permitted to take advantage of its own wrong. When that is used as the touchstone of the maxim’s application, one can readily see that it may apply even where the conduct in question is not directed at the defendant. So in *Magafas*, the defence of clean hands was available to Mr Carantinos even though the conduct of Mr Magafas raised in support of that defence, being the defrauding of the revenue, was not directed at Mr Carantinos. If clean hands was not available, the court would be in the position of enforcing an equitable interest with the effect of defrauding the revenue.

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<sup>163</sup> *Kation*, above n 7, [8].

<sup>164</sup> *Carantinos*, above n 87.

<sup>165</sup> *Ibid* [52]-[53] (Hodgson JA), [117] (Campbell JA) [153] (Handley AJA).

<sup>166</sup> *Kettles*, above n 6 and *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384, 397.

Further examples of conduct not directed at the other party being sufficient to satisfy the nexus requirement are provided by *Kation v Lamru*;<sup>167</sup> *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd*;<sup>168</sup> *Armstrong v Sheppard & Short Ltd*;<sup>169</sup> *Kyriakou v Saba*<sup>170</sup> and *Sino Iron v Palmer*.<sup>171</sup>

In *Kation v Lamru*<sup>172</sup> the plaintiff and defendant had been in a business together using a method which defrauded the revenue. Some years after the business relationship ended, the plaintiff brought proceedings seeking an account of profits for the intervening years. The plaintiff relied on the previous pattern of behavior as proof that unaccounted for profits had since been made by the defendant. The court ultimately held, notwithstanding that the misconduct was directed towards defrauding the revenue, that the plaintiff was precluded by his unclean hands from bringing the proceedings.

In *Kettles*<sup>173</sup> the plaintiff had for some time manufactured and sold kettles of a particular design under a particular name and falsely marked as ‘patented’ when in fact the design was not patented. The defendant began trading in similar looking goods and the plaintiff sued for fraudulent passing off, deceit and innocent passing off. The plaintiff’s claims against the defendant for fraudulent passing off and deceit failed by reason of not

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<sup>167</sup> Above n 7.

<sup>168</sup> Above n 6.

<sup>169</sup> [1959] 2 QB 384.

<sup>170</sup> [2000] VSC 318.

<sup>171</sup> *Sino Iron Pty Ltd v Palmer* [2014] QSC 287, [36]. *Sino Iron* was a pleadings case where the plaintiff sought to argue that the clean hands defence was not available because the misconduct alleged was not done to the defendant. Jackson J rejected that argument based on the binding authority of *Carantinos*.

<sup>172</sup> Above n 7, discussed in greater detail below at chapter 5.4.

<sup>173</sup> Above n 6.

establishing the necessary mental element on the part of the defendant. The plaintiff's further claim for equitable relief for innocent passing off was met with the argument by the defendant that the plaintiff was barred from obtaining equitable relief by reason of its unclean hands in falsely claiming the kettle was patented. Long Innes J held:

I am of the opinion that ... the use of the word 'Patented' was deliberate and intended to deceive the public and to deter others from manufacturing and vending a similar article, and was likely to have that effect, and I see no reason why I should not infer that it had that result. I think also that the acquisition of that degree of distinctiveness without which the plaintiff could not have established its right to succeed in this suit was in part at least due to such action.<sup>174</sup>

In one sense it could be said that the plaintiff's conduct was 'done to the defendant' as the defendant was a member of the class of people at whom the conduct was relevantly directed, that is the public. However the better justification for the application of the clean hands defence is that notwithstanding the misconduct in question was not directed at the defendant, the plaintiff was by the proceedings seeking to obtain an advantage (in the context of the proceedings) from its misconduct.

As discussed above, the underlying principle for the clean hands doctrine is that the Court should not assist a person to take advantage of a wrong, and in the facts of *Kettles*, the sense of that approach is obvious. The plaintiff's goods had developed a degree of distinctiveness because they were falsely represented as 'patented.' That distinctiveness was a necessary fact as a matter of evidence and pleading for the claim to

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<sup>174</sup> [1959] 2 QB 384, 394

succeed. If the Court upheld the plaintiff's claim notwithstanding that conduct, the plaintiff could be said to have successfully taken advantage of its wrong with the assistance of the Court.

Another example of the way in which advantage could be derived if a court were to ignore a wrong done to someone other than the defendant is provided by the relatively uncomplicated facts in *Kyriakou*.<sup>175</sup> In that case, the plaintiff claimed a constructive trust over property to which he had made financial contributions. However, it became apparent that at the time of the contributions, the plaintiff was bankrupt and the moneys should have been disclosed and largely paid to the trustee in bankruptcy for distribution to creditors. Balmford J held:

In the present case, the unclean hands are said to derive from the inferred breach ... of Mr Kyriakou's obligations to his trustee and through the trustee, to his creditors, rather than from a breach of his obligations to Mr Saba, against whom his claim is made, or a fraud on the public. However, that breach of obligations to his creditors has 'an immediate and necessary relation to the equity sued for' (*Dering v Earl of Winchelsea*) in that he relies on payments made with moneys not his own and not notified to his trustee as founding an equitable interest in the property. I am satisfied that for Mr Kyriakou to establish his equitable claim to a constructive trust in his favour over the property would be for him to 'derive advantage from his own wrong' (*Meyers v Casey*) and thus he cannot maintain that claim.<sup>176</sup>

This decision may well have resulted in prejudice to the creditors who were defrauded of a possible share in the property, however the point for

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<sup>175</sup> *Kyriakou v Saba* [2000] VSC 318.

<sup>176</sup> *Ibid* [35].

the present purposes is that misconduct not directed at the defendant was sufficient to constitute unclean hands.

The 'rule' that conduct must be directed at the defendant appears to have emerged from a desire to emphasise that general or unrelated depravity could not amount to unclean hands. That emphasis was converted into the rule which was expressed as being generally applicable, but which, it has transpired, was not. That is not to say the cases in which the rule was expressed were incorrectly decided, or that they would be decided differently without that rule. It merely is to say that the fact that conduct is not directed towards the defendant does not necessarily preclude the clean hands defence. Such circumstances may still form part of the description of the circumstances which taken together will persuade a court of equity to preclude relief by reason of unclean hands.

When considered through the lens of the 'taking advantage of a wrong' rationale, it becomes apparent that there is no need that the conduct be directed at the defendant, and indeed such a rule can lead to circumstances where a party is able to take advantage of its own wrong with impunity.

If the plaintiff's action need not be 'done to' the defendant in a direct sense, is it nonetheless necessary that the defendant has suffered some type of harm as a result?



### 5.3.2 Defendant Must Be Injured by the Misconduct

Another 'rule' stated by Pomeroy is that a defendant 'must show that he himself has been injured by such conduct, to justify the application of the principle to the case.'<sup>177</sup> Pomeroy relied on the case of *Langley v Devlin* in which the collusion of the parties to the litigation to a fraud on a third party was held not to be sufficient to give rise to a clean hands defence, in part, because the defendant had not been injured by the conduct.

In *Langley v Devlin* the Court held

Respondents were put in no worse position by the alleged fraudulent acts of the appellants. On the contrary, they profited by them. The maxims, 'He who comes into equity, must come with clean hands,' or, after suit brought, 'He who seeks equity, must do equity,' mean no more than that he who has defrauded his adversary to his injury in the subject-matter of the action will not be heard to assert a right in equity.<sup>178</sup>

This again, is a situation of a court expressing a general principle in circumstances where it is neither necessary, nor advisable to do so. It is not necessary because whether the conduct has an 'immediate and necessary' relation to the equity sued for can and should be answered primarily by considering whether the plaintiff is, by the proceeding, seeking to take advantage of their own wrong. And it is not advisable because there may be circumstances in which a plaintiff is seeking to take advantage of his own wrongdoing although no action has been directed

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<sup>177</sup> Pomeroy, above n 7, §399 n 20 citing *Langley v Devlin* 95 Wash. 171, 163 P. 395, 4 A.L.R. 32 and other authorities. See also *Lincoln National Insurance v Chitkin*, 879 F. Supp 841 (S.D. Cal 1995).

<sup>178</sup> (1917) 95 Wash 171, 163 P 395 (Chadwick J with whom Ellis CJ, Mount, Fullerton and Morris JJ agreed).

towards the defendant and the defendant has not suffered any loss. It is difficult to justify a general principle which would so constrain a court of equity exercising its discretion having regard to considerations of conscience.

*Kation v Lamru*<sup>179</sup> is an example of a case where the plaintiff's misconduct was not directed at the defendant nor did the defendant suffer any loss. In fact, the defendant was entirely complicit and gained from the misconduct to which he was a party. However, it was equally clear that the plaintiff brought the proceedings to take advantage of its wrong. Similarly in *Kettles*,<sup>180</sup> it would have been very difficult to establish that the defendant in that case suffered any harm as a result of the plaintiff's misconduct in falsely claiming its kettles were patented. Nonetheless the court denied the plaintiff relief on the basis that it was seeking to take advantage of its wrong.

The underlying principle is not that a plaintiff should not be permitted to harm a defendant; it is that a plaintiff should not be permitted to take advantage of its own wrong. A court exercising equitable jurisdiction should not be precluded from taking into account the misconduct of a plaintiff merely because the misconduct is not directed at a defendant or a defendant is not injured. That is not to diminish the necessity of a connection between the misconduct and relief sought, it is merely to grant the court sufficient latitude to give effect to the conscience of equity expressed through the clean hands defence having regard to its rationale.

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<sup>179</sup> *Kation*, above n 7, discussed below at chapter 5.4.

<sup>180</sup> *Kettles*, above n 6.

### 5.3.3 The Conduct Must Have Been Done by the Plaintiff

It seems obvious at first that for a plaintiff to be met with a clean hands defence, it must have engaged in some relevant misconduct. However various situations give rise to questions of whose conduct is relevant and whether that conduct is appropriately attributed to the plaintiff for the purposes of clean hands. For example, questions arise in the context of agency, trusteeship, attribution of conduct and knowledge of directors to companies, and the role of liquidators vis-à-vis the company. The authors of *On Equity* state ‘it is unclear whether the conduct of a party who is seeking relief on behalf of another, or in a representative capacity, is relevant.’<sup>181</sup> Further questions arise as to how a plaintiff’s conduct should be considered when he has multiple motivations in bringing proceedings or there are multiple possible consequences to the proceedings, some clean and some unclean. Each of these is considered below.

#### 5.3.3.1 Agency

There is no reason why principles of agency should not apply in the context of the nexus requirement of the clean hands defence so that the actions of an agent within its actual or apparent authority are treated as the conduct of the principal.<sup>182</sup> As Long Innes J held in *Kettles*:

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<sup>181</sup> Above n 7, 184 [3.360].

<sup>182</sup> *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165.

The plaintiff, like any other principal, is affected with the guilty knowledge, and liable for the fraud, of its agent acting within the scope of his authority.<sup>183</sup>

On basic principles, and consistently with conscience, an agent dealing with a third party will bind a principal where the agent is acting within actual or apparent authority. Conversely, an agent will not bind a principal where they are acting beyond the scope of apparent authority or where, even though an agent purports to act within the scope of authority, the third party knows the agent is acting beyond authority.<sup>184</sup>

The situation is more complicated where an agent acts beyond the scope of their authority, and so would not prima facie bind the principal, but the practical consequence is that a plaintiff/principal stands to gain an advantage as a result of that conduct. A parallel may be drawn between this situation and the case of innocent misrepresentation. As is the case in relation to innocent misrepresentation, although the circumstances in which a right arises may not be unconscientious, an attempt to enforce a right may nonetheless amount to 'moral delinquency' for the purposes of equitable relief.<sup>185</sup> A similar approach is taken in relation to agency principles where a principal is not bound by acts of an agent beyond

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<sup>183</sup> *Kettles*, above n 6, 128.

<sup>184</sup> *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421; *Combulk Pty Ltd v TNT Management Pty Ltd* [1993] FCR 89; (1993) 41 FCR 59; *Sydney Water Corp v Makucha* [2010] NSWSC 114, [60] (White J).

<sup>185</sup> See discussion at 5.6.1 in relation to *Redgrave v Hurd* (1881) 20 Ch D 1; [1881-5] All ER Rep 77 and see *MGL*, above n 7, 454 [13-015]; *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; (2003) 217 CLR 315; 325 [25] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ); *ACCC v C G Berbatis* [2003] HCA 18; (2003) 214 CLR 51, 72-3 [42] (Gummow and Hayne JJ).

actual or apparent authority unless a benefit accrues to the principal.<sup>186</sup> So where money, or property, or the proceeds thereof have been received by or applied for the benefit of the principal, the principal will be bound by the actions of the agent.<sup>187</sup>

However, the fact that a benefit accrues to a person by the actions of another, does not mean that a relationship of agency exists. In *Cassegrain v Cassegrain*<sup>188</sup> the High Court has recently considered whether the fraudulent intent of a husband who transferred an interest in torrens title land to his wife, to her benefit, in breach of obligations he owed to the corporate transferor, could be imputed to the wife for the purposes of the *Real Property Act 1900 (NSW)*.<sup>189</sup> The majority held:

Concluding that Claude [the husband] had taken the steps necessary to procure registration of the transfer from the company to Felicity [the wife] and him as joint tenants showed no more than that Claude had performed tasks that were of advantage to Felicity. It was neither alleged nor found that Claude had acted as Felicity's agent in any other way, whether by negotiating the transaction with GC&Co [the transferor] or by representing that the price for the land could be met by debiting the loan account. So far as the evidence and argument went, Felicity was no more than the passive recipient of an interest in land which her husband had

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<sup>186</sup> *Jacobs v Morris* [1902] 1 Ch 816, 832 (Vaughan Williams LJ); *Lloyd v Grace Smith and Co* [1912] UKHL 1; (1912) AC 716, 738 (Lord Macnaghten). The benefit could be by way of money, property, or proceeds of property.

<sup>187</sup> See *Halsbury's Laws of Australia* [15-260], nn 7-11.

<sup>188</sup> *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2; (2015) 316 ALR 111 ('*Cassegrain*')

<sup>189</sup> In particular s118(1) as set out at [19] of the decision.

agreed to buy, but which he wanted (with her acquiescence) put into their joint names.<sup>190</sup>

The question could still arise whether it would be considered a 'moral delinquency'<sup>191</sup> on the part of the wife in *Cassegrain*, to take proceedings to enforce her interest in circumstances if, at the stage of litigation, she was aware of the fraudulent circumstances in which the transfer to her came about. Considerations of the effect of indefeasibility of title play into that question<sup>192</sup> and it is not necessary for present purposes to attempt to resolve those issues. Suffice to say that the policy of the *Real Property Act 1900* is likely to be determinative of whether, and if so to what extent, equitable rights are affected by the terms of the statute.<sup>193</sup>

What can be said is that where an agent acts beyond the scope of authority and a benefit to the principal accrues as a result, any steps by the principal to enforce such a benefit or advantage may amount to unclean hands where the enforcement of the advantage is unconscientious.

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<sup>190</sup> *Cassegrain*, above n 188, [41] (French CJ, Hayne, Bell and Gageler JJ) (footnotes omitted).

<sup>191</sup> See *Redgrave v Hurd* (1881) 20 Ch D 1; [1881-5] All ER Rep 77 and *Tanzwar*, above n 107.

<sup>192</sup> As to which see the comments of Keane J at [84] that '[i]n addition, the primary judge held that, while the appellant may have been accountable in equity to the respondent, ss 42 and 118(1)(d) of the *Real Property Act* operated so that her title as sole registered proprietor of the Dairy Farm was indefeasible: *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156; 6 BFRA 77, [164].' At first instance, Barrett J held at [164] that '... Felicity may have become aware subsequently that she had received the proceeds of fraud (she was obviously aware of the allegations in these proceedings) and that may be sufficient, in the eyes of equity, to cause Felicity to be accountable to GC & Co.'

<sup>193</sup> See *Nelson*, above n 7.

### 5.3.3.2 *Misconduct of Directors Attributed to Company*

Similar issues arise in relation to corporate identity. A company will not generally be imputed with knowledge of the fraudulent conduct of one of its directors as against the company so as to preclude equitable relief.<sup>194</sup>

However

[i]f the director is guilty of fraudulent conduct which ... by design or result ... partly benefits the company, the knowledge of the director in the transaction will be attributed to the company.<sup>195</sup>

This does not mean that any benefit would necessarily bar relief. In the context of clean hands, a court exercising equitable jurisdiction may, for example, consider that the conscience of equity is best accommodated by allowing a company to bring proceedings notwithstanding some delinquency on the part of a director that benefitted the company. The benefit may be trifling compared to the rights infringed.<sup>196</sup> A correct analysis of such a situation would be that hands are unclean, but general discretionary considerations weigh against precluding relief on that basis.<sup>197</sup>

A more complicated situation arose in *Bell v Westpac*<sup>198</sup> where it was alleged<sup>199</sup> that the misconduct by fraudulent directors within the Bell

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<sup>194</sup> *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1988) 91 FLR 271, 287 discussed in *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239; (2008) 39 WAR 1, [9403]-[9404].

<sup>195</sup> *Beach Petroleum NL and Claremont Petroleum NL v Malcolm Keith Johnson* [1993] FCA 283; (1993) 43 FCR 1, 32.

<sup>196</sup> In *Fiona Trust*, above n 74, [19] it was held that the 'misconduct may be too trivial to import' the consequence of barring relief.

<sup>197</sup> As to general discretionary considerations see below chapter 8.

<sup>198</sup> *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239; (2008) 39 WAR 1.

<sup>199</sup> See *ibid* [9401].

Group of companies constituted unclean hands undermining any claim by any members of the group for equitable relief. Owen J rejected that submission and held:

If the banks argument is correct, it would be very difficult to establish an entitlement to equitable relief in any situation where there was a group of companies, there were common directorships and more than one company within the group was involved in the joint enterprise. Common directorships across group companies is a frequent occurrence in Australian commerce. I think it would take more than the mere existence of a joint enterprise by members of a group (carrying with it the knowledge possessed by common directors) to amount to unclean hands.<sup>200</sup>

It is unclear why the knowledge and conduct of common directors should not be attributed to the company and so come within the meaning of legal and moral depravity for the purposes of the clean hands maxim. The considerations identified regarding the extent of common directorships within groups of companies may be policy considerations militating against the blanket application of a clean hands defence in such circumstances, however that is more a question of general discretion than a basis to find there would be no unclean hands at all, particularly where some benefit accrues to the companies in the group.

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<sup>200</sup> Ibid [9406].



In this regard, a director would include those who are not validly appointed as directors but are shadow or de facto directors.<sup>201</sup> Further, attribution in this context is not limited to directors but extends to

persons so closely and relevantly connected with the company that the state of mind of that person or those persons can be treated as being identified with the company so that their state of mind can be treated as being the state of mind of the company.<sup>202</sup>

Unclean conduct, therefore, of a director or person sufficiently closely connected with the company can constitute unclean hands of the company where a benefit accrues to the company and the company is in a relevant sense taking advantage of that wrong in proceedings. An example of such attribution is the case of *Suleman v George*.<sup>203</sup>

In *Suleman v George*, the plaintiff company (KSE) conducted an illegal managed investment scheme. Karl Suleman and his wife were sole directors and shareholders. The scheme operated as a ponzi scheme, described by Windeyer J as ‘a giant fraud enabling Karl Suleman to live the life of Riley on investors’ funds.’<sup>204</sup> As part of the implementation of this fraud the company engaged agents, including the defendant Babanour, to lure investors into the scheme for which services they were paid a percentage of the amounts received or commission. KSE was wound up and its liquidators issued proceedings against the agent

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<sup>201</sup> See definition of ‘director’ in s9 of the *Corporations Act 2001* (Cth) which includes those who, though not validly appointed, ‘act in the position of a director’ or those in accordance with whose instructions or wishes the directors ‘accustomed to act.’

<sup>202</sup> *Krakovski v Eurolynx Properties Ltd* [1995] HCA 68; (1995) 183 CLR 563, 582-3 (Brennan, Deane, Gaudron and McHugh JJ).

<sup>203</sup> *Karl Suleman Enterprises Pty Ltd (in liq) v George* [2003] NSWSC 544 (*‘Suleman’*).

<sup>204</sup> *Ibid* [2].

Babanour to recover moneys improperly paid to Babanour alleging breach of fiduciary duties owed to it. Windeyer J noted that the liquidators had no standing to bring the action and that the cause of action was vested in, and brought by, the company.<sup>205</sup> In commenting generally, Windyer J identified the difficulty faced by a company seeking to bring such an action:

The extraordinary thing about this action is that KSE, having been engaged in what is pleaded to be a thoroughly fraudulent and illegal operation and having entered into a contract with various persons to assist it in this operation, is seeking to recover back from those persons moneys received by them from KSE as a result of their agency operations, or perhaps in some cases some moneys paid to them by investors in their capacity as agents for KSE and not passed on to KSE.<sup>206</sup>

Unsurprisingly, the defendant brought an application to strike out or dismiss the claims for equitable relief on the basis that they were destined to fail having regard to the unclean hands of the plaintiff. Windeyer J commented generally in relation to the company's claim that:

If a company guilty of fraud under one set of directors comes under the control of an honest set of directors that cannot make a claim which, if made by the company in the control of dishonest directors, would fail, into a claim that could succeed if brought when honest directors were in control.<sup>207</sup>

On the basis that the claim was by the company, and the misconduct was that of the company albeit performed when under the control of previous

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<sup>205</sup> Ibid [10].

<sup>206</sup> Ibid [9].

<sup>207</sup> Ibid [17].

directors, the claim was fatally flawed. A contrary result was achieved in the New Zealand case of *Marshall Futures Ltd v Marshall*,<sup>208</sup> upon which the plaintiff in *Suleman* sought to rely.

In *Marshall* the plaintiff (MF) had improperly paid trust funds held by it to an associated company (M). MF went into liquidation and the liquidator instituted proceedings in the name of the company seeking to recover the funds improperly transferred. M raised a clean hands defence based on MF's involvement in the fraud and sought to strike out the plaintiffs claim. Tipping J observed '[t]he plaintiff must prove that the hands of those who were controlling it at the material times were unclean in such a way as to make it, the plaintiff, fraudulent...'<sup>209</sup>

Tipping J acknowledged that the plaintiff MF was 'the same legal entity' however, critically to his decision, noted that 'the hands controlling it are now those of the liquidator and not those of the directors. There cannot be any suggestion that the liquidator's hands are unclean.'<sup>210</sup> Tipping J ultimately held that it was an appropriate case to 'lift the corporate veil' and when he did, it was apparent that 'in substance in the present case the company now in liquidation raises the first cause of action in essence as the agent of its creditors.'<sup>211</sup>

It is apparent from Tipping J's reasoning that there was force in the claim that the plaintiff had unclean hands. However, even where unclean hands is established it is not 'an absolute bar' and the court retains a general

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<sup>208</sup> *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316.

<sup>209</sup> *Ibid* 330.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Ibid*.

discretion.<sup>212</sup> In *Marshall* Tipping J took into account the fact that the liquidator was taking action essentially for creditors in determining that a court deciding the issue may exercise its discretion to overlook the plaintiff's unclean hands. The generous approach of Tipping J in *Marshall* may be accounted for having regard to the justifications which may operate in such circumstances. There is no sense in which the integrity of the court would be compromised by the claim as the result would not legitimise or perpetuate any wrong. Punishment of the company by precluding relief would only harm the creditors. Deterrence is irrelevant, and the moral authority of the company under the control of the liquidator is not intuitively diminished in the circumstances by the actions of the company under previous directors.

Notwithstanding the result in *Marshall*, each of *Suleman* and *Marshall* support the proposition that where a company has unclean hands because of the actions of its controlling minds, a change in the controller of the company will not render the conduct clean, nor will it necessarily enable a company to avoid the consequences of that uncleanliness. Windeyer J distinguished *Marshall* on the basis that the funds in question in *Suleman* were not for the purposes of the proceeding treated as trust funds whereas in *Marshall* they were.<sup>213</sup> However, *Marshall* is best explained as an example of the exercise of discretion where unclean hands would have been established.

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<sup>212</sup> Ibid 331.

<sup>213</sup> See *Suleman*, above n 203, [19]. The reasoning was that a trustee in breach of trust may bring proceedings to reinstate the trust fund notwithstanding their own misconduct. However, Windeyer J acknowledged (at [19]) that that was not the basis of the decision in *Marshall*.

The decisions in *Robson v Robson*<sup>214</sup> and *Singh v Singh*<sup>215</sup> demonstrate that the rights of third parties are relevant to the exercise of the discretion whether to grant equitable relief. *Suleman* could perhaps be explained as a product of discretion, however, the vigour with which the plaintiff was condemned by its misconduct suggests that the court did not descend to matters of discretion. The degree to which this transgresses accepted personality distinctions in company law need not necessarily preclude equitable sanction. In a similar vein, in *Overton v Bannister*<sup>216</sup> and *Cory v Gertcken*<sup>217</sup> the beneficiaries who, as infants had procured a distribution to themselves from the trustee of a trust fund and later upon attaining their majority sought to charge their trustees with the moneys advanced, found that equity did not recognise the protections usually given to infants and barred them from relief.

### 5.3.3.3 *Misconduct of Company Attributed to Directors*

The inverse raises another question: if a company has unclean hands, will a director be personally tainted by that misconduct so a clean hands defence will be available to defendants resisting claims brought by the director personally.

It would be consistent with the clean hands maxim and considerations of conscience which underlie it, that if the misconduct of the company was brought about by the director/plaintiff (presumably as the controlling

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<sup>214</sup> *Robson v Robson* [2012] QCA 119 discussed at chapter 8.4.

<sup>215</sup> *Singh v Singh* (1985) 15 Fam Law 97 discussed at chapter 8.4.

<sup>216</sup> (1884) 3 Hare 503; 67 ER 479.

<sup>217</sup> (1816) 2 Madd 40; 56 ER 250.

mind and will of the company) and if by the proceedings the plaintiff/director sought to take advantage of that misconduct in some way, a court exercising equitable jurisdiction should be able to take that conduct into account in determining whether the plaintiff should be granted relief. The point was argued by the respondent bank in *Commonwealth Bank of Australia v Invest Pty Ltd (In Liq) (No 2)*.<sup>218</sup> In that case the plaintiff bank obtained orders for possession of two properties pursuant to a mortgage from the registered corporate owner. The controlling mind of the company, Mr Harker-Mortlock, applied to set the orders aside including on the basis that the property was held subject to a discretionary trust. The bank argued in response that

because Mr Harker-Mortlock is the guiding mind of the company, his conduct in causing the company to breach the mortgage by declaring that it held Blackburn and Brecon on trust is relevantly ‘a depravity in a legal as well as in a moral sense’ which bears ‘an immediate and necessary relation to the equity sued for’ (citation omitted).<sup>219</sup>

The argument was that the equity sought to be engaged was the equitable principle permitting a beneficiary to bring proceedings rather than a trustee. The bank argued that *Mr Harker-Mortlock’s* hands were so unclean that no cross-claim which depends upon that equity should be permitted to proceed. De Jersey CJ declined to summarily dismiss the claim, holding that it was a matter for trial to resolve the question.

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<sup>218</sup> [2014] NSWSC 1640. In *Dhami v Martin* [2010] NSWSC 770; (2010) 241 FLR 165 it was argued that a person had unclean hands based on his influencing 2 of 4 board members to make certain decisions. The Court rejected that argument because, not only did he not in fact so influence them, but the two directors in question did not have a controlling vote.

<sup>219</sup> At [35].

There remains the issue that a company is a separate legal entity from its members and directors<sup>220</sup> and the acts of it and its directors are strictly speaking distinct. However the rationale of *Marshall* could be applied in reverse so that the misconduct of company could be seen to be ‘in essence’ misconduct of the company as agent for a plaintiff who is a director of the company.

#### 5.3.3.4 *Misconduct of a Predecessor*

In *Kettles Long Innes J* considered<sup>221</sup> the question whether a plaintiff should be saddled with the misconduct of the plaintiff’s predecessor – in that case an individual predecessor to a corporate plaintiff. Long Innes J held that the plaintiff should not be so saddled. However, one can imagine circumstances where the conduct of the predecessor should bar relief – such as where there is the sale of a business to a related entity to avoid insolvency issues, or where the individual becomes the controlling mind of the corporation.

#### 5.3.3.5 *Misconduct by Trustee*

A more legally direct sense in which a plaintiff acts for or on behalf of another, is the situation where a trustee brings proceedings for the benefit of a beneficiary. Case law in this area provides some guidance, albeit not

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<sup>220</sup> *Salomon v Salomon* [1897] AC 22; *Pilmer v Duke Group Ltd* [2001] HCA 31; (2001) 207 CLR 165, [34] (McHugh, Gummow, Hayne, Callinen JJ).

<sup>221</sup> *Kettles*, above n 6, 126.

entirely consistent, as to how the clean hands maxim applies in such circumstances.

It is well established that a trustee has a right to sue in order to remedy breaches of trust.<sup>222</sup> As observed by Brooking J in *Young v Murphy*<sup>223</sup> a trustee may in fact be in breach of his duty if he fails to do so, and that is so even where the trustee who was a party to a wrongdoing, sues a co-trustee to remedy the breach. This power arises from, and is justified by, the obligation to get in all the trust property for the benefit of the beneficiaries.<sup>224</sup> However, there is no reason in principle why an action by a trustee who has unclean hands could not be maintained in circumstances other than getting in trust property where the purpose is to benefit the objects of the trust.<sup>225</sup> By contrast, a proceeding by a co-trustee against another co-trustee for a purpose other than to benefit the beneficiaries, may be barred by unclean hands. For example, a fraudulent co-trustee who has made good the loss to the trust estate caused by that fraud, may be precluded from seeking contribution from other fraudulent co-trustees,<sup>226</sup> whereas if a trustee is liable to make good the loss to the beneficiaries but is not tainted sufficiently to constitute unclean hands,

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<sup>222</sup> *Alexander v Perpetual Trustees WA Ltd* [2004] HCA 7; (2004) 216 CLR 109, [55]–[56] (Gleeson CJ, Gummow and Hayne JJ) recently applied in *Lewis v Condon* [2013] NSWCA 204; (2013) 85 NSWLR 99, 122 [108] (Leeming JA with whom McColl JA at 102, [1] and Sackville AJA at 124 [118] agreed); *Young v Murphy* [1996] 1 VR 279.

<sup>223</sup> *Young v Murphy* [1996] 1 VR 279, 281.

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid* 284 citing *Adamson, Ex Parte*; *Re Collie* (1878) 8 Ch D 807, 819; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* (1966) 2 NSWLR 211; *Bartlett v Barclays Trust Co (No 2)* [1980] Ch 515, 543; *Hill v Rose* [1990] VR 129, 143–144; *Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne* (unreported, Full Court, 26 November 1991).

<sup>226</sup> William Fratcher, *Scott on Trusts* (Little, Brown & Co, 4<sup>th</sup> ed, 1988) §258.3 cited with approval in *Burke v LFOT Burke v Lfot Pty Ltd* [2002] HCA 17; 209 CLR 282, [143] (Callinen J).



that co-trustee could recover from the fraudulent co-trustee by way of contribution.<sup>227</sup>

On this rationale, the fact that the trustee plaintiff has unclean hands is beside the point if the purpose of the litigation is to benefit the beneficiary. The dictates of conscience that underlay the result in *Marshall* are more obvious in the case of trustees taking action on behalf of beneficiaries in relation to some wrongdoing in which the trustee has taken part. There is no sense in which proceedings by the trustee would offend against the principle that a Court should not permit a person to gain an advantage by their wrong, and insofar as any advantage could be identified, it would likely be outweighed by the competing interests of the beneficiaries in the proceedings.

#### 5.3.3.6 *Independent Cause of Action*

The question whether the plaintiff has engaged in misconduct will generally be readily ascertainable by reason of the coincidence of the identity of the plaintiff, its conduct, and fact that proceedings are brought by it for its own purposes. Questions of agency can be resolved in the ordinary course. More complicated questions arise where a plaintiff acts in a representative capacity. Where there is the distinction between the plaintiff and the person on whose behalf the litigation is being conducted, the question becomes, does misconduct on the part of the litigant amount

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<sup>227</sup> *Lincoln v Wright* (1841) 4 Beav. 427; *Bain v Hughes* (1886) 31 Ch D 390, 395; *Wynne v Tempest* [1897] 1 Ch 110 cited in William Fratcher, *Scott on Trusts* (Little, Brown & Co, 4<sup>th</sup> ed, 1988) §258.1.

to unclean hands, or is the proper inquiry directed towards the conduct of the person represented?

A two stage inquiry assists in clarifying the issues. In actions brought by liquidators or trustees, for example, the first inquiry is whether the liquidator or trustee is exercising rights vested in the trustee or liquidator personally or rights vested in and derived from the company or beneficiary.<sup>228</sup> If the action is an independent action vested in the liquidator or trustee, then the next question is whether they have engaged in any relevant misconduct within the clean hands maxim.

If the action being taken by the trustee or liquidator is an action vested in, or taken on behalf of the company or beneficiary, and not the trustee or liquidator, the question to be asked is whether the beneficiary or company engaged in any relevant misconduct.

Keeping these distinctions clear will ensure the clean hands maxim is applied consistently with the underlying principle of ensuring a plaintiff does not take advantage of their own wrong. In that way the conscience of equity will not be offended.

#### **5.3.4 Misconduct Must Be In the Relationship, In the Transaction.**

This requirement has been expressed in a number of different but closely related ways. It is predicated on a transactional relationship between the parties, and on the misconduct being tied to the transaction. There are

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<sup>228</sup> See *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; (1990) 169 CLR 332, [11]-[12] (Brennan and Dawson JJ) regarding whether a proceeding brought by a liquidator was brought 'through or under' the company.

numerous examples of cases expressing this kind of requirement for the clean hands maxim. In *FAI Insurances*,<sup>229</sup> for example, Young J observes that the clean hands maxim is descended from the maxim 'he who seeks equity must do equity' and further that in *Viner's Abridgement on the Maxims of Equity*, 'the maxim "he who seeks equity must do equity" is also limited to doing equity in the same transaction.'<sup>230</sup> In *Magafas* at first instance, Einstein J based his decision in part upon the fact that '[t]here was no lack of clean hands in the relationship between the two participants to the scheme.'<sup>231</sup>

This requirement was also expressed by Lord Brougham in *Attwood v Small* where he observed:

[T]hat general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention in design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which the transaction took place, and must have given rise to this contract.<sup>232</sup>

This passage from *Attwood* was cited with approval by Buchanan JA in *Anaconda Nickel*<sup>233</sup> where it was held:

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<sup>229</sup> *FAI Insurances*, above n 7, 559E.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Magafas v Carantinos* [2007] NSWSC 416, [190] although overturned on appeal.

<sup>232</sup> *Attwood v Small* [1838] EngR 515; (1838) 6 Cl & Fin 232.

<sup>233</sup> *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* [2004] VSCA 167; (2004) 50 ACSR 679, [37].

Unmeritorious or immoral conduct will not disentitle a plaintiff from equitable relief unless it has ‘an immediate and necessary relationship to the equity sued for’ (*Dering v. Earl of Winchelsea* (1787) 1 Cox. Eq. Cas. 318 at 319 per Lord Chief Baron Eyre) in that the conduct gave rise to the transaction sued upon.<sup>234</sup>

Pomeroy expresses the matter in similar terms:

The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction ...<sup>235</sup>

In *Sang Lee* the Privy Council considered ‘what conditions must be satisfied by the litigant who seeks to resist equitable relief on the ground of the misconduct of the opponent.’<sup>236</sup> It held that two conditions must be met, first, ‘the conduct must be wanting good faith’ and second, it must be ‘in the transaction’ which is the basis of the suit.<sup>237</sup>

*Sang Lee* involved a complex web of transactions for the purpose of a joint venture property development. The transactions sought to be specifically enforced were four sale agreements. The misconduct sought to be relied upon as disentitling the plaintiff to equitable relief were share allotments and the payment of sums of money. The Privy Council rejected the submission that they constituted relevantly disentitling conduct because

<sup>234</sup> Ibid [36] (Buchanan JA with whom Eames JA and Coldrey AJA agreed).

<sup>235</sup> Pomeroy, above n 7, 94-5 [399] quoted in *Kation*, above n 7, 340 [2] (Allsop P). See also *Robson v Robson* [2012] QCA 119, [71]-[87] (Fraser JA with whom Muir and White JJA agreed).

<sup>236</sup> *Sang Lee*, above n 72.

<sup>237</sup> Citing *Dering*, above n 7, and *Cadman v Horner* (1810) 18 Ves. 10. Cited with approval in *Coghlan v Pyoanee Pty Ltd* [2003] QCA 146; 2 Qd R 636, [16].

first, there was no finding that by the conduct the plaintiff intended to defraud or overreach the defendant and secondly,

[t]hese transactions had no connection whatever with any of the four sale agreements. The first and second sale agreements were made some 9 months before Ball Land was even incorporated, and the third and fourth sale agreements were mere reflections of the earlier agreements.<sup>238</sup>

Thus in *Sang Lee* the Privy Council appears to have proceeded on the basis that the equity relied on had accrued upon the execution of the four sale agreements and subsequent misconduct in the performance of the joint venture partnership did not relevantly undermine the equities that had arisen. The same approach was taken in *Alliance Craton* where one of the bases for declining to apply the unclean hands was 'the difficulty ... in relying for the defence of unclean hands on conduct which post-dates the event giving rise to the equity sought to be enforced.'<sup>239</sup>

The requirement that the conduct must be 'in the transaction' or to have 'given rise to the contract' is inconsistent with two towering decisions in the landscape of clean hands in which the misconduct was not in any transaction between the parties being sued upon, nor did it give rise to any contract.

The first case is *Kettles*<sup>240</sup> in which the alleged misconduct of the plaintiff was falsely representing on its products that they were patented. There is no sense in which the misconduct could be said to be 'in the transaction'

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<sup>238</sup> *Sang Lee*, above n 72, 3.

<sup>239</sup> *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2011] SASC 171, [67].

<sup>240</sup> Above n 6, discussed at chapter 5.3.1 above.

between the two parties, nor that the misconduct gave rise to any 'contract' between the parties.

The second case is *Kation v Lamru*<sup>241</sup> where the plaintiff and defendant some years prior to the claim, and before the break down of their relationship, had conducted business so as to perpetrate a tax fraud. Later the plaintiff sought an account of profits of the business that had been conducted since the breakdown of that relationship. The plaintiff did not need to rely on the misconduct for his claim, however he in fact did and it was material to the decision. In Court of Appeal Basten JA held the plaintiff's hands were unclean and that the clean hands defence did not apply because the requisite 'necessary' connection between the misconduct and the equity sued for did not exist.

Allsop P and Hodgson JA each held that, notwithstanding the misconduct was in a sense not strictly necessary to the claim, it was sufficiently closely related to the equity sued for to justify the application of the clean hands defence.<sup>242</sup> It is clear, that the misconduct in *Kation* in no way 'gave rise to the contract' sued on. As Basten JA noted:

At the legal level, the right which Lamru relies upon is that arising from the Nortex trust deed. In clear contrast to many cases in which the defence has been relied upon, there was no sense in which the establishment of the trust was tainted: cf *Nelson v Nelson* [1995] HCA 25; 184 CLR 538; *Gascoigne v Gascoigne* [1918] 1 KB 223; *Emery v Emery* [1959] Ch 410; *Griffiths v Griffiths* [1973] 1 WLR 1454. Nor was the conduct

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<sup>241</sup> Above n 7, discussed at greater length in chapter 5.4.

<sup>242</sup> Ibid 341 [9]. Allsop P applied the clean hands defence because the misconduct had a close temporal, forensic and practical human connection to the equity sued for. At 348 [26] Hodgson JA found '[t]he earlier conduct was an integral part of the plaintiff's case on this cause of action.'

complained of, which was found to be a fraudulent misappropriation of trust property, conduct in which either Lamru or Mr Lamb was implicated.<sup>243</sup>

It is difficult to reconcile *FAI*, *Anaconda*, *Attwood* and *Sang Lee* with *Kation* and *Kettles*. The strict interpretation of the nexus requirement suggested by the former cases are inconsistent with liability being imposed in the facts of *Kation* where the transaction itself was, in a strict sense, untainted, or in *Kettles* where there was no transaction at all between the parties.

The requirement is an example of a specific rule being inappropriately expressed as being of general application where general application does not serve the principle underlying clean hands, and is antithetical to the requirements of the conscience of equity.

### 5.3.5 Equity Must Have Been Brought Into Existence or Induced By the Misconduct

In *Meyers v Casey* Isaacs J referred to the need for an ‘immediate and necessary connection’ and held, as a mandatory requirement for clean hands, that the equity sued for must have been ‘to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff.’<sup>244</sup> This has been followed many times.

In *Michael Wilson v Nicholls* Einstein J adopted an approach that reflected this rule where he held:

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<sup>243</sup> *Kation*, above n 7, [151].

<sup>244</sup> *Meyers v Casey*, above n 7, 124. Referred to with approval by Allsop P in *Kation*, above n 7, 341 [8], and Young J in *FAI Insurances*, above n 7, 560C.

The particulars provided set out eight grounds that supposedly support the plea of unclean hands. In not one case is it even suggested, let alone alleged, that they have any relation to the equity sued on in ...

The particulars concentrate on matters pertaining to the plaintiff's conduct of these proceedings, which arose in time after the equity on which the plaintiff sues was complete. They do not, as they must do, attack the equity itself.<sup>245</sup>

The equity could not be said to have 'arisen out of' or been 'brought into existence by' the tainted conduct.

In *Robson v Robson*<sup>246</sup> the plaintiff sought to enforce a trust against the defendants. The defendants argued that the plaintiff had unclean hands by reason of having given false evidence in relation to the same trust in earlier matrimonial proceedings. The trial judge rejected the clean hands defence on the basis that the case could 'not be treated as one where the subject matter of the trust [sought to be enforced by the plaintiff] was the result of or augmented by the alleged misconduct.'<sup>247</sup> The defendants appealed and the Court of Appeal upheld the approach of the trial judge on that point.<sup>248</sup>

A similar issue arose in *Alliance Craton Explorer*.<sup>249</sup> In that case the plaintiff (Alliance) and defendant (Quasar) entered into a joint venture agreement. Quasar entered into two native title mining agreements and Alliance issued proceedings alleging that entering into such agreements was in

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<sup>245</sup> *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 721, [27]-[30].

<sup>246</sup> *Robson v Robson* [2011] QSC 234; *Robson v Robson* [2012] QCA 119.

<sup>247</sup> *Ibid* [77].

<sup>248</sup> *Ibid*.

<sup>249</sup> *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd & Heathgate Resources Pty Ltd (No3)* [2011] SASC 171.



breach of the joint venture agreement and sought equitable relief in relation to the conduct of the joint venture. Quasar countered that Alliance's conduct was unconscionable and also constituted unclean hands. The basis for the plea of unclean hands was that Alliance had, since the joint venture agreement was entered, been expressing concern and threatening to obstruct progress, had been refusing to participate in management meetings unless they were recorded, was pressuring the defendant to renegotiate and would continue to raise objections. The court rejected Quasar's submissions. White J referred to *Meyers v Casey* and held that the equity Alliance was enforcing 'does not have its origins in the conduct pleaded.'<sup>250</sup>

Another example arose in the Spycatcher case<sup>251</sup> where the plaintiff sought to restrain the defendant publisher from publishing what it alleged was confidential information in relation to the operations of the UK secret service by an ex-employee of the secret service. The defendant argued that the plaintiff had unclean hands which were said to be constituted by the very conduct described in the book, that is, the illegal activities of its employees.

The Court held that the clean hands defence did not apply because the obligation of confidentiality, which it sought to enforce, arose prior to and independently of the misconduct alleged. That is, the ex-employee was subject to obligations of confidentiality by reason of the employment and once that obligation was imposed, any subsequent misconduct by the employer would not constitute unclean hands because the obligation upon

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<sup>250</sup> Ibid [43].

<sup>251</sup> *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341.

which the equitable right was founded, pre-dated it. Such rationales echo the ability to enforce accrued rights under a contract that is later terminated.

However there are difficulties with any general rule that the equity must have arisen out of the misconduct.

First, the enforcement of legitimately obtained rights may be unconscientious.<sup>252</sup> In *Redgrave*<sup>253</sup> and *Tanwar*<sup>254</sup> it was acknowledged that the enforcement of rights that are obtained in a conscientious manner, that is that do not by their nature offend the conscience of equity, may constitute a moral delinquency for the purposes of equitable relief. So rights obtained by innocent misrepresentations may nevertheless be prevented from being enforced in equity if the conduct of the enforcement is itself unconscientious.

Secondly, misconduct in litigation that is seeking to enforce a pre-existing equity can constitute unclean hands so as to preclude relief.<sup>255</sup>

Thirdly, recent authority suggests Isaacs J's mandatory 'must' is being read as a permissive 'may'.

In *Kation v Lamru*,<sup>256</sup> Allsop P did not shy away from Isaacs J's rule, quoting it directly. However, thereafter Allsop P recast the nexus requirement as 'immediate and sufficiently close', and found that the circumstances came within that expression. Of particular importance to

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<sup>252</sup> See discussion at chapter 5.6.1.

<sup>253</sup> *Redgrave v Hurd* (1881) 20 Ch D 1; [1881-5] All ER Rep 77.

<sup>254</sup> *Tanwar*, above n 107.

<sup>255</sup> See discussion at chapter 6.

<sup>256</sup> Above n 7.

Allsop P was the fact that the misconduct had a close temporal, forensic and practical human connection to the equity sued for.

Allsop P was careful to set out the principles on which a court of equity will act, that is ‘honesty, equity ... conscience and good faith.’<sup>257</sup> Allsop P seems to have found himself in a position where in his opinion the conduct of the plaintiff offended against those underlying principles and granting relief to the plaintiff would facilitate the transgression. In those circumstances some creativity was required to ensure the conscience of equity was not offended. That creativity involved interpreting the scope of the nexus requirement, not by what the words include, but rather by what they exclude, that is, that the nexus requirement was ‘in contradistinction to “general depravity”’.<sup>258</sup> Then having found the misconduct had a close temporal, forensic and practical human connection to the equity sued for, Allsop P held it had an ‘immediate and sufficiently close’ connection to the equity and satisfied the nexus requirement.

In *Kation*, Hodgson JA held that the ‘immediate and necessary relation’ requirement ‘is not a requirement that the relation be of the nature of contributing to or constituting the equity sued for’.<sup>259</sup> Hodgson JA ultimately held that the misconduct ‘provided an essential part of the evidentiary material supporting the finding that the equity sued for existed’ and on that basis that it ‘was sufficiently close to justify the application of the clean hands doctrine.’<sup>260</sup> Hodgson JA’s approach in this regard seems inconsistent with the principle as stated in *Myers v Casey* and

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<sup>257</sup> *Kation*, above n 7, 339-40 [2].

<sup>258</sup> *Kation*, above n 7, 341 [8].

<sup>259</sup> *Kation*, above n 7, 348 [28].

<sup>260</sup> *Ibid.*

the cases which follow it in so far as it waters down the nexus requirement set out in *Dering* and explained by Isaacs J in *Meyers v Casey*. Hodgson JA justifies his approach by stating that the nexus requirement in *Dering* is not a rule of law but merely 'an aspect of principles guiding the exercise of discretion.'<sup>261</sup> That may be justifiable in principle, but textually, having regard to Isaacs J's use of the mandatory 'must' it is less explicable other than as a contradiction.

In *Windridge v Grassi*<sup>262</sup> it was argued that Hodgson JA intended to dilute the meaning of 'immediate and necessary' in *Meyers* and *Black Uhlans*. The Court in *Windridge* rejected that argument that Hodgson JA so intended, however the decision was based on the fact that the plaintiffs did not have to prove the fact of its unclean hands to prove its case.

*Kation* is a difficult case because it demonstrates that complex and unusual facts of a case may not neatly fit within established rules such as that the equity must have been brought into existence by the misconduct. Rather than stating as a rule that the equity must have been brought into existence by the misconduct, the better approach is to describe that fact, if it exists, as a non-mandatory indicium of connection supporting the application of clean hands. Indeed, in light of the fact that unclean hands may be constituted by misleading the court, the rule that the equity must have been brought into existence by the misconduct cannot be mandatory across all applications of clean hands, and its use in that context has caused confusion.

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<sup>261</sup> Ibid.

<sup>262</sup> *Windridge Farm Pty Ltd v Grassi* [2010] NSWSC 335; (2010) 238 FLR 289.

The better view is that the misconduct need not have been brought into existence or induced by the misconduct, and may be constituted by misconduct which post-dates the creation of the equity.

### 5.3.6 Forensic Proximity: Necessary to Prove, Plead or Rely on the Questionable Conduct

The requirement for forensic proximity of the misconduct to the relief sought has been stated in various ways: that it is necessary to prove,<sup>263</sup> plead or rely on the iniquitous conduct. The focus is on what is required to establish the case in the court process, rather than what is the actual state of fact.

As discussed above, the principle of the necessary relationship expressed in *Meyers v Casey*, was that conduct that does not have to be proved or relied on, or is not relevant to a cause of action, will not support a defence of unclean hands. As Barton ACJ held:

Evidence as to the turpitude or integrity of his conduct was not admissible on the case made. The evidence on the inquiry and on the appeal was admissible before the Supreme Court solely as part of the proof of the proceedings, and was not before it as proof of any facts deposed to by witnesses on these inquiries. On the case as so far dealt with I think the appellant fails.<sup>264</sup> Isaacs J in *Meyers v Casey* described the proof or reliance slightly differently as follows:

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<sup>263</sup> See for example *Hypac Electronics (in liq) v Mead* [2003] NSWSC 934; (2003) 202 ALR 688, 715-716 [110].

<sup>264</sup> *Meyers v Casey*, above n 7, 101-2 (Barton ACJ with whom Powers J and Rich J agreed).

The issue of whether the appellant was or was not in fact guilty of misconduct is in no way raised for the Court's determination, whereas the misconduct in respect of which the maxim is always applied is equally with all the other matters an issue within the sphere of the Court's determination.<sup>265</sup>

Isaacs J explicitly applied the *Dering* formulation to the facts of the case in *Meyers* to determine whether the maxim applied. Although it is clear from the decision that his Honour considered the misconduct in question in that case did not have an immediate and necessary connection to the equity sued for because it was not 'within the sphere of the Court's determination,' it is not clear whether all matters that happen to come within the sphere of the Court's determination will have a necessary connection to the relief sought.

In *Moody v Cox*<sup>266</sup> Warrington LJ held that 'relief should only be denied where it has been shown that the taint has a necessary and essential relation to the contract which is sued upon ...'<sup>267</sup> Lord Cozens Hardy MR precluded the clean hands defence on the basis that '[t]he relief which is sought for in no way depends upon the [misconduct]; it is something quite independent of it ...'<sup>268</sup>

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<sup>265</sup> Ibid 124.

<sup>266</sup> *Moody v Cox* [1917] 2 Ch 71, 82 (Lord Cozens Hardy MR), 85-86 (Warrington LJ), 87-88 (Scrutton LJ).

<sup>267</sup> *Moody v Cox* [1917] 2 Ch 71, 85-86 (Warrington LJ).

<sup>268</sup> Ibid 82 (Lord Cozens Hardy MR), see also 87-88 (Scrutton LJ).

The use of the word ‘necessary’ in *Dering* is ambiguous and the facts of *Kation v Lamru*<sup>269</sup> brought that ambiguity to the fore. As Basten JA said in *Kation*, it could mean that the misconduct must be a necessary element of the equitable cause of action so that it could not be legally established without it.<sup>270</sup> A second possibility, as was argued by Lamru in *Kation*,<sup>271</sup> is that it must be necessary to prove the misconduct from an evidentiary point of view in order to establish the entitlement to equitable relief.<sup>272</sup>

The difficulty faced by the Court in *Kation* was that the trust in relation to which the plaintiff sought relief was not implicated in the misconduct. As described by Basten JA:

[T]here was no sense in which the establishment of the trust was tainted ...[n]or was the conduct complained of, which was found to be a fraudulent misappropriation of trust property, conduct in which either Lamru or Mr Lamb was implicated. That was because Mr Lamb had ceased to have a role in the administration of the business prior to the misappropriations by Mr Peter Lewis.<sup>273</sup>

Basten JA in *Kation* ultimately held that there had to be ‘a legal necessity of reliance on the bad conduct’<sup>274</sup> in order for the clean hands defence to apply, and further held ‘no part of Lamru’s cause of action depended on its or Mr Lamb’s improper or discreditable conduct’ notwithstanding that

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<sup>269</sup> Above n 7.

<sup>270</sup> *Kation*, above n 7, [159] (Basten JA).

<sup>271</sup> *Ibid* 348 [27] (Hodgson JA).

<sup>272</sup> *Ibid* [159] (Basten JA).

<sup>273</sup> *Ibid* [151] (Basten JA).

<sup>274</sup> *Ibid* 375 [159].

'Lamru chose to lead evidence of Lamb's and its own misconduct.'<sup>275</sup> On that basis he rejected the clean hands defence.

Allsop P expressly disagreed with Basten JA on clean hands.<sup>276</sup> Allsop P discussed the difference between an equitable cause of action and evidence and questioned the legitimacy of using that distinction as the operating discriminant to determine whether the nexus requirement was satisfied.<sup>277</sup> Allsop P reasoned:

The potential breadth of the bill in equity (which at times led to problems of prolixity) does, however, militate against a bright line distinction between the equity (or equitable cause of action) and the evidence to justify its vindication.<sup>278</sup>

Ultimately Allsop P approached the question not by reference to a strict analysis of whether the misconduct was an element of an equitable cause of action, or whether it was merely evidentiary, but rather having regard to the fact that it had a close temporal, forensic and practical human connection to the equity sued on. On that basis Allsop P held that the misconduct had an 'immediate and sufficiently close relation to the equity sued on.'<sup>279</sup> Hodgson JA similarly found that there was a 'sufficiently close'<sup>280</sup> relation on the basis that the misconduct 'provided an essential

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<sup>275</sup> Ibid 374 [153].

<sup>276</sup> Ibid 339 [1] (Allsop P).

<sup>277</sup> Ibid 340-341, [4]-[6] (Allsop P).

<sup>278</sup> Ibid.

<sup>279</sup> Ibid 341 [9]. Note that this is a different formulation from *Dering* 's 'immediate and necessary.' Discussed at greater length in chapter 5.4.

<sup>280</sup> Ibid 348 [29]-[30].



part of the evidentiary material supporting the finding that the equity sued for existed.<sup>281</sup>

*Hypac Electronics Pty Ltd (In liq) v Mead*<sup>282</sup> is a case where the conduct in question was obviously tainted but the Court held that it did not constitute unclean hands because it was not necessary to prove. Campbell J made adverse comments in relation to the conduct said to constitute unclean hands (saying it had 'nothing to recommend it'<sup>283</sup>), however, Campbell J (at [110]) rejected the reliance on the defence of clean hands on the basis that the plaintiff

does not need to prove anything to do with his [unclean] conduct ... to make out the elements of the estoppel - and it is the estoppel which is 'the equity sued for.' The defence of unclean hands is not made out in this respect.<sup>284</sup>

In *King v Lynpete*<sup>285</sup> Davies J drew a distinction between proof of a prima facie untainted transaction and proof of the improper underlying purpose, holding that it is only if the improper purpose had to be proved that the clean hands defence would apply. In that case the plaintiff (King) who was subject to a restraint of trade clause with Freelance Co. agreed with Mr Watson to set up a competing business through a complicated corporate structure. It was agreed that King's shares in the relevant company would be held on trust to hide King's involvement in a competing business (potentially in breach of the restraint clause) from

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<sup>281</sup> Ibid 348 [29].

<sup>282</sup> (2003) 202 ALR 688; [2003] NSWSC 934 (affirmed on other grounds in *Hypac Electronics Pty Ltd (In liq) v Mead* [2004] NSWCA 221).

<sup>283</sup> Ibid [111].

<sup>284</sup> *Hypac Electronics Pty Ltd (in liq) v Mead* [2003] NSWSC 934, [109].

<sup>285</sup> *King v Lynpete Australia Pty Ltd* [2012] VSC 140.

Freelance, albeit that King had received advice the restraint clause may not be enforceable.

A dispute arose and King sought to enforce the trust. The defendant argued that King was precluded from doing so by reason of King's unclean hands being constituted by his improper and dishonest purpose in establishing the trust, that is, to deceive Freelance to whom he remained contractually bound.

Davies J held:

By parity of reasoning, an improper or dishonest purpose on the part of Mr King for bringing the trust on which he sues into existence, would not disentitle Mr King from enforcing that trust unless he has to rely on that purpose in order to prove the existence of the trust.

...

But the deceit was directed at the Freelance Group, not at Mr Watson. Mr King's claim for relief does not rest upon him proving the deceit as the reason for the trust. To put it another way, Mr King did not have to show that he had the purpose as alleged in order to prove the agreement on which he relies to establish the trust.<sup>286</sup>

Taken at its highest *King v Lynpete* stands for the proposition that a court of equity will enforce an arrangement entered into for the purpose of deceiving a third party provided the agreement, divorced from that purpose, would otherwise be enforceable and it is not necessary to prove the purpose in the present case.

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<sup>286</sup> Ibid [31].

This is at odds with the case of *Kyriakou*.<sup>287</sup> In *Kyriakou*, the plaintiff claimed a constructive trust over property to which he had made financial contributions. However, at the time of the contributions, the plaintiff was bankrupt and the moneys were moneys that should have been disclosed and largely paid to the trustee in bankruptcy for distribution to creditors. Balmford J held:

In the present case, the unclean hands are said to derive from the inferred breach, described above, of Mr Kyriakou's obligations to his trustee and through the trustee, to his creditors, rather than from a breach of his obligations to Mr Saba, against whom his claim is made, or a fraud on the public. However, that breach of obligations to his creditors has 'an immediate and necessary relation to the equity sued for' ... in that he relies on payments made with moneys not his own and not notified to his trustee as founding an equitable interest in the property. I am satisfied that for Mr Kyriakou to establish his equitable claim to a constructive trust in his favour over the property would be for him to 'derive advantage from his own wrong' ... and thus he cannot maintain that claim.<sup>288</sup>

There is some tension between the reasoning process in *King v Lynpete* and that in *Kation* and *Carantinos*. In *Kation* the plaintiff did not 'have to show' his misconduct to prove his case, albeit that he did in fact rely on it for evidentiary purposes. In *Carantinos* the fact that the arrangement was directed at defrauding the revenue was an essential part of the case.

The application of the clean hands defence to the facts of *Carantinos* was complicated by the fact that of the moneys sought to be recovered by the

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<sup>287</sup> *Kyriakou v Saba* [2000] VSC 318.

<sup>288</sup> *Ibid* [35].

plaintiff, some were tainted having been made pursuant to a scheme designed to defraud the taxation commissioner, while others were not. In theory, the clean hands defence could apply to the tainted payments but not to others in so far as they could be separately claimed.<sup>289</sup> This distinction was diminished by the fact that the tainted and untainted payments were 'thoroughly mixed' in the course of the venture.<sup>290</sup> Hodgson JA also noted that to order recovery of the untainted moneys and an accounting of profits in relation to the use of those moneys in the venture, but not to order recovery of the tainted moneys would 'introduce additional difficulty and complexity into the taking of accounts which will already be complex and difficult.'<sup>291</sup> Hodgson JA answered these difficulties by using the flexibility available in the granting of equitable relief and ordering relief conditionally upon Magafas fully disclosing to the tax commissioner the fraudulent conduct and paying whatever penalties may be imposed.<sup>292</sup>

It might be argued that if Magafas only sought to recover the \$1.1million of payments legitimately made then the clean hands defence would not apply. If the scenario were such that payments could be considered separately, then there would be a good argument that the tainted conduct did not have an immediate and necessary connection to the relief sought because there was no need to prove, plead or rely on the questionable conduct. In that context, it could also not be said that the equity sued for 'arose out of' the questionable conduct. However, in cases such as *Carantinos* where a partnership or joint venture is concerned, the relief to

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<sup>289</sup> *Carantinos*, above n 87, [60] (Hodgson JA).

<sup>290</sup> *Ibid* [64].

<sup>291</sup> *Ibid* [60].

<sup>292</sup> *Ibid* [62]-[64]

which a party will be entitled, generally speaking, will be determined by reference to net returns of the venture or partnership. That will invariably involve a consideration of all contributions (including tainted contributions), and all returns, although that consideration would not necessarily occur at the stage of making the order for an account to be taken, but rather upon the taking of accounts.<sup>293</sup>

Thus, even though not all the legitimate payments in *Carantinos* were tainted, it would be necessary for the Court (or assessor on the taking of accounts) to consider the tainted payments in determining how the accounts were to proceed, and if that is so, then the plaintiff would have to prove an entitlement to an account on that basis which brings into consideration the tainted payments. There would be a need to prove, plead or rely on the questionable conduct because proof of the tainted payments was necessary to obtain an order for the taking of accounts which would consider them.

In *Windridge Farm* it was argued that Hodgson JA intended to dilute the meaning of 'immediate and necessary' in *Meyers* and *Black Uhlands*.<sup>294</sup> *Windridge Farm* concerned copyright in photos obtained by animal rights activists who trespassed onto a piggery in order to obtain evidence of cruelty which they intended to publish. The farmer brought proceedings seeking orders that the photos were held on constructive trust. The activists argued that the farmer had unclean hands because of the treatment of the pigs.

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<sup>293</sup> As noted by Handley AJA at [165]: 'It is well established that the plaintiff's cause of action and the scope of any account or inquiry must be established at the trial. 'The course of the inquiries follow,' as Lord Haldane said in *McGrory v Alderdale Estate Co Ltd* [1918] AC 503, 511 'merely consequentially.'

<sup>294</sup> *Windridge Farm Pty Ltd v Grassi* [2010] NSWSC 335; (2010) 238 FLR 289, [33].

Latham J ultimately held that nothing in *Kation* suggested an intention to dilute well-established guiding principles of 'immediacy and necessity'. Latham J further held that as the plaintiff did not need to, nor did it in fact, assert anything in relation to its treatment of the pigs to establish its case for equitable relief, there was no immediate and necessary connection and no occasion for the application of the clean hands defence.

It is clear from the above analysis that in considering whether clean hands applies, courts have required varying degrees of forensic proximity between the misconduct and the relief sought. One can understand why courts would approach the matter from this angle, as the degree to which a party needs to plead, prove or rely on misconduct to vindicate an equity will necessarily reflect the degree to which a court is asked to assist a person to take advantage of their wrong. And that will raise the spectre of the need to protect the court's integrity. However, rigid rules tend to unduly fetter equitable discretion. The preferable approach is one that is guided by the extent to which a court is being asked to assist a party to take advantage of their own wrong. Using that principle as a guide, courts could assess whether the conscience of equity is offended by the plaintiff's claim to a sufficient degree to preclude relief. That assessment will necessarily be evaluative, however that is no impediment to the exercise of discretion. The application of that principle would permit a court to take into account matters of evidence even where not strictly necessary to the case, such as in *Kation*, but would not compel a particular result if the conscience equity was not sufficiently offended.

### 5.3.7 Taking Advantage of Own, or Related Party's, Wrong

As demonstrated above, there has undoubtedly been general acceptance of the *Dering* nexus requirement. However, it is also apparent that the many attempted refinements or extrapolations of it are not without their problems. One extrapolation which is not as problematic as others is to consider the *Dering* nexus requirement simply by reference to the underlying principle that a party should not be permitted to take advantage of their own wrong.

That approach was taken in *Meyers v Casey*<sup>295</sup> where Isaacs J held that '[n]o court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim.' Young J in *FAI* followed suit holding:

The more one examines the rule and its application in the cases, the more one can see that it is only if the right being sought to be vindicated by the plaintiff in a court of equity, is one which if protected, would mean the plaintiff was taking advantage of his own wrong, that the court will either debar him from relief or perhaps say he is not a proper plaintiff in a representative suit.<sup>296</sup>

More recently in *IGA Distribution* Nettle J held:

[I]n order to have an immediate and necessary relation to the equity sued for, the plaintiff must seek to derive advantage from his dishonest

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<sup>295</sup> (1913) 17 CLR 90, 124.

<sup>296</sup> *FAI*, above n 7, 561G.

conduct in so direct a manner that it is considered to be unjust to grant him relief.<sup>297</sup>

Another example is *Robson v Robson*<sup>298</sup> where the clean hands defence was rejected because of the plaintiff's failed attempts to hide assets from his ex-wife. The court at first instance and on appeal rejected the clean hands defence primarily on the basis that the relief sought 'would not facilitate a fraud'<sup>299</sup> because the attempt had already been discovered.

The approach that requires the party to be seeking to take advantage of a wrong in an unconscientious manner in order for the nexus requirement to be satisfied is in some respects broad, and may not provide much more practical direction than the words 'immediate and necessary.' However, it is not unduly restrictive, it reflects the historical rationale of the maxim, and it should enable courts to grant or decline relief consistently with the conscience of equity. If only one refinement or description of the nexus requirement were to be adopted, this would be the preferable one.

#### 5.4 Recent Appellate Authority: *Kation v Lamru* – a New Test?

While it is correct to say that the *Dering* nexus requirement has generally been accepted, two recent intermediate appellate decisions have departed, or at least flirted with departure, from this formulation.

The first was the decision of Hodgson JA in *Carantinos*. The trial judge had expressed and applied the *Dering* requirement of an immediate and

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<sup>297</sup> *IGA Distribution Pty Ltd v King & Taylor Pty Ltd* [2002] VSC 440, [247] ('IGA').

<sup>298</sup> *Robson v Robson* [2012] QCA 119 discussed at chapter 8.4.

<sup>299</sup> *Ibid* [79] (Fraser JA with whom Muir JA at [1] and White JA at [91] agreed).



necessary connection.<sup>300</sup> The defendant appealed from that ruling.<sup>301</sup> Hodgson JA did not express any concerns about reliance on the *Dering* formulation of immediate and necessary connection, as expressed by the trial judge, but later held that the clean hands defence was available because the misconduct was ‘sufficiently close’ to the relief sought to invoke it.<sup>302</sup> Hodgson JA did not explicitly reject the requirement of necessity and it may be that his Honour was using ‘sufficiently close’ as shorthand for the ‘immediate and necessary’ requirement. That appears to be the way in which the point is discussed in Snell where the author states:

[T]he question is ... whether the relief should be denied because there is a sufficiently close connection between [the] alleged misconduct and the relief sought. The maxim is therefore applicable only in relation to [misconduct] which has ‘an immediate and necessary relation to the equity sued for ...’<sup>303</sup>

Where the author in Snell states the misconduct must be ‘sufficiently closely’ related to the equity sued for, he appears to be saying no more or less than that the misconduct must have an immediate and necessary relation to the equity sued for because that is the test to be applied. It is akin to saying a fiduciary relationship will exist where there is a sufficiently close relationship between the parties. That does not mean that whether there is such a relationship will be determined by some abstract

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<sup>300</sup> See *Carantinos*, above n 87, [51] citing paragraphs [189]-[193] of the decision at first instance.

<sup>301</sup> *Carantinos*, above n 87, [52]. The appeal was also on the basis that that consequences of refusing relief were irrelevant, as to which see below. That was also rejected in favour of conditional relief.

<sup>302</sup> *Kation* above n 7, 348 [29]-[30].

<sup>303</sup> *Snell*, above n 7, 91-92 [5-010]. See also *Amcor Ltd v Barnes* [2012] VSC 434, [35] (Vickery J).

concept of ‘sufficiency’ but rather by reference to existing principles applicable to the question. However, it is not as clear that that is how Hodgson JA uses the phrase ‘sufficiently close,’ particularly in light of his Honour’s further finding that ‘to give effect to the equity claimed would not actually further advance the illegal purpose or fraudulent scheme.’<sup>304</sup> Hodgson JA’s approach to what is required by ‘immediacy and necessity’ was further extended in *Kation*.

The unclean conduct in *Kation* was the establishment some years prior to trial, of practices which facilitated a fraud on the revenue. Proof of those practices was not necessary in the sense that for the plaintiff to succeed, it would be compelled to plead that fact as an element of the cause of action, or call evidence supporting it. Notwithstanding that, the plaintiff did call evidence to support inferences that the fraudulent practices had continued and had generated income that the plaintiff was entitled to. There was therefore the fact of reliance on some misconduct without any necessity to so rely. The result was that a clean hands defence could only succeed if the ‘necessary’ requirement was avoided or read in a sufficiently broad way to enable a finding of unclean hands in the circumstances.

In *Kation* Hodgson JA held:

The relief sought was equitable relief. The Court has the discretion whether or not to grant such relief, but there are principles guiding the exercise of that discretion. Some of those principles relate to the circumstances in which equitable relief may be refused because of unclean hands; and these principles require that the bad conduct in question have ‘an immediate and necessary relation to the equity sued

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<sup>304</sup> *Carantinos*, above n 87, [59].

for.’ However, this is not a requirement that the relation be of the nature of contributing to or constituting the equity sued for; and since this requirement is not a rule of law but merely an aspect of principles guiding the exercise of discretion, it should not in my opinion be given a narrow or technical construction.<sup>305</sup>

Having explicitly accepted the *Dering* formulation, Hodgson JA moderated its force by declining to give it ‘a narrow or technical construction.’<sup>306</sup> Hodgson JA held that the misconduct ‘provided an essential part of the evidentiary material supporting the finding that the equity sued for existed’ and therefore ‘was sufficiently close to justify application of the unclean hands doctrine.’<sup>307</sup> It appears therefore that Hodgson JA read ‘immediate and necessary’ expansively and held that the misconduct in question was sufficiently close to the relief sought to come within that definition.<sup>308</sup>

The question might be asked whether the clean hands defence would have applied had the plaintiff not relied on that evidence. If the misconduct was not necessary from a pleadings or proof point of view, it is difficult to see how it could be said to be necessary in any sense. Hodgson JA’s application of clean hands extends ‘necessary’ to include matters ‘actually relied on’ whether they could otherwise be described as necessary or not. That raises the question, what if a party relies on evidentiary material which would constitute unclean hands but it does not form any part of the ‘evidentiary material supporting the finding that the equity sued for

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<sup>305</sup> *Kation*, above n 7, 348 [30].

<sup>306</sup> *Ibid* [28].

<sup>307</sup> *Ibid* [29].

<sup>308</sup> Cf *Kation*, above n 7, [2] (Allsop P), [160] (Basten JA) both of whom appear to read Hodgson JA in *Carantinos* as expressing and acting on a more flexible standard than immediacy and necessity.

existed.’ For example what if such evidence is rejected as unreliable, or irrelevant. Would misconduct of that kind amount to unclean hands? Again it is difficult to see how such misconduct could be said to be necessary.

The advantage of Hodgson JA’s approach is that it leaves the court with the flexibility to determine whether the conscience of equity is offended by the misconduct. It also enables the court to adapt the clean hands defence to accommodate situations where the plaintiff is seeking to take advantage of a wrong, as a plaintiff who actually relies on misconduct must be doing. The problem with it is that it strains the meaning of ‘necessary’.

Basten JA on the other hand referred to the requirement for an immediate and necessary connection and to the passage in *Black Uhlands* where Campbell J held:

If a plaintiff needs to prove his own bad conduct to be able to prove the circumstances which he says entitles him to an equitable remedy, that bad conduct has an immediate and necessary relation to the equity sued for.<sup>309</sup>

Basten JA concluded that this meant legal necessity of reliance on the conduct to prove the case rather than mere evidentiary reliance and that the clean hands defence therefore did not apply to that case. This is because it did not satisfy the established elements of the defence as Basten JA understood it. As described by Basten JA:

[T]here was no sense in which the establishment of the trust was tainted ...[n]or was the conduct complained of, which was found to be a fraudulent misappropriation of trust property, conduct in which either

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<sup>309</sup> *Kation*, above n 7, 375 [158] (Basten JA) citing *Black Uhlands*, above n 83, [179].

Lamru or Mr Lamb was implicated. That was because Mr Lamb had ceased to have a role in the administration of the business prior to the misappropriations by Mr Peter Lewis.<sup>310</sup>

Basten JA therefore took a narrow view of ‘immediacy and necessity.’ The application of such a test, while in some sense more consistent with the tenor of *Black Uhlands* and *Moody v Cox*<sup>311</sup> would mean that clean hands defence would not be available to preclude a plaintiff from relief where that plaintiff relies on misconduct to prove their case. Nor would it enable the court to preclude such relief where the plaintiff would in that sense be taking advantage of a wrong. From that perspective, Basten JA’s approach may be seen as being unsympathetic to the principles underlying the maxim.<sup>312</sup> It is preferable that, where possible, ‘immediate and necessary’ be interpreted consistently with that objective.

Allsop P expressly disagreed with Basten JA on clean hands.<sup>313</sup> He discussed the difference between an equitable cause of action and evidence and questioned the legitimacy of using that distinction as the operating discriminant to determine whether the nexus requirement was satisfied.<sup>314</sup> Allsop P reasoned:

The potential breadth of the bill in equity (which at times led to problems of prolixity) does, however, militate against a bright line distinction

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<sup>310</sup> *Kation*, above n 7, [151] (Basten JA).

<sup>311</sup> [1917] 2 Ch 71, 85-6 (Warrington LJ) 87-88 (Scrutton LJ). See *Kation*, above n 7, 375 [157] (Basten JA).

<sup>312</sup> Cf *Kation*, above n 7, 339 [2] (Allsop P); *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; (2000) 202 CLR 629, 644 [27] quoting *Cabell v Markham* 148 F 2d 737, 739 (1945).

<sup>313</sup> *Kation*, above n 7, 339 [1] (Allsop P).

<sup>314</sup> *Ibid* 340-341, [4]-[6].

between the equity (or equitable cause of action) and the evidence to justify its vindication.<sup>315</sup>

Ultimately Allsop P approached the question not by reference to a strict analysis of whether the misconduct was an element of an equitable cause of action, or whether it was merely evidentiary, but rather having regard to the fact that it had a close temporal, forensic and practical human connection to the equity sued on. On that basis his Honour, referring to both *Dering* and Hodgson JA's judgment in *Carantinos*,<sup>316</sup> applied the clean hands defence on the basis that the misconduct had an 'immediate and sufficiently close relation to the equity sued on.'<sup>317</sup>

As stated above, the difficulty faced in *Kation* was that the misconduct on one view did not have a 'necessary connection' to the equity sued for. Allsop P addresses that difficulty by describing the nexus requirement in exclusive rather than inclusive terms. Allsop P notes that the 'necessary connection' requirement was introduced to 'avoid barring justice ... to persons who may not be morally or legally blameless, but whose behavior that could be so described had not relevant connection with the equity they sought to invoke.'<sup>318</sup> Later Allsop P emphasizes that the *Dering* formulation of the nexus requirement 'was in contradistinction to "general

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<sup>315</sup> Ibid [6].

<sup>316</sup> Allsop P referred to *Carantinos* at [2] and identified the question as being '[w]hether the disentitling conduct had a sufficiently close relationship to the equity sued for.'

<sup>317</sup> *Kation*, above n 7, 341 [9]. Note that this is a different formulation from *Dering*'s 'immediate and necessary.' In *MGL*, above n 7, [3-135] the authors, having identified (in [3-130]) the nexus requirement as being *Dering*'s 'immediate and necessary,' go on to say '[p]rovided the impropriety complained of is directly and immediately related to the equity relied on, the maxim is of almost universal application.' No explanation is given for this change of language.

<sup>318</sup> Ibid [2].

depravity.”<sup>319</sup> In that way, Allsop P avoids the maze of semantics around the meaning of ‘necessary’ and skips straight to the rationale of the nexus requirement, that is to ensure relief is not denied because of unrelated conduct. Allsop P identifies equity’s motivating principles as being ‘honesty, equity and conscience’<sup>320</sup> and implicitly suggests that rigid application of the ‘necessity’ requirement, such as by Hodgson JA, could impair the evaluative process of enforcing ‘conscience and good faith.’<sup>321</sup>

It is not easy to reconcile Allsop P’s approach with the nexus requirement as expressed in *Dering* and adopted by the multitude of cases since.<sup>322</sup> For example, in *Sang Lee* the Privy Council held that the first aspect of the inquiry is to determine whether the elements of clean hands (including immediacy and necessity of the connection) are satisfied, and if they are, then to decide whether other discretionary considerations dictate that relief should be granted notwithstanding any unclean hands. However, having regard to the facts of *Kation*, Allsop P’s approach seems preferable as there is a risk with the contrary approach that a strict definition of ‘necessary’ will enable plaintiffs to take advantage of their wrong. The alternative approach is to apply a broad definition of ‘necessary’ such as that by Hodgson JA. While that voids some practical difficulties, it would require the application of creative semantics and a departure from ordinary English usage.

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<sup>319</sup> Ibid [8].

<sup>320</sup> Ibid [2].

<sup>321</sup> Ibid.

<sup>322</sup> See above n 7, and, since *Kation* was decided, see eg. *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd (No 3)* [2011] SASC 171; *British American Tobacco Australia Ltd v Gordon (No 3)* [2009] VSC 619, [149]; *Sino Iron Pty Ltd v Palmer* [2014] QSC 287, [26]. See also MGL, above n 7, [3-115] where the authors state ‘it is absolutely necessary for the courts to insist on this nexus ...’

The distinction between Allsop P and Hodgson JA is a fine one, however it does have the potential to recast the nexus requirement as ‘sufficient proximity’, rather than by reference to an ‘immediate and necessary’ connection. That should not be seen as a fundamental shift in the substance of the clean hands defence provided the maxim continues to be applied consistently with the underlying principle that a court should not assist a person to take unconscientious advantage of their wrong. The authorities tending towards a narrow definition of ‘necessity,’ including the decision of Basten JA in *Kation*, are unduly rigid and could act as an impediment to the enforcement of conscience and good faith.

## 5.5 Conclusion re Nexus

There is a long line of authority going back to 1727 that accepts the nexus requirement as expressed in *Dering*, that is, the misconduct must have an immediate and necessary connection to the relief sought. As with any broad statement of principle, it is characterised by a degree of imprecision that invites further explanation and refinement to render its application more precise. However, there are inevitable risks with any attempt to further refine such principles. As Gageler J said in *Clark v Macourt*:

[S]tatements of subsidiary principle framed in the context of working out the ruling principle in standard categories of case must be approached with circumspection. There is, as has often been pointed out, ‘a danger in



elevating into general principles what are in truth mere applications to particular facts or situations of the overriding general principle.’<sup>323</sup>

In *Fiona Trust*, Andrew Smith J similarly observed:

The enquiry whether the maxim is to be applied is, of its nature, fact-sensitive, and there is a danger in making any general statements about the limits of its application.<sup>324</sup>

In *Commerzbank AG v Price-Jones*<sup>325</sup> Mr Justice Munby echoed that position in the context of a discussion of the causal link to be proved between the payment and the change of position. He eschewed any attempt at precision stating:

I have no particular difficulty with the general principle that some such kind of causal link has to be shown ... But I should be very concerned to see this translated into a dogmatic legal rule, let alone into a legal analysis of the principles of causation of the kind that already bedevils too many areas of the common law or into a theoretical debate as to what particular test of cause and effect is appropriate or what particular kind of causal link has to be established.<sup>326</sup>

The risks inherent in articulating sub-rules as mandatory rules or requirements as demonstrated above, is that they will fail to accommodate the variety of circumstances in which clean hands arises. As has frequently been stated, the question whether the application of clean hands is

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<sup>323</sup> [2013] HCA 56, [66]. See also *Fiona Trust*, above n 74, [19].

<sup>324</sup> *Fiona Trust*, above n 74 [19].

<sup>325</sup> *Commerzbank Ag v Price-Jones* [2003] EWCA Civ 1663.

<sup>326</sup> *Ibid* [58].

appropriate in any particular case will be fact sensitive.<sup>327</sup> That is not to say the particular cases and refinements are irrelevant. At the very least they operate as examples by reference to which the facts of the particular case can be measured. It is not controversial to say that the method of equity includes the process of reasoning by analogy and precedent. In that respect the circumstances expressed as sub-rules may be seen as indicia of connection to which a court may have regard in determining whether the nexus requirement is satisfied.<sup>328</sup> However, they are not appropriately expressed as absolute rules.

*Kation v Lamru*<sup>329</sup> is a salutary example demonstrating that the nexus requirement should be expressed in a way that enables a court to consider forensic, temporal and practical connections between the misconduct and the relief sought in order to ensure that the conscience of equity is not offended by a person taking advantage of their wrong. Rules expressed in mandatory terms undermine the ability of a court to weigh the competing wrongs of the defendant's conduct justifying relief on the one hand, and the plaintiff's misconduct barring it on the other, to achieve a balance that best reflects the conscience of equity.

The *Dering* formulation, and some of the refinements have a long pedigree, however, there are obvious difficulties with manipulating an ancient but in some respects ill-suited expression of a principle to accommodate modern circumstances, just as there are problems with articulating sub-

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<sup>327</sup> *Royal Bank of Scotland*, above n 7, [179] quoting *Grobbelaar*, above n 71, 3057F (Lord Scott); *Fiona Trust*, above n 74, [19].

<sup>328</sup> This approach would be similar to the approach taken by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavara* [2009] NSWCA 258; (2009) 75 NSWLR 649, [103] where Allsop P lists numerous salient features to be taken into account in determining whether there is a duty of care to avoid pure economic loss.

<sup>329</sup> Above n 7.

rules of general application. There would some advantage in articulating the clean hands nexus requirement in a way that strikes a balance between flexibility and precision, and which would enable the principle underlying clean hands to operate unimpeded by technicalities.

If *Dering* and its sub-rules do not adequately identify the nexus requirement for clean hands then what, if anything, does? The least problematic of the interpretations or explanations of the nexus requirement is that expressed by Nettle J in *IGA Distribution* and Young J in *FAI Insurances*:

[T]he plaintiff must seek to derive an advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief.<sup>330</sup>

Provided ‘unjust’ is read as meaning inconsistent with the conscience of equity, this formulation is an attractive candidate. It represents a balanced approach between the breadth required of an equitable maxim and the degree of prescription necessary to ensure the maxim is applied in accordance with the principles underlying equitable jurisdiction generally (equity, conscience and good faith)<sup>331</sup> and the clean hands maxim in particular (a court will not assist a party to take advantage of their own wrong.)

The use of the phrase ‘in so direct a manner’ avoids the complications that have grown out of the nexus requirement expressed in *Dering* that the

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<sup>330</sup> *IGA*, above n 297, and *FAI*, above n 7, both proffer this as a definition of the ‘immediate and necessary’ requirement. Given the state of binding authority that is not surprising however, the problems associated with the application of ‘immediate and necessary’ suggest the better approach may be to abandon it altogether for this new formulation.

<sup>331</sup> See *Kation*, above n 7, 339 [2].

equity must have an 'immediate and necessary' relation to the equity sued for. The difficulties that have arisen in trying to interpret this nexus requirement consistently, and in accordance with the underlying principle, support this change and reflect a move towards the approach of Allsop P in *Kation*.

However, two further qualifications are required if the formulation is to meet all of the circumstances in which clean hands applies. First, the reference to taking advantage of dishonest conduct suggests that the misconduct must pre-date the act of taking advantage of it. That is, there is an implication that the misconduct must have given rise to the equity sued for, as opposed to being constituted by the taking advantage of it. As discussed above, this does not easily accommodate the situation where the right was obtained innocently and the misconduct is constituted by the taking advantage of it through court processes.<sup>332</sup> Nor does it accommodate unclean hands constituted by misleading the court.

The second qualification, which is closely aligned to the first, is that the word dishonesty suggests a degree of moral culpability that need not be present for the application of clean hands. As discussed above, the unclean hands may be constituted by equitable fraud, which does not require intention, and it may be constituted by the prosecution of an innocently obtained right,<sup>333</sup> which also is not readily equated with morally negative content of the word 'dishonest.'

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<sup>332</sup> See discussion at chapter 5.6.1.2 below.

<sup>333</sup> *Ibid*.

The better formulation would include the word 'misconduct' in place of 'dishonesty.' The word 'misconduct' is broad enough to accommodate the ways in which the conscience of equity may be offended. It encompasses:

- dishonest conduct connected to the right itself, for example, where the right arises as a result of, or entails, deceiving the other party or non-parties;
- conduct that is not dishonest but nonetheless transgresses equitable norms such as aspects of equitable fraud which have no element of intention;
- the unconscientious enforcement of rights innocently obtained, such as rights obtained as a result of an innocent misrepresentation (as in the cases of *Redgrave* and *Tanwar*);<sup>334</sup>
- attempts to mislead the court in the enforcement of equitable rights.

For that reason, the word 'dishonest' in the formulation above is better replaced with 'misconduct' so that the nexus requirement could be expressed.

[T]he plaintiff must seek to take advantage of misconduct in so direct a manner that it is against conscience to grant him or her relief.

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<sup>334</sup> Ibid.

## 5.6 The Depravity Requirement: Legal and Moral Depravity

In *Dering*, Lord Chief Baron Eyre held that there must be ‘depravity in a legal as well as a moral sense.’ As stated above, this part of the test has been adopted to the present day.<sup>335</sup> This way of describing the requisite depravity identifies two elements, legal depravity and moral depravity, each of which is necessary under the *Dering* formulation for the clean hands defence to apply.

This dichotomy is familiar to equity. In 2009, Keane JA, writing extra-curially, observed:

The idea that moral rectitude and legality of conduct were not necessarily co-extensive was very familiar to those responsible for the foundations of equity. ... Moral justice and legal right were quite distinct concepts. This distinction reflects a clear appreciation of the distinctions between natural and positive ideas of justice and between the Chancery and the common law, between private conscience and public policy.<sup>336</sup>

The Macquarie Dictionary defines ‘depravity’ as ‘the state of being depraved’, and ‘depraved’ as ‘corrupt or perverted, especially morally; wicked’.<sup>337</sup> The Oxford English Dictionary<sup>338</sup> defines ‘depravity’ as the quality or condition of being depraved or corrupt, and ‘depraved’ as ‘rendered morally bad; corrupt; wicked.’ There are other similar meanings and examples to support them, however it is clear that the notion of

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<sup>335</sup> See n 7, and also *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick* [2004] VSCA 167; (2004) 50 ACSR 679, [36]; and *Carr v Resource Equities Limited* [2010] NSWCA 286; (2010) 275 ALR 366.

<sup>336</sup> Keane JA, *The Conscience of Equity*, (Paper presented at the 2009 W A Lee Lecture in Equity, 2 November 2009), (2009) 10 *QUT Law Review* 106, n 9.

<sup>337</sup> *Macquarie Dictionary* (Macquarie Dictionary Publishing, 6<sup>th</sup> ed, 2013).

<sup>338</sup> *The Compact Edition of the Oxford English Dictionary* (Oxford University Press 1971).

depravity involves some moral shortcoming. In that respect it encompasses, at least, conduct that would be considered unconscientious from an equitable perspective.

An example of a legal transgression that is not a moral transgression is a mere breach of contract. Such a breach would not disentitle a plaintiff to equitable relief even if the nexus requirement were satisfied. So in *Gleth v MacDonald*,<sup>339</sup> Brereton J rejected the argument that the plaintiff should be precluded from obtaining relief against forfeiture because of its mere breach of contract. Brereton J observed that '[i]f it were not so, then it is difficult to conceive of any circumstance in which equity would grant relief against forfeiture.'<sup>340</sup>

Attempts have been made to define the scope of the clean hands defence by reference to categories of case in which conduct has been found to constitute unclean hands. They include:

- When relief is sought in furtherance of a deception on, or misrepresentation to, the defendant or a particular third person or the public;<sup>341</sup>
- Where the right sought to be enforced has been obtained or retained by the plaintiff in circumstances involving equitable fraud;<sup>342</sup>
- Where there has been gross sexual immorality.<sup>343</sup>

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<sup>339</sup> [2007] NSWSC 1000

<sup>340</sup> *Ibid* [60].

<sup>341</sup> *Spry*, above n 1, 424-5; *Parkinson*, above n 127, 1022-3 [2934].

<sup>342</sup> *Spry*, above n 1, 425; *Parkinson*, above n 127, 1023 [2934].

<sup>343</sup> *Parkinson*, above n 127, 1023-4 [2934].

- Where the plaintiff 'is shown to have materially misled the court or to have abused its process, or to have attempted to do so.'<sup>344</sup>

Such categories are not conclusive,<sup>345</sup> or even sound in every case,<sup>346</sup> however their identification does go some way towards attempting to minimise the danger that unclean hands 'might simply act as a net to catch situations which fail to attract redress on bases such as misrepresentation, fraud or estoppel, but which nevertheless arouse the judges' sympathy.'<sup>347</sup> The extent to which these categories fit within the *Dering* framework is discussed below. Where such categories do not fit within *Dering* the question must be asked, is the category an appropriate one for clean hands or is the *Dering* formulation inadequate to describe clean hands.

### 5.6.1 Moral Depravity

The *Dering* formulation is a broad principle that purports to prescribe the boundaries of clean hands. However, very little guidance is given in *Dering* or the cases that consider it as to what constitutes 'moral depravity'. A fairly conservative interpretation of 'moral depravity' was

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<sup>344</sup> Ibid 1023 [2934]; *Spry*, above n 1, 253-4 and 429. Discussed in detail in chapter 6 below. American commentators have identified other categories. For example, Chafee identified 18 different categories case: Chafee, above n 55. See also Anenson who identified 4 different categories by reference to the degree to which the clean hands defence protects court processes: litigation misconduct with the potential to interfere with the adjudication process; other misconduct that may interfere with the adjudication process; misconduct prior to litigation that has no potential to disrupt the process; non-litigation misconduct that has no effect on the adjudication process: Anenson, 'Beyond Chafee: A Process-Based Theory of Unclean Hands,' (2010) 47 *American Business Law Journal* 509, 511.

<sup>345</sup> *Spry*, above n 1, 255.

<sup>346</sup> See eg discussion below chapter 5.6.2.5.

<sup>347</sup> *Parkinson*, above n 127, 1024 [2934].



expressed in *Fiona Trust*<sup>348</sup> where Andrew Smith J held ‘the [clean hands] maxim is directed, at least typically, to conduct that is in some way immoral and deliberate.’

A survey of cases reveals that unclean hands have frequently been found in cases where there is what could be described as ‘immoral and deliberate’ conduct. They include:

- Deceiving the public: In *Kettles*, the plaintiff was denied relief because it sought to rely in its claim for injunctive relief on reputation built up by means of a deception on the public.<sup>349</sup>
- Deceiving creditors: In *Gascoigne*, the husband was precluded from rebutting the presumption of advancement because he could only do so by relying on his improper purpose of advancing the property to his wife in order to defeat then present and future creditors.
- Deceiving the revenue: In *Kation v Lamru* the Court refused to grant relief because the plaintiff had entered into an arrangement for the purpose of defrauding the revenue. Similarly in *Re Emery’s Investment Trusts* the purpose of defrauding a foreign government out of tax revenue was sufficiently unconscientious/depraved to warrant precluding the plaintiff from relief.
- Deceiving the Court.<sup>350</sup>
- Deceiving a trustee, even when done by a beneficiary as an infant.<sup>351</sup>

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<sup>348</sup> *Fiona Trust*, above n 74, [19].

<sup>349</sup> In *Kettles*, above n 6, 129-130 Long Innes J concluding that a ‘mis-statement of a material fact calculated to deceive the public, will be sufficient for the purpose.’

<sup>350</sup> See generally chapter 6.

These examples fit within the category of unclean hands cases where relief is sought in furtherance of a deception on, or misrepresentation to, the defendant or a particular third person or the public.<sup>352</sup> In each of the above mentioned examples, the immoral or unconscientious quality of the conduct is apparent largely because there is a clear element of deliberate deceit.<sup>353</sup>

However, there are circumstances in which unclean hands have been found which are not so readily identified with dishonesty or immorality. Those classes include where the misconduct is constituted by equitable fraud in the absence of intent. If dishonesty or immorality is not required, the question arises whether there is any broad principle or standard that describes the quality of conduct required to satisfy the description 'morally depraved'.

As discussed above,<sup>354</sup> courts of equity developed as courts of conscience. It is consistent with those origins that what is morally depraved for the purposes of clean hands defence should be determined by reference to the conscience of equity.<sup>355</sup> As such conscience is the foundation of equitable jurisdiction, a court should only be willing to aid a plaintiff where the plaintiff, in the context of the dispute, is acting within the limits of such

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<sup>351</sup> *Cory v Gertcken* (1816) 2 Madd 40; 56 ER 250; *Overton v Bannister* (1884) 3 Hare 503; 67 ER 250.

<sup>352</sup> *Spry*, above n 1, 424-5; *Parkinson*, above n 127, 1022-3 [2934].

<sup>353</sup> See *Spry*, above n 1, 423-4.

<sup>354</sup> Chapters 2.5-3.1.

<sup>355</sup> See eg, *Precision Instrument Co v Automatic* 324 U.S. 806, 814 *Machinery* (1945); *Keystone Driller Co v General Excavator Co* 290 US 240, 245 (1933) quoted in Anenson, 'Limiting Legal Remedies: An Analysis of Clean Hands' (2012) 99 *Kentucky Law Journal* 63, n 7.

conscience.<sup>356</sup> To intervene otherwise would be, tacitly at least, to endorse unconscientious conduct in contradiction of such principles. Conversely, to intervene when the conscience of equity is not offended would be to extend the reach of equity beyond its jurisdictional mandate.

What then are the outer limits of the conscience of equity? It will be seen from the following discussion that the conscience of equity is not only offended by ‘deliberate or immoral’ transgressions and that equity’s conscience may be pricked by less obviously tainted conduct.

#### 5.6.1.1 *Unconscionability as Moral Depravity*

As stated above, very little guidance as to the meaning of the phrase ‘moral depravity’ is provided by the cases on clean hands. Courts are more inclined to use more modern and prominent expressions of the moral content of equity such as ‘unconscionable’. For example, in *IGA Distribution*, Nettle J held that the ‘gist’ of unclean hands is

that equity will not assist unconscionable conduct on the part of the plaintiff, either by enforcing a right already improperly obtained or by otherwise furthering unconscionable purposes.<sup>357</sup>

However, there are two senses in which the word ‘unconscionable’ is used in equity<sup>358</sup> - first, as a broad description of the quality of conduct that

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<sup>356</sup> The United States Supreme Court in *Precision Instrument Mfg. Co. v Automatic Maintenance Machinery Co.* 324 U.S. 806, 814, 65 S.Ct 993 (1945), cited by Chafee at 877, described this principle as being ‘rooted in the historical concept of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.’

<sup>357</sup> *IGA*, above n 297, [246]-[247]. See also *Spry*, above n 1, 254.

<sup>358</sup> See discussion in *On Equity*, above n 7, 299-300.

breaches equitable standards (such as equitable fraud, undue influence and breach of fiduciary duty)<sup>359</sup>, and secondly, as a description of the specific equitable doctrine of unconscionability where a person takes advantage of another persons disability.<sup>360</sup> The following discussion as to what is ‘morally depraved’ for the purposes of the clean hands defence involves consideration of the first meaning of unconscionable. The doctrine of unconscionability operates in more confined circumstances which do not translate generally into a consideration of moral component of clean hands.<sup>361</sup>

Mahoney JA observed in *Antonovic v Volker* that the term ‘unconscionable’ is ‘better described than defined.’<sup>362</sup> A similar sentiment was expressed by Lord Scarman in *National Westminster Bank Plc v Morgan* where his Lordship said ‘[d]efinition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.’<sup>363</sup> In *Tanwar* the High Court slightly more helpfully observed ‘the term “unconscionable” is used to refer to that which “ought not, in conscience,” be allowed as between the parties.’<sup>364</sup> Allsop P, Jacobsen and Gordon JJ in *ACCC v Lux* defined

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<sup>359</sup> Discussed in *ACCC v C G Berbatis Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51, 72-3 [42] (Gummow and Hayne JJ).

<sup>360</sup> As exemplified in the case *Commercial Bank of Australia v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

<sup>361</sup> See *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd & Heathgate Resources Pty Ltd (No3)* [2011] SASC 171, [27]-[32].

<sup>362</sup> *Antonovic v Volker* (1986) 7 NSWLR 151, 165 cited by the majority in *ACCC v C G Berbatis Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51, 74 [44].

<sup>363</sup> [1985] AC 686, 709 cited by Deane J in *Commonwealth v Verwayen* (1990) 170 CLR 394, 440-441. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199, 227 [45].

<sup>364</sup> *Tanwar*, above n 107, 324 [21]. See also *Sang Lee*, above n 72, 208, where the Privy Council held that the conduct in question must be ‘wanting in good faith:’ quoted with approval in *Coghlan v Pyoanee Pty Ltd* [2003] 2 Qd R 636, 643.

‘unconscionability’ as meaning ‘something not done in good conscience’<sup>365</sup> and further held:

Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question.<sup>366</sup>

In *Lux* the relevant norms were those that arose in the context of consumer protection legislation being ‘notions of justice, fairness ... vulnerability, advantage and honesty.’<sup>367</sup>

In any clean hands argument therefore, the relevant norms will be the norms of society. However the identification of the relevant norms and their consideration in the context of allegations of unconscionability are not straight forward. The task of the court will always be, to a degree, evaluative. As observed by Deane J in *Verwayen*:

[T]he question whether conduct is or is not unconscionable in the circumstances of a particular case involves a ‘real process of consideration and judgment’ (citation deleted) in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present.<sup>368</sup>

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<sup>365</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41].

<sup>366</sup> *Ibid.* This formulation in *Lux* was subsequently approved in *PT Ltd v Spud Surf Chatswood Pty Ltd* [2013] NSWCA 446, [105] (Sackville AJA, McColl JA at [1] and Leeming JA at [2] agreeing).

<sup>367</sup> *Ibid* [41].

<sup>368</sup> *Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 394, 441 (Deane J).

As was stated by Allsop P in *Kation* specifically in the context of the clean hands defence:

The expression of the matter in terms of ‘discretion’ reflects the underlying conception of equity to enforce conscience and good faith, these matters being, to a significant degree, necessarily evaluative: Pomeroy at 92-93 [398]; and see *Deweese v Reinhard* [1897] USSC 35; 165 US 386 at 390 (1897). ... the underlying concepts<sup>369</sup> are evaluative and, to a degree, reflective of contemporary social morality ...<sup>370</sup>

In *Tanwar Enterprises Pty Ltd v Cauchi*, in the context of a dispute as to whether the court should grant relief against forfeiture, Kirby J noted:

The differences of conclusion in the Court of Appeal may reflect the fact (illustrated also by decisions of this Court (citations deleted) that judges often disagree upon such matters, reflecting as they do (to some extent) ‘ideological differences about the limits of equitable intervention to modify strict legal rights’ (citations deleted) as well as the peculiarities of complex factual circumstances and individual judicial reactions to them.<sup>371</sup>

It is apparent from the long history of cases that have considered clean hands that what is meant by moral depravity will change with the times. As noted by Basten JA in *Kation v Lamru*<sup>372</sup> in discounting the value of factual analysis of earlier cases ‘[h]istorically, many of the cases have

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<sup>369</sup> Of conscience and good faith.

<sup>370</sup> *Kation*, above n 7, [2].

<sup>371</sup> *Tanwar*, above n 107, [71].

<sup>372</sup> *Kation*, above n 7.

arisen in circumstances which no longer have social resonance or which are now covered by the expanding blanket of statutory regulation.’<sup>373</sup>

As conscience is based in part on the standards/mores of the society, it will change with time. What is morally depraved in one era may not be so in another. The 1822 decision of *Lawrence v Smith*<sup>374</sup> is a stark example of the changing parameters of immorality. In that case the plaintiff published a book under the name *Letters on Physiology, Zoology and the Natural History of Man* based on lecture delivered to the college of surgeons. The plaintiff sought an injunction to prevent the defendant publishing a pirated version. The defendant resisted relief on the basis that it was not entitled to the protection of equity because ‘it was hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul.’<sup>375</sup> Lord Eldon in considering the question stated:

The question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts, and inquiring, whether there be any which deny, or appear to deny the truth of the Scripture.

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Looking at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of

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<sup>373</sup> Ibid 372 [148].

<sup>374</sup> *Lawrence v Smith* (1822) Jac 471 cited in Dennis Browne, *Ashburner’s Principles of Equity* (Butterworths, 2<sup>nd</sup> ed, 1933), 467.

<sup>375</sup> The decision in *Lawrence* was based on Dr Priestley’s case, in which injunctive relief sought by Dr Priestley was refused because the work was ‘calculated to do injury to the public’ (*Dr Priestley’s case* 2 Meri. 437). That principle was also relied on in refusing equitable relief in relation to John Walcot’s writings under the name ‘Peter Pindar’ (*Walcot v Walker* (1802) 7 Ves 1) and in relation to the publication of Lord Byron’s ‘Cain’ *Murray v Benbow* (1822) Jac. 474 and Southey’s ‘Wat Tyler.’ *Southey v Sherwood* (1817) 2 Meri. 435 cited in Dennis Browne, *Ashburner’s Principles of Equity* (2<sup>nd</sup> ed), 467.

the Scriptures, considering that the law does not give protection to those who contradict the scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction.<sup>376</sup>

More recently, although still nearly a century ago, in *Glyn v Weston Feature Film Co* Younger J refused equitable relief for the protection of a book which had the 'cruelly destructive tendency' of 'misleading many a poor romantic girl striving amidst manifold hardships and discouragements'<sup>377</sup> into the belief that 'she may without danger choose the easy life of sin.' Seventy years later in *Stephens v Avery* Sir Nicolas Browne-Wilkinson V.C. considered that the work, 'if published today, would widely be regarded as, at its highest, very soft pornography.'<sup>378</sup>

While these cases may perhaps be better explained as the application of public policy considerations than directly as a result of the application of clean hands, they do bring into focus the reality of moral relativism. The point is not so much what specifically will constitute moral depravity, but that insofar as that inquiry is relevant to equity, it will involve consideration of the contemporary standards of society.

The New South Wales and Victorian Courts of Appeal<sup>379</sup> have each held that unconscionability (whether equitable or statutory) is a concept which

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<sup>376</sup> ER, 929. According a note in *The Quarterly Review* (1822) Vol XXVII April & July, London 1822, this case resulted in a flood of pirated copies of *Don Juan*. If applied today, the principle would likely result in a flood of pirated copies of Richard Dawkins' books.

<sup>377</sup> *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 270.

<sup>378</sup> *Stephens v Avery* [1988] 1 Ch 449, 453G.

<sup>379</sup> *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446, [93]-[106]; *A-G v World Best Holdings*, Spigelman CJ [2005] NSWCA 261; 63 NSWLR 557, [121]; *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196; 34 VR 536, [90]-[91], [96] (Macaulay AJA with whom Harper and Hansen JJA agreed); *Violet*



requires a high level of ‘moral obloquy.’ Merely enjoying the fruits of an improvident agreement will not suffice.<sup>380</sup>

In considering the types of conduct coming within the statutory definition of ‘unconscionability’ courts have likewise identified the need for a ‘moral taint’ or ‘moral obloquy’ or a ‘pejorative moral judgment.’<sup>381</sup> So in *Sang Lee*, which involved a complex web of transactions for the purpose of a joint venture property development, the Privy Council rejected the submission that the alleged conduct in question disentitled the plaintiff to relief because first, there was no finding that by the conduct the plaintiff intended to defraud or overreach.

#### 5.6.1.2 *Equitable Fraud as Moral Depravity*

However there are instances in which the conduct found to be unclean is less obviously morally tainted. Examples of such cases include innocent misrepresentations or transgressions of equitable obligations where there is no element of intention.<sup>382</sup>

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*Homes Loans Pty Ltd v Schmidt* [2013] VSCA 56; 300 ALR 770, [58], *per curiam*; *Canon Australia Pty Ltd v Patton* [2007] NSWCA 246; 244 ALR 759, [41]-[43], (Campbell JA with whom Harrison J agreed).

<sup>380</sup> See *Riverlate Properties Ltd v Paul* [1975] Ch 133, 141; *Fragomeni v Fagliani* (1968) 42 ALJR 263; *Leighton v Parton* [1976] 1 NZLR 165; *Commercial Credit Corp v Newall Agencies* (1982) 126 DLR (3d) 728 cited in *Dal Pont Equity and Trust in Australia* (6<sup>th</sup> ed, 2015), [8.200]-[8.205].

<sup>381</sup> See discussion in *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446, [93]-[106] (Sackville AJA, McColl JA at [1] and Leeming JA at [2] agreeing); *Attorney-General (NSW) v World Best Holdings* [2005] NSWCA 261; (2005) 63 NSWLR 557, 565 [18]-[22] (Spigelman CJ) regarding s62B of the *Retail Lease Act 1994* (NSW); *Ange v First East Auction Holdings Pty Ltd* [2011] VSCA 335; (2011) 284 ALR 638 [104]; *Director of Consumer Affairs v Scully* [2013] VSCA 292; (2013) 303 ALR 168, [28] (Santamaria JA, Neave JA at [1] and Osborne JA at [2] agreeing).

<sup>382</sup> See *Spry*, above n 7, 425, *Parkinson*, above n 127, 1022-3 [2934].

In relation to innocent misrepresentations the description itself suggests the difficulty. If the misrepresentation is innocent, how can it be said that the 'moral depravity' requirement is met? The answer is provided by the decision of *Redgrave v Hurd* where Sir George Jessel MR in considering the jurisdiction in equity to rescind a contract for innocent misrepresentation, held:

Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to take advantage of his own false statements.<sup>383</sup>

In *Tanwar* the High Court followed *Redgrave* in holding:

[T]o speak of 'unconscionable conduct' as if it were all that need be shown may suggest that it is all that can be shown and so covers the field of equitable interest and concern. Yet legal rights may be acquired by conduct which pricks no conscience at the time. A misrepresentation may be wholly innocent. However, at the time of attempted enforcement, it then may be unconscientious to rely upon the legal rights so acquired. To insist upon a contract obtained by a misrepresentation now known to be false is, as Sir George Jessel MR put it in *Redgrave v Hurd* (1881) 20 Ch D 1; [1881-5] All ER Rep 77, 'a moral delinquency' in a court of equity.<sup>384</sup>

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<sup>383</sup> *Redgrave v Hurd* (1881) 20 Ch D 1; 12-13 (Jessel MR). See *MGL*, above n 7, [13-015].

<sup>384</sup> *Tanwar*, above n 107, 325 [25] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). See also *ACCC v C G Berbatis* [2003] HCA 18; (2003) 214 CLR 51, 72-3 [42] (Gummow and Hayne JJ).

This approach can be readily accepted in the context of clean hands, where the principle underlying the doctrine is the concern of the court to ensure a party does not take unconscientious advantage of their own misconduct in a broad sense. This may be contrasted with the approach of the Court in *Kakavas* where it considered the meaning of unconscionable in the narrower *Amadio* sense of the predatory taking advantage of another person's weakness.

In *Kakavas* it was alleged that the plaintiff's casino gambling losses were caused by unconscionable conduct of the casino in breach of s51AA of the *Trade Practices Act*. Unconscionable conduct within the meaning of that section incorporated notions of unconscionable conduct in equity. The High Court concluded with the following observation on the circumstances in which conduct will be sufficiently unconscionable to warrant the intervention of equity:

Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's length commercial transaction. Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned.<sup>385</sup>

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<sup>385</sup> *Kakavas v Crown Melbourne Limited* [2013] HCA 25; (2013) 250 CLR 392, [161].

A comparison may be drawn between the innocence of an innocent misrepresentation and the 'inadvertence or indifference' attendant upon the gaining of an advantage from a vulnerable person. They are in one sense each equally morally culpable and yet courts treat the first as unconscionable (in the context of litigation to enforce it) and the other as not being unconscionable.

The critical difference comes back to the importance of considering the particular circumstances. In *Berbatis*, Gummow and Hayne JJ observed:

It will be unconscientious for a party to refuse to accept the position which is required by the doctrines of equity. But those doctrines may represent ... the outcome of an interplay between various themes and values of concern to equity. The present editor of Snell has noted the use of the terms 'unconscionable' and 'unconscientious' 'in areas as diverse as the nature of trusteeship and the doctrine of laches;' he rightly observed that 'this may have masked rather than illuminated the underlying principles at stake.'<sup>386</sup>

*Amadio*<sup>387</sup> type unconscionability which involves the predatory taking advantage of another person's weakness is concerned with considerations of power and exploitation as between the parties but is also concerned with the operation of the market in general and the extent to which parties should be responsible for their own actions. So in *Kakavas* the Court observed:

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<sup>386</sup> *ACCC v C G Berbatis Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51, 73 [43] (Gummow and Hayne JJ).

<sup>387</sup> *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

[E]quitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business.

...

To describe the business of a casino as the victimisation of the gamblers who choose to frequent it might well make sense in moral or social terms depending on one's moral or social philosophy; but it does not make a lot of sense so far as the law is concerned, given that the conduct of the business is lawful. And the courts of equity have never taken it upon themselves to stigmatise the ordinary conduct of a lawful activity as a form of victimisation in relation to which the proceeds of that activity must be disgorged.<sup>388</sup>

The point is that regard must be had to the themes and values underlying the equitable principle being invoked. Clean hands, being a broad discretionary remedy, is guided broadly by the conscience of equity, and the moral component of the maxim will be determined by reference to that conscience.<sup>389</sup>

Fraud in its broader sense, thus fits comfortably within the *Dering* formulation. Such fraud is primarily dealt with under the substantive heads of equitable fraud. To the extent there is any question about legal and moral depravity in cases such as those concerning innocent

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<sup>388</sup> *Kakavas v Crown Melbourne Limited* [2013] HCA 25; (2013) 250 CLR 392, [20]-[26].

<sup>389</sup> Technical or minor breaches of conscience may not be sufficient to warrant the preclusion of relief. See eg, *Virgtel Limited v Zabusky* [2006] QSC 66; [2006] 2 Qd R 81 where de Jersey CJ at [81], in answering the argument that the plaintiff was in contempt of court by breaching an injunction and so should be precluded relief, held, '[a]ny contravention is technical in character and without impact on the membership the injunction obviously seeks to protect.'

misrepresentation for example, the cases of *Redgrave v Hurd* and *Tanwar* demonstrate how the attempted enforcement of innocently obtained rights can properly be considered unconscientious.

### 5.6.1.3 *Conclusion re Moral Depravity*

In considering whether conduct in question is sufficiently morally depraved to constitute unclean hands, the Court must have regard to the conscience of equity which requires consideration of contemporary moral standards applicable to the question in issue, guided by the 'ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases.'<sup>390</sup> In that sense, the use of 'morally depraved' in *Dering* and subsequently adopted in various decisions, may be equated with the 'unconscientious' conduct. Generally speaking this will involve an element of immoral intent at the time the equity is created, however that will not necessarily be the case. As discussed above,<sup>391</sup> the misconduct in question may first manifest itself during the attempted enforcement of otherwise legitimately obtained equities. Such enforcement misconduct may be constituted by the fact of attempted enforcement, as in *Redgrave* and *Tanwar*, or the manner of attempted enforcement, as where the plaintiff attempts to mislead the court.<sup>392</sup>

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<sup>390</sup> *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583 (Deane J).

<sup>391</sup> See chapter 5.6.1.2 above.

<sup>392</sup> See chapter 6 below.

The meaning of ‘moral depravity’ is rarely considered in the context of clean hands. Far more frequently the concept of the conscience of equity is referred to when assessing the moral component of the defence.<sup>393</sup> Thus, although the language of *Dering* in this regard has not created any obvious difficulties, the better approach would be to abandon to use of ‘depravity’ to describe the moral component of clean hands, and to use instead more modern designations of the conscience of equity by referring to ‘unconscionable’ or ‘unconscientious’ conduct.

### 5.6.2 Legal Depravity

Legal depravity, as contrasted with moral depravity, suggests a transgression of a legal standard. That could include a number of things: it could include breach of a statute; it could also extend to acts which constitute common law breaches such as breach of contract or tortious conduct; it could also extend to conduct which constitutes a transgression of standards of conduct imposed by equity, such as fiduciary obligations.

There is no obvious reason to limit the relevant breach to any one of the above types of breach.<sup>394</sup> Similarly, there is no reason in principle why transgressions of legal standards imposed in tort, or transgressions of contractual obligations, should not be able to constitute legal transgressions for the purposes of unclean hands. Having regard to the circumstances in which the question of clean hands arises, it would be

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<sup>393</sup> See eg, *Kation*, above n 7, 339 [2]; *IGA*, above n 297, [248]-[249].

<sup>394</sup> In *Precision Instrument Co v Automatic Machinery* (1945) 324 U.S. 806, 814, the United States Supreme Court described the conduct sufficient to constitute unclean hands as including ‘fraud, deceit, unconscionability or bad faith.’

perverse if a breach of equitable obligations could not amount to unclean hands.

What then constitutes a legal transgression for the purposes of the clean hands defence? As the classes of action that may be considered legally depraved is exceptionally broad, the following discussion focuses largely on the concept of legal depravity by reference to degrees of action and their consequences. Those parameters expose some divisions in the way legal depravity is treated. This section also considers whether the category of case described as 'gross sexual immorality' comes within the meaning of legal depravity specifically and the clean hands defence in general.

#### *5.6.2.1 Mere Intention to Transgress, Without Action, is Insufficient*

*Cadwallader v Bajco*<sup>395</sup> involved an in-fight between family members of a small proprietary company. The defendants alleged that the plaintiffs were improperly pursuing their own self-interest, particularly in requisitioning a meeting of members in order to remove directors, and that that conduct constituted unclean hands. Heydon JA held that the trial judge was correct in rejecting that argument. He held that whatever the plaintiffs' intention, while they were members they were not exercising any fiduciary duty and were entitled to pursue their self-interest. It would be a different matter if the plaintiffs' self-interested conduct continued after they were appointed directors.<sup>396</sup> Heydon JA explained:

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<sup>395</sup> *Cadwallader v Bajco Pty Ltd* [2002] NSWCA 328 ('*Cadwallader*').

<sup>396</sup> *Ibid* [181].



To prepare to commit a crime or tort or breach of contract is not to commit it, and is not itself unlawful. To intend to commit a crime or tort or breach of contract is not to commit, and is not itself unlawful. And to prepare or intend to commit a breach of statute is not, in the absence of exceptional statutory language, unlawful.<sup>397</sup>

In considering the degree of delinquency required to constitute unclean hands, Heydon JA speaks of improper conduct, misrepresentations, breach of contract, and unlawfulness without drawing any relevant distinction between them for the purposes of that discussion.<sup>398</sup> The only relevance of the discussion of what amounts to ‘unlawful’ conduct therefore appears to be whether it satisfies the legal depravity requirement of clean hands. That is, Heydon JA appears to be using ‘unlawful’ synonymously with ‘legally depraved.’ Later in his decision, as discussed below, Heydon JA finds that the preparation of a false receipt with the intention of deceiving the revenue, ‘even though the receipt was never in fact applied to the intended purpose’ sufficed to constitute unclean hands.<sup>399</sup> Having regard to that finding, it is not clear what Heydon JA meant by the difference between ‘prepare to commit’ and ‘intend to commit.’ The most coherent interpretation, particularly in light of what follows in Heydon JA’s reasons, is that they are used as descriptions (perhaps synonyms) for that which precedes implementation. So, to use Heydon JA’s example, ‘intention’ may be limited to thought, and ‘preparation may extend to buying stationery to prepare the receipt, but the actual creation of the receipt is beyond preparation even though not

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<sup>397</sup> Ibid [180].

<sup>398</sup> Ibid [179]-[181].

<sup>399</sup> Ibid [180].

implemented. However, as will be seen below, there is not always a bright line between preparation and implementation.

Based on *Cadwallader*, merely intending to engage in misconduct, even planning to do so without having taken any step, would not amount to legal depravity and accordingly the clean hands maxim would not apply because the necessary requirement of legal depravity is not satisfied. As Heydon JA stated, such future intentions are arguably only ‘contingently material ... so that this contingency must be fulfilled by those intentions being manifested in acts.’<sup>400</sup>

Where there is a clear plan to act improperly in the future, there may be room for application of the maxim he who seeks equity must do equity. Or the court may in its discretion make any equitable relief conditional, but there is no relevant sense in which the conduct complained of would satisfy the requirements for the application of the clean hands maxim that conduct must be legally depraved.

So in *Cadwallader*, the steps taken were not improper because they were not inherently unlawful (nor had anything been done relying on them) that was a breach of statute, common law right or equitable obligation.

The question then arises, what actual conduct will be sufficient to constitute a legal transgression for the purposes of the clean hands defence?

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<sup>400</sup> *Cadwallader*, above n 395, [179].

### 5.6.2.2 *Where Partial Action Will Constitute Legal Depravity*

Having considered that mere intention was not sufficient, Heydon JA in *Cadwallader* considered what types of steps would suffice to take the conduct beyond mere intention and into the kind of misconduct amounting to unclean hands. Heydon JA said:

[W]here the unclean hands consisted of conduct facilitating a fraud on the revenue authorities by making out a false receipt, the making out of the receipt with knowledge of its falsity and a motive of deceiving sufficed, even though the receipt was never in fact applied to the intended purpose: *Mason v Clarke* [1954] 1 QB 460 at 469 and 471. But unclean hands could not have been found merely in a plan to defraud the revenue authorities by making out a false receipt which was in no respect ever implemented.<sup>401</sup>

*Mason v Clarke*<sup>402</sup> concerned a property which had been leased by the first plaintiff to the defendant but reserving the right to hunt rabbits to the first plaintiff. The first plaintiff and second plaintiff had entered an agreement by which the first plaintiff leased to the second plaintiff for 100 pounds the right to hunt rabbits. However in order to deceive the revenue the receipt was made out in other terms which did not support such a right in an action against the tenant (defendant) for breach of the second plaintiff's hunting rights. The Court denied relief to the second plaintiff by reason of his reliance on the false receipt and held that the false receipt destroyed all of his rights including those that may have been established

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<sup>401</sup> *Ibid* [180].

<sup>402</sup> *Mason v Clarke* [1954] 1 QB 460.

independently by reliance on a letter from the landlord. As Denning LJ held that ‘the false receipt taints the whole of his authority.’<sup>403</sup>

However far the comments of Heydon JA in *Cadwallader* (relying on *Clarke*) go, they do not establish that any step towards the implementation of an improper purpose by some act is sufficient to establish ‘legal depravity’ for the purposes of unclean hands whether or not the conduct in question constitutes a legal transgression. Apart from the fact that the court always retains discretion in relation to equitable relief, cases such as *Clarke* can be explained on the basis that the relevant unclean hands consisted in misleading the court. That leaves the question, whether conduct outside the realm of misleading the court and beyond mere intention, but short of an actionable transgression, could constitute legal depravity?

It is arguable that conduct in relation to which no action can be taken against the actor (whether by a person affected pursuant to contract, tort etc, or by the State under Crimes or other Acts) could not be described as ‘legally depraved.’ Unless someone can seek relief or the State can prosecute a person in relation to an act, it should be regarded as being permitted. And if it is permitted it would, in a sense, not be ‘legally depraved.’ This line of reasoning leads one to the conclusion that ‘legal depravity’ refers to actionable conduct, whether that action is available to affected persons or the State.

An alternative version of the facts in *Kation* would give rise to the same question. What if the plaintiff in that case was implicated in a scheme to

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<sup>403</sup> Ibid 470. Section 83A *Crimes Act 1958* (Vic) renders it a crime to make a false document with the intention to rely on it.

defraud the revenue, or a third person, but at the time of the Court proceeding, the scheme had not been, and may not ever be, carried out? Having regard to the fact that the clean hands defence is concerned with the past conduct of the plaintiff, not the future conduct, and that legal depravity is required, an argument could be made that an unimplemented plan is not sufficient. To the extent the Court had any concerns, relief could be made conditional on disclosure to the revenue authorities of the plan, but that is more an application of the principle that a party seeking equity must do equity.

In *IGA Distribution* Nettle held:

[A]n illegal purpose will not prevent an equitable interest arising. Equity recognises a locus poenitentia<sup>404</sup> and, if the illegal purpose has not been carried out, will uphold the interest.<sup>405</sup>

The position is less clear where the conduct, although not actionable in a strict sense, is undoubtedly a transgression of a legal standard. For example, a person could act in a way that constitutes a breach of the tortious standard of reasonable care but which does not result in any loss. Or, as was the case in *Cory v Gertcken*<sup>406</sup> and *Overton v Bannister*<sup>407</sup> beneficiaries under a trust who, while under age procured the trustee to advance trust funds to them in breach of trust, were precluded from recovering that same amount from the trustee upon coming of age. In those circumstances it would be difficult to justify precluding a court that

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<sup>404</sup> An opportunity for repentance.

<sup>405</sup> *IGA*, above n 297, [248]-[249] citing *Coltinghorn v Fletcher* [1740] EngR 94; 1740) 2 Atk 155; 26 ER 498; *Perpetual Executors & Trustees Association of Australia Ltd v Wright* [1917] HCA 27; (1917) 23 CLR 185, 193; *Nelson*, above n 7, 577.

<sup>406</sup> (1816) 2 Madd 40; 56 ER 250.

<sup>407</sup> (1884) 3 Hare 503; 67 ER 250.

is exercising equitable jurisdiction from considering such matters *because* they are not actionable.

A court exercising equitable jurisdiction will always be governed by considerations of conscience, and in the context of clean hands, should be guided by the underlying principle that a plaintiff should not be permitted to take advantage of their own wrong. If the circumstances of the case involve a plaintiff having breached a legal standard in a non-actionable way but the proceedings involve the plaintiff taking unconscientious advantage of that conduct, a court should not be precluded from taking that into account merely because it is not actionable. The better approach to the meaning of 'legal depravity' is that it be given a broad interpretation which accommodates both actionable and non-actionable breaches of legal standards.

### *5.6.2.3 Where Improper Plan Fully But Unsuccessfully Implemented*

A curious situation arises where a plaintiff has engaged in some improper conduct with a view to obtaining an (improper) advantage of some sort, but is unsuccessful. For example, a person could attempt unsuccessfully to deceive another party in the context of a commercial relationship. In such situations, no improper advantage has accrued. Further, such conduct may not give rise to any accrued cause of action. It may amount to no more than an attempted breach of contract, or fiduciary duty, or misconduct which has not resulted in any loss. Could that amount to legal depravity?

The first point to be made is that where misconduct is unproductive in the sense that its aims were not realised, it is unlikely the misconduct will have the necessary connection to the relief sought to satisfy the nexus requirement. It may be that even if wrongful conduct has not been productive of any wrong, it may nevertheless be relied on in some way in the proceedings such that the conscience of equity will be offended. However those are distinct questions from the question whether the conduct can be classified as legally depraved.

As stated above in relation to the hypothetical situation where a party to a commercial relationship tries unsuccessfully to deceive the other party, it is difficult in principle to see why such conduct should not be considered legally depraved for the purposes of a court exercising equitable jurisdiction *just because* it did not result in any benefit to the plaintiff. Ultimately whether it is appropriate to take it into account will depend upon considerations of whether the plaintiff is taking unconscientious advantage of the legal transgression, but the quality of the transgression as a transgression is not determined by reference to the intended but failed consequences of such action alone.

In *Robson v Robson*,<sup>408</sup> the plaintiff had unquestionably engaged in improper conduct by way of trying to hide his property from his former wife, but the Court at first instance and on appeal both found that such misconduct did not act as a bar to relief, at least in part, because the attempted deceit which the plaintiff had taken steps towards practicing, had not been successful. As Fraser JA observed:

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<sup>408</sup> *Robson v Robson* [2012] QCA 119, [86] (Fraser JA with whom Muir JA at [1] and White JA at [91] agreed).

[The defendants] have not demonstrated any error in the trial judge's conclusion that [the plaintiff]'s endeavours to hide his property from his former wife were ultimately unsuccessful and that he had not obtained the intended fruits of his deception by the settlement in 2004. It was submitted, however, that the trial judge was wrong to take into account that the deception was ultimately ineffective, since the question was merely whether the person seeking equitable relief was not deserving of relief from a court of conscience. .... I see no error in the trial judge's conclusion that the circumstance that Gary's endeavours to hide his property from his ex-wife were ultimately unsuccessful was one of the circumstances which should be taken into account in deciding whether Gary should be refused equitable relief.<sup>409</sup>

The defendant's argument in *Robson* was that the (albeit unproductive) misconduct amounted to unclean hands and was sufficient to warrant precluding relief. Fraser JA decided the question on the basis that the trial judge was entitled to take into account the fact that conduct was unsuccessful. The decision does not go so far as to hold that unsuccessful or unproductive misconduct will inevitably, or could not possibly, amount to unclean hands, but the question what effect the lack of success has would only be relevant if the conduct was relevantly 'depraved'. That is, if the unsuccessful misconduct was not a sufficient legal transgression to satisfy the description of being 'legally depraved' there would be no need to go further and consider questions of the exercise of discretion in relation to that misconduct. The inquiries to be made under the *Dering* formulation are: Is it legally depraved? Is it morally depraved? Does it

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<sup>409</sup> Ibid [86].



have an immediate and necessary relation to the equity sued for? And if those matters are established the question of discretion must be considered. If the misconduct in *Robson* did not meet the description of legally depraved, that would be sufficient to dispose of the clean hands defence under the *Dering* formulation.

It is not easy to reconcile the comments of Heydon JA in *Cadwallader* with the decision of the Queensland Court of Appeal in *Robson*. Although it is difficult to discern precisely the bases upon which each decision was made, it seems that each places very different weight upon the consideration of whether the misconduct was productive of any advantage to the plaintiff.

Insofar as guidance is needed as to the weight to be given to such a consideration, regard should be had to the underlying principles and justifications of the clean hands defence. It is true that in one sense, where misconduct is unproductive of any benefit, there is no sense in which a court would be permitting a party to take advantage of their wrong. However the rationales for the clean hands defence and its underlying principle permit a response consistent with the subtler aspects of the conscience of equity. Thus plaintiffs may be precluded from relief even where no benefit will accrue to them provided the conscience of equity is best satisfied by that course.

#### 5.6.2.4 *Where Improper Plan Fully and Successfully Implemented*

*Fiona Trust*<sup>410</sup> is an example of a case where the plaintiff not only formed an improper plan but also engaged in some improper conduct in implementation of that plan which in fact produced ill-gotten fruits. It is unlikely that such conduct would not come within the description of 'legal depravity.'

In *Fiona Trust*<sup>411</sup> the plaintiffs engaged investigators who used illegal information collection methods to gather information about the defendant in the context of ongoing litigation. The defendants pleaded unclean hands based on that conduct and the plaintiff sought to strike out the clean hands defence. Andrew Smith J struck out the clean hands defence in part upon the basis that

[i]t is not alleged that the claimants ever intended to put perjured evidence or false information forward in support of their claim, and it is not alleged that the claimants have in fact presented the results of the investigation in support of their substantive claim.<sup>412</sup>

As there was no evidence of the plaintiffs' intent to perjure themselves or rely on false information, the court was left with the situation where the improper conduct was characterised as illegal methods of information collection that had been used by the plaintiffs (through their agents) in the context of the litigation. The rationale for striking out the clean hands defence was that there was to be no reliance on the fruits of that improper

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<sup>410</sup> Above n 348.

<sup>411</sup> Ibid [29].

<sup>412</sup> Ibid.

conduct. However, that begs the question whether the conduct itself was legally depraved within the meaning in *Dering*.

As with *Robson* the Court in *Fiona Trust* did not make a specific finding as to whether the conduct was legally depraved (relevantly transgressive) as that term is used in *Dering*, although in the circumstances where the illegality of the conduct appears to have been assumed, it would be surprising if it was not 'legally depraved.'

Based on Heydon JA's comments in *Cadwallader* one would expect the misconduct in *Fiona Trust* to suffice to bar the plaintiff from relief because improper steps had in fact been taken. It is not easy to reconcile *Cadwallader* (and *Clarke*) with *Fiona Trust* in this regard. In the example given by Heydon JA in *Cadwallader* relying on *Clarke*, the fact that a step was taken in the implementation of an improper plan, even though the plan may not have been carried out to fruition, was sufficient to constitute unclean hands, whereas in *Fiona Trust* the illegal activity was carried out, albeit in circumstances where the product of that activity may not have been relied on in Court, and the Court declined to entertain the clean hands defence *because* the product of the misconduct was not to be used.

*Fiona Trust* may be contrasted with *Gibson Chemicals*<sup>413</sup> in which the plaintiff (GC) was a manufacturer and supplier of chemical cleaning products. It sourced some products from the defendant (Sopura) pursuant to a license agreement. GC learned that a competitor was looking to take it over and, believing their jobs were at risk and/or Sopura products might not be available in future, GC employees obtained Sopura products with a

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<sup>413</sup> *Gibson Chemicals Ltd v S A Sopura NV* [1999] VSC 203.

view to reverse engineering them so that they could manufacture them themselves in the future. Meanwhile Sopura learned that a competitor of GC's was looking to take it over, and, wanting to secure its place in the Australian market, created Sopura Australia.

Various employees left GC to work for Sopura Australia as a result of which GC brought proceedings for equitable relief against Sopura and Sopura Australia based, inter alia, on breaches of fidelity and fiduciary duties. The Sopura defences included an allegation that GC was not entitled to equitable relief by reason of its conduct in seeking to reverse engineer products for future use which it was alleged was in breach of obligations of trust and confidence and constituted unclean hands.

The plaintiff's defence to this clean hands allegation appears to have been that 'it never crossed [their] minds that [they] were doing anything wrong' and that everyone in the industry does it. Hedigan J rejected that argument and, in upholding the clean hands defence, held:

It seems to me to be beyond argument ... that what the plaintiff did ... was an underhand and improper breach of GC's obligations and was done deliberately and secretly to enable the formulae to be used at a later stage if necessary.<sup>414</sup>

In each of *Fiona Trust* and *Gibson* the plaintiffs in fact engaged in dubious information gathering conduct in circumstances where the information was gained for use upon a future contingency. Yet in *Fiona* the conduct did not constitute unclean hands whereas in *Gibson* it did.

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<sup>414</sup> Ibid [82].

The fact that a party does not need, or intend, to rely on the fruits of misconduct should not affect an assessment of whether the misconduct amounts to legal depravity. It may well be relevant to the question whether the nexus requirement is satisfied or to the exercise of the discretion as to whether to permit the clean hands defence, however, whether particular misconduct is legally depraved should be answered by reference to whether the conduct breaches a legal, as opposed to moral, standard. That legal standard could be a statutory, common law or equitable standard.

#### 5.6.2.5 *Gross Sexual Immorality as Legal Depravity*

As stated above, it has been proposed that one of the circumstances that will support a finding of clean hands is where there has been gross sexual immorality. There is no doubt that courts have historically declined to enforce rights which involve gross sexual immorality. As discussed above in chapter 1, cases in which this has applied in the past must be approached with caution as morality changes, and has changed significantly, over time. The broader question is whether this is a circumstance appropriately dealt with by the clean hands defence, and if it is, whether *Dering* captures it?

Spence identifies gross sexual immorality as a category of case where conduct amounts to 'legal and moral depravity' for the purposes of clean hands.<sup>415</sup> Such conduct would by definition satisfy the moral depravity requirement. However, it is not as clear that gross sexual immorality

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<sup>415</sup> *Parkinson*, above n 127, 1023-1024

would amount to legal depravity. In a permissive, but in some respects highly regulated, liberal democracy it is not easy to justify a judicial mandate to determine rights by reference to sexual morality. Of course courts may act on public policy grounds,<sup>416</sup> and if a court were inclined to act on that basis, it may be said that there is in that respect, legal depravity. However, if the circumstances warrant the intervention of the court based on well-established public policy grounds, it is not clear why a court exercising equitable jurisdiction should be at liberty to act differently.

There is no contemporary authority supporting this particular application of clean hands and having regard to the degree of regulation and the enlightened state of society, and the power of the courts to act on policy grounds, there is little to commend it. The better juridical justification for precluding relief based on sexual immorality would be public policy.<sup>417</sup>

#### 5.6.2.6 *Conclusion re Legal Depravity*

The requirement for legal depravity is best regarded as a requirement that there be a contravention of a legal standard (statutory, common law or equitable) as opposed to merely a contravention of a moral standard (eg *Kakavas*). The contravention need not be actionable.

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<sup>416</sup> See generally *Cattanach v Melchior* [2003] HCA 38; (2003) 215 CLR 1, 80-89 [223]-[242] (Hayne J).

<sup>417</sup> See eg, *FAI Insurances*, above n 7, 560 where Young J noted that there were some cases in the 20<sup>th</sup> century 'where what is really a defence of public policy or illegality is sometimes given the tag of clean hands.'

### 5.6.3 Legal and Moral Depravity: Conclusion

There is undoubtedly much common ground between conduct that will transgress the moral component of clean hands (that is, unconscionable or unconscientious conduct) and conduct which transgresses the legal component of clean hands. However, as discussed above,<sup>418</sup> there exists a dichotomy between the concepts of moral transgression and a legal transgression, and it is possible that conduct may come within one but not the other. So a simple breach of contract would be a legal transgression but not necessarily a moral one, and the exercise of legal rights for reasons of malice only may be a moral transgression but not a legal one. The distinction remains an important one, even if the word 'depravity' is to be abandoned, because courts exercising equitable jurisdiction do not impose sanctions based on character flaws alone.

These issues may be accommodated in a new formula for clean hands by using the term 'misconduct' as a descriptive term of what was previously called depravity, as well as by tying that description to the conscience of equity. In that way the moral and legal component may be incorporated without using unduly restrictive or pejorative language. As stated above, the appropriate description of clean hands then becomes:

[T]he plaintiff must seek to take advantage of misconduct in so direct a manner that it is against conscience to grant him relief.

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<sup>418</sup> Chapter 5.6.

## 6 Where the Plaintiff Materially Misleads the Court

In addition to the *Dering* formulation of clean hands, a plaintiff may be refused equitable relief based on their unclean hands where he or she has materially misled the court or otherwise attempted to abuse the court's process.<sup>419</sup> They are distinct descriptions of the clean hands defence. *Dering* provides a general description of the requisite quality of conduct and nature of its connection to the relief sought, whereas the misleading the court formula describes a particular circumstance that may warrant the application of the defence. It is not clear that the *Dering* formulation aspects all aspects of the misleading the court formula, and to that extent, it is not clear that *Dering* is an appropriate description of the clean hands defence generally. The following discussion examines the misleading the court aspect of clean hands and demonstrates that, in addition to an apparent lack of consistency in application, it does not fit readily within the *Dering* formulation.

There is some tension between the clean hands defence as described by *Dering* on the one hand, and the clean hands defence constituted by misleading the court on the other. From one perspective, an attempt to mislead the court satisfies the *Dering* requirements in that such conduct

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<sup>419</sup> See *Spry*, above n 1, 424 fn 4; *Parkinson*, above n 127, 1021-1024, both citing *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384. See also *Murphy v Rayner* [2011] EWHC 1 (Ch), [330]; *Fiona Trust*, above n 74; *J Willis & Son v Willis*, [1986] 1 EGLR 62; *Gonthier v Orange Contract Scaffolding Ltd*, [2003] EWCA Civ 873; *The Royal Bank of Scotland*, above n 7, [159]; *IGA*, above n 297, [246] (Nettle J). This dual aspect of clean hands has an antecedent in Roman law: see chapter 2.2 n 12.



could qualify as legally and morally depraved and also be described as having an immediate and necessary relation to the equity sued for.<sup>420</sup>

However, the rationale for the application of the clean hands defence in the circumstance of misleading the court is in some respects not readily reconcilable with the underlying principle that a court will not assist a person the take advantage of their own wrong. That is so because the conclusion that a person has attempted to mislead the court is predicated on the discovery of that attempt, and if the attempted misleading has been discovered, it can be assumed, similarly with those who have washed their unclean hands, that no advantage will flow from it.<sup>421</sup> The underlying principle in this context, therefore, may be better described as being that a court exercising equitable jurisdiction will not assist a person who has attempted to obtain relief by deceiving the court, or who has attempted to abuse its processes. Consistently with this approach, Nettle J in *IGA Distribution*<sup>422</sup> described this aspect of unclean hands as being available '[w]here the plaintiff is shown materially to have misled the court or to have abused its process, or to have attempted to do so.'

The application of this aspect of clean hands is not consistent and it is difficult to reconcile with other aspects of clean hands as discussed in relation to the *Dering* formulation. For example, it is unclear whether an attempt to mislead the court in respect of one aspect of a case, or one

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<sup>420</sup> In *Fiona Trust*, above n 74, Andrew Smith J held 'the misconduct was by way of deception in the course of litigation directed to securing equitable relief. The connection between the misconduct and the claim to equitable relief was far more immediate than that in this case.'

<sup>421</sup> See *Fiona Trust*, above n 74, where Andrew Smith J held 'as is clear from *J Willis & Son v Willis*, such misconduct can deprive a party of equitable relief notwithstanding the trickery was detected and therefore not pursued to the trial of the claim.'

<sup>422</sup> *IGA*, above n 297, [246] (Nettle J).

aspect of evidence, will justify preclusion of relief generally. It is also unclear whether attempting to mislead the court in relation to equitable relief will bar the proceedings generally even when there are other independent cause of action. Further, there is the question whether a party who has attempted to mislead the court can ever wash their unclean hands and if so, when may they do so and how? A consideration of the cases in which misleading the court has been decisive assists in considering these questions.

The case of *Armstrong v Sheppard*<sup>423</sup> is commonly relied on as authority for the proposition that a court may preclude a plaintiff from equitable relief where they have attempted to mislead the court.<sup>424</sup> In that case, the defendant asked the plaintiff, an adjoining land owner, whether he had any objection to the excavation of a strip of land for the purposes of installing and using a sewer. The plaintiff did not know at the time that he owned the land and expressed no reservations about the defendant's proposed course. The sewer was installed. The plaintiff subsequently learned of his ownership of the land and sued for injunctive relief and damages for trespass. In support of his claim, the plaintiff swore that he had never agreed to the excavation. The facts appear to have been that the plaintiff had not realised his rights, and had acquiesced in the defendant's actions without so realising, but had overstepped the mark in his evidence, stating not that he did not realise he had any rights when he acquiesced, but that he did not have any conversation at all. The trial judge found that the plaintiff should not be granted equitable relief on the

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<sup>423</sup> [1959] 2 QB 384.

<sup>424</sup> See eg, *Sino Iron Pty Ltd v Palmer (No 2)* [2012] NSWSC 587; (2012) 16 BPR 31,011; *Deeson Heavy Haulage Pty Ltd v Cox* [2009] QSC 277; (2009) 82 IPR 521, [275]; *Black Uhlans* above n 7, [177]; *Spry*, above n 1, 254 n 2.

basis that he had falsified his evidence, and awarded him nominal damages as no loss had been proved.

The rationale of that case appears in the decision of Lord Evershed MR where it is stated the plaintiff 'attempted to mislead the court' and 'therefore' that 'it is not at all surprising that the judge came to the conclusion that he should grant no equitable relief.'<sup>425</sup> There was no mention of 'clean hands,' although the inference can be drawn that there was a causal link between the attempt to mislead the court and denial of equitable relief. There was no discussion of any underlying principle or rationale.

In *Willis v Willis*<sup>426</sup> tenants sought to enforce a promissory estoppel on the basis that they had relied on representations and spent money improving the property. In support of their claim they sought to rely on a letter from a third party which falsely claimed that the work had been done by him. The trial judge rejected the claim based on the fact that the document had been fabricated. The tenants appealed.

The Court of Appeal held that the letter was a complete fiction and that the inference could clearly be drawn that if the falsity was not discovered, the tenants would have relied on it to deceive the court. Parker LJ held that he would be 'content to dismiss the appeal on that ground alone.' Parker LJ further stated:

When a party comes to the Court and seeks to obtain from it equitable relief, it is accepted, as I have said, that he must come with clean hands. I

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<sup>425</sup> Ibid 397 (Lord Evershed MR), 398 (Willmer LJ).

<sup>426</sup> *J Willis & Son v Willis* [1986] 1 EGLR 62.

accept also, as was submitted on behalf of the appellants, that not every item of misconduct can possibly be sufficient to deprive a party who seeks equity from being granted the relief he seeks. Some misconduct may be trivial. But when a party acts as these parties have done ... it seems to be impossible for this Court to do other than to take the most serious view of it and to decline to grant equitable relief even if, to which I say nothing because it does not arise on the view I take of this case, they would otherwise have been so entitled.<sup>427</sup>

Sir John Donaldson MR agreed stating '[t]he conduct of the appellants which has been disclosed in this case was such that no Court could, in my judgment, possibly grant equitable relief.'<sup>428</sup>

The case of *Gonthier*<sup>429</sup> involved very similar circumstances. In that case the plaintiff, being owner of commercial premises, permitted the defendant, a prospective tenant, into the premises in anticipation of a lease being executed. The defendant, with the acquiescence of the plaintiff, expended sums of money improving the property. The terms of the lease could not be agreed and the plaintiff sought possession. The defendant sought the grant of a lease or restitution. In support of its counterclaim the defendant gave false evidence (including by 'concocted' documents) that it had spent over £ 50,000 on improvements, when it was found in fact it had spent only £ 19,500. At first instance the trial judge awarded compensation to the defendant on the basis of proprietary estoppel albeit reduced for misconduct. The Court of Appeal reversed the decision and held that the defendant's conduct was sufficiently unclean to bar relief altogether.

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<sup>427</sup> Ibid 63.

<sup>428</sup> Ibid 63.

<sup>429</sup> *Gonthier and Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873; [2003] All ER (D) 332.

Lindsay J who delivered the leading judgment, referred with approval to *Willis* and held:

Whilst consideration of ‘clean hands’ is inescapably a matter that is sensitive to the varying facts of the particular case, unless some compelling distinguishing feature emerges such as to have enabled Mr Recorder Thom to have put *Willis* to one side, it is difficult to see how [the plaintiff]’s very considerable shortcomings failed to debar it from the equitable relief which it claimed.<sup>430</sup>

Some cases have inferentially rejected the proposition that misleading the court can constitute unclean hands at all. The more recent decision of *Michael Wilson*<sup>431</sup> is difficult to reconcile with the broad principle that conduct of a proceeding *may* constitute unclean hands. In that case the defendant sought to amend its defence to include a plea of unclean hands. Einstein J, commenting on the plea and its particulars, stated:

In relation to these particulars, first insofar as they are at all comprehensible, they refer to matters so unrelated to the equity that the plaintiff seeks in this proceeding to enforce that they cannot conceivably raise the issue of clean hands.<sup>432</sup>

It is apparent that these particulars, ... all relate to circumstances concerning the plaintiff’s institution and maintenance of these proceedings and none relates to the equity itself.<sup>433</sup>

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<sup>430</sup> Ibid [34].

<sup>431</sup> *Michael Wilson*, above n 91. There were numerous appeals in the *Michael Wilson* proceeding, including to the High Court, but not related to the proposed unclean hands plea.

<sup>432</sup> Ibid [12].

<sup>433</sup> Ibid [13].

[T]he defendants have ... completely eschewed any attempt to make the allegations, originally of an abuse of process, conform to the recognised principles that apply to the equitable defence of a lack of clean hands, namely that the lack of clean hands must have an immediate and necessary relation to the equity sued for. The particulars concentrate on matters pertaining to the plaintiff's conduct of these proceedings, which arose in time after the equity on which the plaintiff sues was complete. They do not, as they must do, attack the equity itself.<sup>434</sup>

Thus in *Michael Wilson* one of the reasons the unclean hands plea was rejected was *because* the matters relied on all post-dated the creation of the equity and related to the conduct of the proceeding. If those were sufficient reasons, then unclean hands in the conduct of a proceeding would never be a basis for precluding relief – because it can be presumed that Court proceedings would be instituted on the basis of (arguably) existing equities.

The approach of Einstein J in *Michael Wilson* may be contrasted with the decision of Fiona Trust where Andrew Smith J, having referred with approval to *Armstrong, Willis and Gonthier*, observed:

These authorities are examples of cases in which the court regarded attempts to mislead the courts as presenting good grounds for refusing equitable relief, ... in all these cases the misconduct was by way of deception in the course of litigation directed to securing equitable relief.<sup>435</sup>

Given the general acceptance of the principle that unclean hands, constituted by misleading the court, may bar relief, the statements of

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<sup>434</sup> Ibid [30].

<sup>435</sup> *Fiona Trust*, above n 74, [20].

Einstein J in *Michael Wilson* insofar as they suggests otherwise, are a lonely outpost. Although they do have some company, at least inferentially, in the case of *Grobbelaar*,<sup>436</sup> in which gross and blatant misconduct in the course of court proceedings was not sufficient to bar relief.

In *Grobbelaar* an associate of a well-known professional soccer player approached a newspaper with allegations that he had taken money in the past for fixing matches. The newspaper obtained a series of recorded conversations in which Grobbelaar confessed he had taken money to throw matches in the past and accepted money to fix matches in the future.

Grobbelaar faced criminal proceedings in which he was found not guilty after which he pursued a libel action against the newspaper. In the libel proceedings the meaning of the publication was admitted but the sting of it was not. The jury found for Grobbelaar and awarded him £ 85,000 damages. The Court of Appeal overturned the verdict as perverse on the basis that no reasonable jury could have found for him given all of his admitted lies. Grobbelaar appealed to the House of Lords which in a four to one decision reinstated the jury verdict but reduced damages to £ 1.

Some of Grobbelaar's many hurdles included admitted lies made by him in the course of the litigation as set out by Lord Bingham:

But even if the appellant's account, standing alone, were treated as plausible, his difficulties do not end. In his pleaded reply in these proceedings the appellant denied the existence of 'the short man', who was said to be a figment of his own imagination. This lie, which remained

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<sup>436</sup> *Grobbelaar*, above n 71.

uncorrected for three years, was attributed by the appellant to his concern that his forecasting arrangement with Mr Lim might be contrary to the rules of the Football Association. Also in his reply the appellant denied that there had been a meeting with Mr Fashanu on 25 November 1993, a lie for which he was unable at the trial to offer any explanation at all. Again, the appellant in his reply denied that he had visited London with Mr Vincent on the eve of Liverpool's match against Norwich, a lie which he attributed to his concern that his breach of club discipline should not become known.<sup>437</sup>

In the House of Lords, Grobbelaar for the first time sought an injunction to prevent the publication of the allegation of match fixing. There were varying approaches to that application. Lord Bingham,<sup>438</sup> Lord Hobhouse,<sup>439</sup> Lord Millett<sup>440</sup> and Lord Scott<sup>441</sup> held that Grobbelaar was entitled to the protection of an injunction. Lord Scott and Lord Millett probed the clean hands question and held that Grobbelaar's conduct in entering into match fixing arrangement and taking money to that end, was not sufficiently closely connected to Grobbelaar's right to prevent the publication of false allegations that he had in fact fixed matches, to preclude an injunction to protect that right. Only Lord Scott considered whether relief should be precluded because of Grobbelaar's admitted lies told with the intent of misleading the Court. Lord Scott held:

The question is whether the dishonesty that attended his entry into the corrupt agreements, and his denial in court that he had done so, so taints his success in persuading the jury to accept his denial of the truth of his

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<sup>437</sup> Ibid 740 [18].

<sup>438</sup> Ibid 744 [27].

<sup>439</sup> Ibid 756 [61].

<sup>440</sup> Ibid 757 [69].

<sup>441</sup> Ibid 763 [90].



match fixing admissions as to disqualify him from the grant of an injunction. I can well understand that your Lordships may be concerned that, in the absence of an injunction, the Sun may repeat the allegation that Mr Grobbelaar did actually throw matches. If the Sun does so, it will be repeating that which Mr Grobbelaar has succeeded in establishing is not true. I am, somewhat reluctantly, persuaded, on balance, that the grime on Mr Grobbelaar's hands is not such that he should be exposed to a repetition of that allegation. I therefore agree that he should be given liberty to apply in this action to the High Court for the grant of a suitably worded injunction.<sup>442</sup>

Lord Steyn, very much in the minority, stood alone in rejecting the injunction application and holding that 'Mr Grobbelaar is about as far away from being an applicant with clean hands as one can imagine.'<sup>443</sup>

Recently the English Court of Appeal considered the clean hands defence in the context of misleading the court in *Royal Bank of Scotland*.<sup>444</sup> In that case, defendants had been subject to findings made in liability and quantum hearings in England. They later sought an anti-suit injunction against the other parties to prevent them from bringing proceedings in Texas. In support of that injunction application it relied on evidence that was false and inconsistent with findings already made in the quantum hearing. The court held that the plaintiffs (being the defendants in the liability and quantum hearings) were precluded from injunctive relief by

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<sup>442</sup> Ibid 763 [90].

<sup>443</sup> Ibid 748 [40], although Lord Steyn did not expressly address the question of whether Grobbelaar's misleading of the Court should preclude relief. Support for Lord Steyn's attitude is found in *Murphy v Rayner* where it was held that fabrication of documents and persistent lying on a crucial matter is 'very serious misconduct': *Murphy v Rayner* [2011] EWHC 1, [349].

<sup>444</sup> *The Royal Bank of Scotland*, above n 7.

reason of their unclean hands in proffering and relying on untruthful evidence. The plaintiff appealed.

The Court of Appeal referred to *Dering* and *Fiona Trust* to support the view that equitable relief can be barred by reason of unclean hands which has an immediate and necessary relationship to the equity sued for, including attempts to mislead the Court. Unsurprisingly, the appellant relied on *Grobbelaar* in support of the conclusion that even gross misconduct need not bar injunctive relief, whereas the respondent relied on *Armstrong*. The Court of Appeal held that the trial judge was correct to apply the clean hands defence as he did.<sup>445</sup>

It is not easy to reconcile the decisions in *Willis*, *Gonthier* and *Armstrong* with that in *Grobbelaar* given the blatant and gross deceptions practiced on the court in the latter proceedings. Spry describes the requisite quality of wrongdoing as one where the plaintiff 'culpably misleads the court'<sup>446</sup> which was undoubtedly satisfied in *Grobbelaar*. Of course the court retains a discretion having regard to the whole of the circumstances. The reasons in *Grobbelaar*, and the decisions in *Gonthier* at trial and on appeal demonstrate how minds may differ in the exercise of that discretion. In *Gonthier*, for example, the trial judge took into account, favourably to the plaintiff, that although the plaintiff had fabricated documents and evidence, it was done to

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<sup>445</sup> Ibid [164]-[169].

<sup>446</sup> Spry, above n 1, 429.

justify a claim for expenditure which had genuinely in broad terms been incurred but which could not be clearly established partly because of a reluctance of contractors ... to admit that they had received cash.<sup>447</sup>

The Court of Appeal disagreed, holding that the fabricating evidence, whether to establish a falsity or a truth should always be treated very seriously. The Court of Appeal also distinguished *Singh v Singh*<sup>448</sup> upon which the trial judge relied, on the basis that the misleading in *Singh* had occurred in previous proceedings and had already been confessed to prior to the proceedings in which the issue arose. Also, there was the fact that significant detriment would flow to a third party, being the plaintiff's ex-wife, if the clean hands defence was permitted and no benefit flowed directly to the plaintiff.

The irony in *Singh* is that the misconduct was a successful attempt to mislead the court in prior proceedings, which if discovered in the first proceedings (following *Gonthier*), would have barred the plaintiff from relief. However, because the plaintiff confessed his misconduct prior to the second proceedings, the successful misconduct was not a bar to relief.

Clean hands constituted by misleading the court is not brought easily under the rubric of *Dering* or the principle underlying it. An attempt to mislead the court could in a sense be described as legally and morally depraved or unconscientious, however the connection between the misconduct and the equity sought to be enforced is less easily described as having an immediate and necessary relation, and the equity is certainly not 'brought into existence, or induced by the misconduct'. Nor could one

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<sup>447</sup> At [36].

<sup>448</sup> *Singh v Singh* [1985] Fam L.R. 97.

say it is necessary to ‘plead, prove or rely’ on the misconduct to establish the equity. The misconduct in the form of misleading the court will inevitably post-date the creation of the equity.

## 7 Washing Unclean Hands

Misconduct sufficient to constitute unclean hands is not necessarily indelible. Courts have acknowledged that unclean hands may in certain circumstances be ‘washed’ in which case the defence ceases to be available.<sup>449</sup> This aspect of the clean hands maxim, as the maxim itself, is closely allied to the equitable maxim he who seeks equity must do equity. However, such sanitation is not always available and courts have treated some circumstances as being such that unclean hands cannot be washed. There are also circumstances where unclean hands, though washed, may remain relevant in the exercise of the Court’s discretion.<sup>450</sup>

As with the nexus and depravity requirements, the principles upon which courts act in considering the availability and timing of washing unclean hands are not always consistent with each other, nor with the scope of clean hands in general. This chapter examines the way in which the availability of washing unclean hands has been treated by the courts, and the consistency of those decisions with each other and with the broader scope and foundations of clean hands in general. It will be demonstrated

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<sup>449</sup> *Karl Suleman Enterprizes Pty Ltd (in liq) v Babanour* [2004] NSWCA 214, [54] (Beazley JA, Spigelman CJ and Santow agreeing); *Kettles*, above n 6; *Cadwallader*, above n 395, [179]-[180]; *Goldie v Getley [No 3]* [2011] WASC 132, [245]-[247].

<sup>450</sup> See *Spry*, above n 1, 429 citing *Sydney Consumer’s Milk and Ice Co Ltd v Hawkesbury Dairy and Ice Society Ltd* (1931) 31 SR(NSW) 458.

that rules expressed by courts as to when and how clean hands must be washed are occasionally expressed in mandatory terms that are not justified having regard to the underlying principle of clean hands and other policy considerations.

## 7.1 General Principle

Where a plaintiff whose conduct would otherwise constitute unclean hands ceases, withdraws or otherwise makes amends for such conduct, the basis for the defence is removed. This has been described as plaintiffs ‘washing’ their unclean hands. If it is accepted that the fundamental principle underpinning the clean hands defence is that a Court will not assist a party to take advantage of their own wrong, then it is apparent why washing unclean hands should remove the basis for the defence. That is, once the misconduct has been redressed or withdrawn, the party would not be taking advantage of the misconduct.<sup>451</sup> In Heydon JA’s words in *Cadwallader*, ‘the unclean hands can cease to be material.’<sup>452</sup>

A commonly cited example is *Kettles*,<sup>453</sup> where Long Innes J held ‘the Court declines to take the view that because the plaintiff’s hands were once dirty they can never be washed.’<sup>454</sup> And in *Fiona Trust*,<sup>455</sup> in answer to an

<sup>451</sup> *Dewhirst v Edwards* [1983] 1 NSWLR 34, 51B-D.

<sup>452</sup> *Cadawaller*, above n 395, [180].

<sup>453</sup> See eg, *On Equity*, above n 7, 182 [3.340]; *MGL*, above n 7, 83 [3-115]; *Spry* above n 7, 172-173; *Karl Suleman Enterprizes Pty Ltd (in liq) v Babanour* [2004] NSWCA 214, [54] (Beazley JA, Spigelman CJ and Santow agreeing); *Cadwallader*, above n 395, [179]-[180] (Heydon JA); *Goldie v Getley [No 3]* [2011] WASC 132, [245]-[247]; *Dewhirst v Edwards* (1983) 1 NSWLR 34, 51.

<sup>454</sup> *Kettles*, above n 6, 129 relying on *J.H. Coles Pty Ltd v Need* 50 R.P.C. 379, 382 (Lord Tomlin).

<sup>455</sup> *Fiona Trust*, above n 74.

allegation that the claimants had engaged investigators who used illegal information collection methods in relation to the respondents, Andrew Smith J struck out the clean hands defence in part upon the basis that the investigations had ceased before the proceedings were commenced.<sup>456</sup>

In *Carantinos*, Hodgson JA considered the justification for the ability to wash unclean. Hodgson JA first acknowledged 'strong policy reasons why the courts should not assist anyone to benefit from illegal conduct; and where parties are equally at fault, the loss is generally left to lie where it falls.' Hodgson JA then went on to identify the competing policy being the 'strong public interest in encouraging disclosure of past illegal conduct, and submission to appropriate penalties.'<sup>457</sup>

In *Kation* the plaintiff was complicit in the wrongdoing and would likely have been exposed to proceedings against him by the Deputy Commissioner of Taxation but for the fact that the director of the plaintiff gave evidence under a certificate under s128 *Evidence Act 1995* (NSW) protecting him from self-incrimination. That meant that the plaintiff would have the benefit of having given evidence about the misconduct, but would at the same time be immune from any proceedings based on that testimony. Hodgson JA with whom Allsop P agreed held:

The discretion should not be exercised, without conditions attaching, in circumstances where it would both give Lamru the forensic benefit of dishonest conduct of its principal and the principal's evidence of that

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<sup>456</sup> Ibid [28]. See also *Kettles*, above n 6, 130 citing *Benedictus v Sullivan, Powell & Co*, (12 R.P.C. 25, 32); *Mrs Pomeroy Ltd v Scale* (1906) 23 TLR 170 and *J H Coles Pty Ltd v Need* (50 R.P.C. 379) in each of which the unclean hands were washed prior to the institution of proceedings.

<sup>457</sup> *Carantinos*, above n 87, [62]. The examples at chapter 2.6 nn 58-60 demonstrates the extent to which washing could be required before relief was granted, although those examples represent the high water mark.

conduct, but also leave its principal immune from any consequences arising from his voluntary decision to proffer that evidence for the benefit of Lamru.<sup>458</sup>

Accordingly in *Kation*, the relief was granted conditionally and was dependent upon the plaintiff exposing itself to whatever penalties may be imposed by the Deputy Commissioner of Taxation for its wrongs.

## 7.2 Extent of Washing

The extent of the washing required must depend upon the nature of the wrongdoing and the extent to which the washing extinguishes it. So in *Carantinos*, a case involving a fraud on the revenue, Hodgson JA observed:

In November 2006, various Magafas entities wrote to the Deputy Commissioner of Taxation advising that it had come to their attention that tax returns for certain years were ‘subject to an amendment,’ and enclosing amended tax returns showing increased income for these years, presumably to the extent of \$480,000. However, it was not disclosed to the Deputy Commissioner of Taxation that the understatement of income in those years was due to a deliberate fraudulent scheme.<sup>459</sup>

Hodgson JA, apparently unimpressed by the lack of candour in the communication with the tax authorities, later indicated:

If Mr Magafas had frankly disclosed his fraudulent and illegal conduct to the tax authorities, and made appropriate arrangements to pay any additional tax, penalties and interest that might be imposed, this would in

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<sup>458</sup> *Kation*, above n 7, 348-9 [31].

<sup>459</sup> *Carantinos*, above n 87, [46].

my opinion have been a case where unconditional relief could appropriately have been granted.<sup>460</sup>

It appears from Hodgson JA's reasons that he was concerned that the consequences of a full confession to the Deputy Commissioner of Taxation may have been more severe than those flowing from Mr Magafas's innocuous statement that the tax returns was 'subject to amendment.' In that sense Mr Magafas's conduct did not sufficiently wash his unclean hands.

Although not couched in these terms in the leading decisions, conduct sufficient to wash unclean hands could properly be described as that which renders the wrongdoing sufficiently benign that it no longer offends against the conscience of equity. Thus the degree and extent of sanitation required to negate the effect of unclean hands will depend upon the circumstances and there may be some cases where sanitation is not sufficient to render the unclean hands immaterial. There may be circumstances where misconduct cannot be unwound, or the nature or gravity of the unclean hands are such that the conscience of equity will be offended no matter what steps are taken to wash them.

Questions may also arise as to whether the conduct in question constitutes washing at all. One example may be drawn from alternative facts of *Mason v Clarke*.<sup>461</sup> In that case the plaintiff was precluded from relief because he created a false receipt with intent to use it to defraud the revenue. It might

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<sup>460</sup> Ibid [62].

<sup>461</sup> *Mason v Clarke* [1954] 1 QB 460, 469 and 471, applied in *Cadwallader*, above n 395, [179]-[180] (Heydon JA). See above n 402. Section 83A *Crimes Act 1958* (Vic) renders it a crime to make a false document with the intention that he, she or someone else rely on it.



be asked whether, and if so how, the plaintiff could wash his unclean hands. For example, would it suffice to express an intention to no longer rely on the receipt, or to destroy it? Or what of the situation where the receipt became lost, negating its ability to assist in a wrongful purpose?

Another situation could be where the corporate plaintiff goes into liquidation. In *Suleman* it was opined that the result of the company going into liquidation, and so coming under the control of other persons, meant that the 'wrongful behaviour had ceased.'<sup>462</sup> This decision was based on the authority of *Marshall Futures*,<sup>463</sup> discussed above,<sup>464</sup> which turned on lifting the corporate veil.

Courts occasionally approach misconduct as if it is a fully accrued wrongdoing which cannot be undone, and at other times are more flexible. An example of the former was the creation of the receipt in *Mason v Clark*<sup>465</sup> which, if done in Victoria today, would constitute an offence under s83A *Crimes Act 1958 (Vic)*, irrespective of what happened afterwards. An example of the latter is provided by the facts of *Carantinos* where a fully implemented plan to defraud the Deputy Commissioner of Taxation could have been unwound by washing.<sup>466</sup>

The reasons for the availability and effect of washing unclean hands are not always explicit. One approach available to courts is to follow 'rules' that have been laid down such as the rule that if hands are to be washed they must be washed prior to the issue of proceedings. There is little to

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<sup>462</sup> *Karl Suleman Enterprizes Pty Ltd (in liq) v Babanour* [2004] NSWCA 214, [55] (Beazley JA with whom Spigelman CJ and Santow JA agreed).

<sup>463</sup> *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316.

<sup>464</sup> At chapter 5.3.3.2 nn 209-213.

<sup>465</sup> See above n 461.

<sup>466</sup> See above n 460.

commend a mandatory rule of this sort, as there is a real risk it would unduly fetter the exercise of discretion. Another approach available to courts, and the preferable one, is to consider the availability and effect of washing unclean hands having regard to the conscience of equity, the underlying principle, and the various moral imperatives informing the appropriateness of barring or allowing the plaintiff's claim in the face of misconduct. However courts do not always follow the later course, as will be shown below.

### 7.3 Timing of Washing

Some authorities suggest that unclean hands cannot be washed during the proceedings.<sup>467</sup> So in *Kettles* where the plaintiff protested it had washed its hands, Long Innes J found 'there is no evidence that the plaintiff had washed its hands before the suit was brought or in fact at all.'<sup>468</sup> *Kettles* suggests this could only be done in relation to subsequent transgressions and not those already considered by the Court. It has also been suggested that if unclean hands are detected, and if they are capable of being washed, the proceedings can be finalised, by withdrawal for example, and reinstituted when the hands have been washed.<sup>469</sup> Other decisions, such as *Nelson*,<sup>470</sup> are predicated on the ability of the plaintiff to effectively wash unclean hands after proceedings have been heard as a condition of relief.

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<sup>467</sup> *Kettles*, above n 6, 130 citing *Benedictus v Sullivan, Powell & Co*, (12 R.P.C. 25, 32); *Mrs Pomeroy Ltd. V Scale* (24 R.P.C. 177) and *J H Coles Pty Ltd v Need* (50 R.P.C. 379) in each of which the unclean hands were washed prior to the institution of proceedings. See also *Dewhurst v Edwards* [1983] 1 NSWLR 34, 51B-D.

<sup>468</sup> *Kettles*, above n 6, 130.

<sup>469</sup> *Kettles*, above n 6, 131.

<sup>470</sup> Above n 81.

In the latter case, the plaintiff had falsely represented that she had no beneficial interest in a property in order to secure social security payments. The misconduct was permitted to be remedied by confessing the non-disclosure and repayment of amounts improperly obtained.<sup>471</sup>

In *Dewhirst v Edwards*<sup>472</sup> an owner of land with a garage at the rear sought injunctive relief to prevent an owner of adjacent land from building a fence across land arguably subject to an easement which would block access to the his garage. The case was resolved on different issues but Powell J considered the question of the plaintiff's clean hands having regard to the fact that the garage had been built in breach of the *Local Government Act 1919 (NSW)*. Powell J held:

It seems to me that it would have been open to me to refuse relief to [the plaintiff] on the basis of a discretionary defence of want of 'clean hands', for the fact that the building had been erected in breach of the provisions of the ... Act, ... however, it would, I think, have been different if, prior to the hearing before me, Mr Moloney had been able to obtain from the Council ... a certificate under the Local Government Act, 1919, s 317A for, in that event, the effect of the illegality would, in substance, have been removed.<sup>473</sup>

In *Goldie v Getley*<sup>474</sup> Simmons J proceeded on the basis that 'clean hands does not operate where the court finds the plaintiff has "washed his hands," as by showing the misconduct ceased well before the suit ...' The

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<sup>471</sup> Ibid [50]-[51] (McHugh J).

<sup>472</sup> *Dewhirst v Edwards* [1983] 1 NSWLR 34.

<sup>473</sup> Ibid 51B-D.

<sup>474</sup> *Goldie v Getley* [No 3] [2011] WASC 132, [245] citing Meagher, Gummow and Leeming, *Meagher, Gummow & Lehane* (Butterworths, 4<sup>th</sup> ed. 2002) [3-120]; *Kettles*, above n 6, 129-130; *Rhodes v Badenach* [2000] TASSC 160.

question may be asked, if unclean hands must be washed prior to the hearing or the suit, would a party with unclean hands be permitted to discontinue proceedings that had been issued and perhaps progressed some distance, and then re-issue at a later time having washed their unclean hands? And what if the hearing had commenced but had not been decided? Could a party withdraw, wash hands and re-issue with impunity?

It is understandable why a court may be reluctant to permit a person with unclean hands to chance their arm in litigation and, if prospects are dire, wash them at the last minute. The moral imperatives of deterrence, protecting the court's integrity, and punishment, each support such an approach. However, the policy of maximising effective use of court resources may lead to the conclusion that, irrespective of when a party seeks to wash their unclean hands, and subject always to the circumstances of the case, a party may be permitted to do so at a late stage. That may particularly be the case in long and complex cases which are well advanced, and where the unclean hands are sullied by only moderate depravity.

As in most situations where a rigid rule is expressed, there are risks that it will operate as a fetter on the conscience of equity. The treatment of any washing of unclean hands at an advanced stage of litigation is better accommodated as a factor relevant to the exercise of discretion. In that way, questions of the overall gravity of any transgression and the consequences of barring relief even if there has been an attempt at washing, can be taken into account, with all other relevant circumstances, and weighed on the scales of equity's conscience.

## 7.4 Washing Unclean Hands where Constituted by Misleading the Court

The general principle that a party may wash their unclean hands is not easily accommodated in the situation where the misconduct involves misleading, or attempting to mislead, the court. In *EDPI v Rapdocs* it was held that the plaintiff's hands must be cleansed before the proceedings are commenced and that it is too late to attempt to do so in closing address.<sup>475</sup> Once the proceedings have been commenced, the main conceptual difficulty is that upon the identification or discovery of the misconduct, no advantage could accrue to the wrongdoer. To apply the clean hands defence in those circumstances would be to sanction or punish the wrongdoer notwithstanding that no negative consequences could then flow from any relief granted in the proceeding. It would, in that sense, not be a case of precluding a plaintiff from taking advantage of their own wrong.

It might be argued that the unconscientiousness of an attempt to mislead the court cannot be undone because it is the attempt that constitutes the unconscientiousness, and the attempt cannot be undone. However, that does not sit easily with *Robson v Robson*<sup>476</sup> where Fraser JA held that the fact the misconduct was unsuccessful is a consideration which can be taken into account in considering whether to grant relief.

A more rigid approach where the misconduct is constituted by misleading

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<sup>475</sup> *EDPI PTY v Rapdocs Pty Ltd* [2007] NSWCS 195.

<sup>476</sup> *Robson v Robson* [2012] QCA 119, [86] (Fraser JA with whom Muir JA at [1] and White JA at [91] agreed).

the court could be based on the moral imperatives of punishment and deterrence, the rationale being that there should be a strong disincentive for parties to attempt to deceive the court. In such circumstances the administration of justice will best be served by a framework of sanctions which encourages honesty before the court. Penalties for perjury no doubt serve that purpose to a certain extent, as would the risk that a claim will be precluded in equity.

As with most other areas of equitable jurisdiction, it is difficult to justify an inflexible rule in relation to the ability to wash unclean hands when the misconduct is constituted by misleading the court. There is an infinite variety of other circumstances which could bear upon the question whether granting relief would be against conscience.

At a broader level, sanctions for misleading the court may be justified by reference to the prevention of abuses of the court's processes rather by reference to precluding a plaintiff from taking advantage of a wrong.<sup>477</sup> Since the *Judicature Acts* the common law and equitable claims are administered in the same courts. Courts today have broad statutory and inherent powers to control their own processes and avoid abuses<sup>478</sup> that will bring the administration of justice into disrepute.<sup>479</sup> As with clean hands, considerations of proportionality are relevant to whether a claim

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<sup>477</sup> *Spry*, above n 1, 515 notes in relation to ex parte proceedings for injunctions that '[t]he requirement of proper disclosure is based in part upon public policy, in the sense that it is intended to prevent abuse of the procedure of the court ...'

<sup>478</sup> See eg, rule 23.01 *Supreme Court (General Civil Procedure) Rules 2005* Vic; *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 395 (Mason CJ, Deane and Dawson JJ).

<sup>479</sup> See *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251, 286; *Moti v R* [2011] HCA 50; (2011) 283 ALR 393; *Batistatos v Roads and Traffic Authority (NSW)* [2006] HCA 27; (2006) ALR 425; *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, 536 (Lord Diplock); *Mariotti v Wanneroo North Pty Ltd* [2008] WASCA 243, [61]-[62] (Steytler P with whom Buss and Beech JJA agreed).

should be barred or stayed by reason of a party giving deliberately false evidence.<sup>480</sup>

It may be asked whether there are any differences, when faced with a litigant attempting to mislead the court, between equity's approach in a clean hands context, and the court's approach to dealing with an abuse of process. As discussed above, the cases concerning attempts to mislead the court do not yield any consistent principle. *Willis, Gonthier* and *Armstrong* suggest that a single instance of false evidence being knowingly proffered will almost inevitably justify the barring of the plaintiff's claim by reason of unclean hands. *Grobbelaar* suggests that a party may lie through their teeth without that consequence.

Cases on abuse of process have examined underlying policy considerations in this area at greater depth.<sup>481</sup> Those policy considerations include: safeguarding the administration of justice by protecting the court's processes and authority;<sup>482</sup> the avoidance of injustice to other parties;<sup>483</sup> and the prejudice to a plaintiff of summary dismissal.<sup>484</sup> Whether a plaintiff should be precluded from relief will depend upon the balance of those considerations.

There is no obvious reason why those policy considerations should not apply equally in relation to the application of clean hands where misleading the court is in issue. Their breadth reflects the breadth of

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<sup>480</sup> *Walton v Gardiner* (1993) 177 CLR 378, 398 (Mason CJ and Deane and Dawson JJ). *Spry*, above n 1, 254 n 3, 512-518.

<sup>481</sup> *Re AWB Ltd (No 10)* [2009] VSC 566; (2009) 76 ACSR 181, [264]; *Australian Securities and Investment Commission (v Lindberg (No 2))* [2010] VSCA 19.

<sup>482</sup> *Mariotti v Wanneroo North Pty Ltd* [2008] WASCA 243, [61]-[62] (Steytler P with whom Buss and Beech JJA agreed).

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*

discretionary factors relevant to the application of clean hands generally. There is also no obvious reason why the consequences of an attempt to mislead the court should be more serious in equitable claims than in other claims. Heavier obligations may be imposed on those subject to equitable duties, however, every litigant is required to be honest in its dealings with the court.

In light of the above discussion, it is difficult to justify a general rule that that clean hands *must* be washed before proceedings are issued. The better approach is that adopted by the court in relation to an abuse of process constituted by falsifying evidence. Such an approach should ensure as far as possible that the discretion to summarily determine a claim for misleading the court is exercised having regard to all relevant policies, rather than by reference to the imperfect guides of *Willis*, *Gonthier*, *Armstrong* and *Grobbelaar*.

If that approach were to be adopted, it is not clear why the clean hands maxim need be resorted to at all. It seems to add little to the well-developed principles in relation to abuse of process, nor does it seem that it should operate differently. Dealing with misleading the court under abuse of process would also obviate the slightly tortured task of trying to fit clean hands in this area within the *Dering* formulation. However, the weight of authority supporting the application of clean hands in the context of misleading the court suggests it is entrenched and unlikely to be ceded to statutory or inherent jurisdiction.



## 7.5 ‘Out, Damn’d Spot’:<sup>485</sup> Indelible Wrongs

There are cases in which it is difficult to conceive of the possibility of the plaintiff washing its hands because the misconduct is such that it cannot be undone without destroying the equity. The facts of *Kettles*<sup>486</sup> provide an example. In that case, the plaintiff had been selling kettles imprinted with the words ‘Patented Copyrighted’ when in fact they were neither patented nor copyrighted. The plaintiff sought an injunction to restrain the defendant from passing off its kettles as those of the plaintiff. In the context of considering the relationship between the misconduct and the equitable right asserted, Long Innes J held:

[T]he acquisition of that degree of distinctiveness without which the plaintiff would not have established its right to succeed in this suit was in part at least due to such action.<sup>487</sup>

Long Innes J ultimately held that ‘the plaintiff has failed to show that it has washed its hands, sufficiently or at all, before it came into equity.’<sup>488</sup> His Honour dismissed the suit ‘without prejudice to any suit which it may ... bring hereafter in the event of the repetition of the wrong, and when it has cleansed its hands to the necessary extent.’<sup>489</sup> However, where the equity sought to be enforced is based on a public profile that was established by the plaintiff’s false claim that its product was patented or subject to copyright, it is difficult to conceive how that wrong could be sufficiently extinguished. That is, the equity arose as a result of the false

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<sup>485</sup> Shakespeare, *Macbeth* Act 5, scene 1, 26-40.

<sup>486</sup> Above n 6.

<sup>487</sup> *Kettles*, above n 6, 128.

<sup>488</sup> *Ibid* 131.

<sup>489</sup> *Ibid* 131.

statements. The only way to correct the statements would be to publish widely that those statements were in fact false. In a sense that would correct the false statements, however, the association of the product with the plaintiff, which association was established by that falsity, and which identity is the foundation of the equity sought to be enforced, could not be undone. The result would be that whatever equity was being enforced after the attempted washing of hands would be based on an improperly obtained reputation and would constitute a taking advantage of a wrong. In those circumstances, and notwithstanding the possibility of repentance left open by Long Innes J, the better view is that the unclean conduct could not be rendered immaterial, and therefore, could not be washed in such circumstances.

Another example is provided by the facts of *Karl Suleman Enterprizes Pty Ltd (in liq) v George*.<sup>490</sup> The plaintiff company in that case set up a managed investment scheme which, in breach of the applicable corporate law, was not registered. The company got into financial difficulties and came under the control of a different set of directors, and ultimately a liquidator, who sought to recover funds from an agent who was also implicated in the wrongdoing.

At first instance,<sup>491</sup> Windeyer J summarily struck out the plaintiff's claim as bound to fail on the basis that the money sought to be recovered from the agent was money paid as a direct consequence of the misconduct of the plaintiff. Windeyer J expressed it as follows:

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<sup>490</sup> Above n 203, [21].

<sup>491</sup> [2003] NSWSC 544, [21].

Repentance or washing of hands could not help in an action where the improper conduct of the plaintiff resulted in payments which the plaintiff seeks to recover.<sup>492</sup>

However on appeal Beazley JA, with whom Spigelman CJ and Santow JA agreed, referred to the decision in *Marshall Futures Ltd v Marshall*,<sup>493</sup> and ultimately held:

Although his Honour is correct when he says that a change in directorship does not alter the legal identity of a company, I consider that his approach fails to pay sufficient regard to the principle to which I have just referred. The liquidators cannot make legal or non-fraudulent that which was illegal or fraudulent. However, they can take steps to reimburse the investors of sums of moneys of which they have been defrauded. These proceedings are, we have been informed, an attempt to do that. It seems that that conduct is or is at least of a similar cleansing nature as has been held sufficient to defeat the defence of unclean hands.<sup>494</sup>

It appears that the appellate decision in *Suleman*, and the decision in *Marshall*, turned on the effect the interposition of a liquidator had on the connection between the wrongdoing and the current actions. If a liquidator was not interposed, the principle as stated at first instance would likely have stood. That is, subject always to discretionary considerations, the plaintiff's conduct would have constituted unclean, and likely unwashable, hands.

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<sup>492</sup> Ibid.

<sup>493</sup> [1992] 1 NZLR 316, where the Court lifted the corporate veil by reason of the separate identity of a liquidator.

<sup>494</sup> *Karl Suleman Enterprizes Pty Ltd (in liq) v Babanour* [2004] NSWCA 214, [57].

As with other aspects of clean hands, an absolute rule that unclean hands may only be washed prior to the issue of proceedings, would be unnecessarily rigid. The policy behind allowing a person to wash clean hands may apply even after proceedings have been issued. Once proceedings are issued, further considerations may become relevant such as the efficient use of court resources, and the advantages of a strong disincentive to deceive the court.

## 8 General Discretion

For all of its history and the care with which the elements of clean hands have been articulated and refined, it remains the case that equitable relief is discretionary.<sup>495</sup> The High Court has described the notion of judicial discretion generally as follows:

'Discretion' is a notion that 'signifies a number of different legal concepts'. ... In general terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result:' ... Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made: ...<sup>496</sup> (references deleted)

Depending on the circumstances in which the discretion is to be exercised

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<sup>495</sup> *Carantinos*, above n 87, [193]; *Black Uhlands*, above n 83, [181]-[183].

<sup>496</sup> *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194, 204-205 [19], (Gleeson CJ, Gaudron and Hayne JJ) quoted in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, [89] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Aon Risk Services*').

it may be broad or narrow.<sup>497</sup> Where a discretion is granted by statute it will be confined to a certain extent by the purposes and objects of the statute.<sup>498</sup> In the context of equitable relief, the discretion will be governed by the principles underlying the exercise of equitable jurisdiction, that is broadly speaking by the conscience of equity informed by the particular circumstances of the case, and the attendant moral imperatives. The English Court of Appeal has identified the exercise of equitable discretion with ‘what fairness requires.’<sup>499</sup>

The existence of the broad discretion means that, as clear as the elements of clean hands are, and as comprehensive as are their proofs in any particular case, the most that can be said is that they are necessary but not sufficient, for the application of the maxim.<sup>500</sup>

As to how and when that discretion is to be exercised, in *Sang Lee* Lord Brightman held that there was a two step process.<sup>501</sup> First the Court should consider whether there is relevant disentitling conduct, and presumably that involves whether the conduct has an immediate and necessary connection and whether there has been depravity in a legal as well as moral sense. Only if those questions are answered in the affirmative should it proceed to the next question – whether having regard

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<sup>497</sup> *Aon Risk Services*, *ibid*, [89] (Gummow, Hayne, Crennan, Keifel and Bell JJ).

<sup>498</sup> See eg, *Aon Risk*, above n 496, and *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194.

<sup>499</sup> *Wilson v Hurstanger Ltd* [2007] EWCA Civ 299, [48] (Tuckey LJ with whom Jacob and Waller LJ agreed) citing *Johnson v E.B.S. Pensioner Trustees Limited* [2002] Lloyd's Reps. PN 309. The Court of Appeal was not dealing specifically with the question of clean hands. In *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615, [703] Males J questioned whether circumstances could fall short of ‘unclean hands’ but nevertheless justify the preclusion of relief because it would be ‘unfair’ in the sense described in *Williams v Hurstanger*. Males J did not express any conclusion. The better view is that each concept is founded on the same equitable considerations.

<sup>500</sup> *Black Uhlands*, above n 83 [181].

<sup>501</sup> *Sang Lee*, above n 72.

to all of the facts of the case, there are other discretionary considerations which should operate to preclude reliance on the defence. Lord Brightman observed that it was not the proper approach for a court to compare the misconduct on the one side with the misconduct on the other side but that:

[T]he court should first decide whether there has been any relevant want of faith, honesty or righteous dealing on the part of the person seeking relief, and the court should then decide whether, as a matter of discretion and in all the circumstances, which may include any relevant misconduct on the part of the person resisting equitable relief, it is right to grant or refuse specific performance. There was no balancing exercise which falls to be performed.<sup>502</sup>

In *Carantinos* Hodgson JA proceeded on the basis that satisfaction of the nexus [and morality] requirement ‘gives rise to a discretion to refuse relief or impose conditions on the grant of relief.’<sup>503</sup>

Particular instances of the exercise of discretion in this context are of limited prescriptive utility, beyond providing examples of relevant factors, given the evaluative nature of the exercise and the infinite variety of circumstances in which they arise. However, the following examples give some indication of the circumstances in which general discretion has precluded reliance on an otherwise established defence of unclean hands:

- where the wrongdoer would avoid the obligation to account,<sup>504</sup>

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<sup>502</sup> Ibid 209 cited in *Robson v Robson* [2012] QCA 119, [82] (Fraser JA with whom Muir at [1] and White JJA at [91] agreed).

<sup>503</sup> *Carantinos*, above n 87, [58] (Hodgson JA) cited in *Kation*, above n 7, 339 [2] (Allsop P).

<sup>504</sup> *Carantinos*, above n 87.

- where the wrongdoer would obtain a forensic benefit from reliance on evidence without any consequences,<sup>505</sup>
- where the defendant would receive a windfall which on balance outweighs the wrongdoing of the plaintiff;<sup>506</sup>
- where a third party would be harmed;<sup>507</sup>
- where the defendant is complicit in the wrongdoing;
- where the defendant is guilty of independent but proximate wrongdoing.

Notwithstanding the breadth of equitable discretion, this is also an area bedevilled by an overly rigid, and unjustified, rule based approach. The following discussion considers the way in which courts have approached the exercise of discretion in a clean hands context and the particular factors that have been taken into account.

## 8.1 Mitigating Factors

It has been suggested by the author of *Snell* that misconduct that has an immediate and necessary relation to the equity sued for, and so would bar a plaintiff's claim, 'is not balanced by any mitigating factors'.<sup>508</sup> That, as a broad statement of principle, is difficult to support.

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<sup>505</sup> *Kation*, above n 7.

<sup>506</sup> *Sang Lee*, above n 72; *Nelson*, above n 7.

<sup>507</sup> *Sang Lee*, above n 72.

<sup>508</sup> *Snell*, above n 7, 91-2 [5-010] citing *Singh v Singh* (1985) 15 Fam Law 97.

The OED defines ‘mitigate’ as ‘make (something bad) less severe, serious, or painful’ and ‘lessen the gravity of’. In contract, mitigation embraces two ideas: loss which ought to have been avoided and loss which was in fact avoided.<sup>509</sup> It is unlikely the author of *Snell* intended to use the contractual meaning as that could only benefit the wrongdoing plaintiff. In the context of clean hands therefore, the best interpretation of ‘mitigating factors’ is that it means factors attributable to the plaintiff that lessen the severity of the misconduct.

It is clear that where there has been some wrongdoing which would otherwise be sufficient to constitute unclean hands, a party may in some circumstances wash their hands, and also there are questions of degree and discretion so that a plaintiff may not be precluded from relief where its misconduct is trifling<sup>510</sup> or where there has been a cessation of the conduct.<sup>511</sup> The cases of *Marshall Futures* and *Suleman* also support the proposition that attempts by a wrongdoing company to redress past wrongs should be taken into account in determining whether to preclude relief by reason of directly relevant unclean hands. Such conduct can be described as conduct that lessens the severity of the wrongdoing, and so as mitigating conduct, and is clearly relevant to the clean hands defence.

If any broad principle in relation to mitigating factors is to be expressed, the better broad principle is that ‘[a] finding of unclean hands is not an automatic bar to relief. Account must be taken of all the circumstances,

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<sup>509</sup> *Clark v Macourt* [2013] HCA 56; (2013) 304 ALR 220, [17] (Hayne J) cf *Chitty on Contracts* (Sweet and Maxwell, 31st ed, 2012), Vol 1, 1805–1806 [26-077].

<sup>510</sup> *Western v MacDermott* (1866) LR 2 Ch App 72; *Besnat v Wood* (1879) 12 Ch D 605 cited in *Parkinson*, above n 127, 639.

<sup>511</sup> *Mrs Pomeroy Ltd v Scale* (1906) 23 TLR 170 (Ch); *Kettles*, above n 6, cited in *Parkinson*, above n 127, 639.



including any mitigating factors, before deciding that unclean hands defeats a plaintiff.’<sup>512</sup>

## 8.2 Contributory Uncleanliness

It is clear that the conduct of the defendant is relevant to the exercise of the discretion whether to preclude relief for unclean hands. The Privy Council in *Sang Lee* held that where there are improprieties on both sides, the task of the court is to

determine whether there has been any relevant unclean hands and then decide whether as a matter of discretion and in all the circumstances which might include any relevant misconduct on the part of the person resisting if it was right to grant relief.<sup>513</sup>

Similarly in *Carantinos* at first instance Einstein J, after referring to the discretion exercisable where unclean hands have been proved, held that the injustice of permitting the wrongdoing defendant to avoid the obligation to account was a relevant consideration in the exercise of the discretion.<sup>514</sup>

A similar approach was taken by Owen J in *Bell v Westpac* where it was alleged<sup>515</sup> that the misconduct by fraudulent directors within the Bell Group of companies constituted unclean hands undermining any claim by any members of the group for equitable relief against the bank. Owen J

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<sup>512</sup> *On Equity*, above n 7, 183 [3.350] citing *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316, 331.

<sup>513</sup> *Sang Lee*, above n 72.

<sup>514</sup> *Magafas v Carantinos* [2007] NSWSC 416, [193].

<sup>515</sup> *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No. 9)* [2008] WASC 239, [9401].

rejected that submission, and one of the bases upon which he did so was that

[t]he participation of most of the Bell group companies in this joint enterprise was at the insistence of the banks. It seems strange that the banks should now to complain [sic] about the consequences of conduct that they were instrumental in bringing about. This is especially so in light of my findings that the banks knew of the breaches of duty.<sup>516</sup>

In *Robson v Robson*<sup>517</sup> the plaintiff sought declarations as to ownership of assets held by the defendants being his brother and his brother's wife. The defendants resisted the claim in part by alleging the plaintiff's unclean hands. The misconduct in question was said to be that he had previously given false testimony in matrimonial proceedings brought by his own wife that he did not own the assets in question so as to insulate them from the claim by his ex-wife. Those attempts failed as the wife discovered the assets anyway. In the declaration proceedings, the trial judge noted that the grant of equitable relief would 'not facilitate a fraud' because the scheme to deceive his own wife had failed. The trial judge also based his decision in part on the fact that the defendants (being the plaintiff's brother and his wife) were complicit in those same wrongdoings. The Court of Appeal approved that approach as follows:

The trial judge held that: one of the circumstances informing the conclusion that [the plaintiff's] misconduct should not deny him equitable relief was that [the defendants] were parties to [the plaintiff's] concealment of his interest in Yalgold and, by the clean hands argument,

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<sup>516</sup> Ibid [9407].

<sup>517</sup> *Robson v Robson* [2012] QCA 119.

hoped to gain a large windfall from a scheme in which they were active participants; ...

The trial judge considered that these additional circumstances were relevant because the equitable defence, being discretionary, was to be applied or otherwise according to the circumstances of the case. ...

His Honour was entitled to take into account that the argument that [the plaintiff] lacked clean hands was pursued by a man who had himself given false testimony in his own interests about the same matter in the Family Court.<sup>518</sup>

In *Gascoigne v Gascoigne*<sup>519</sup> a husband took a lease of land in his wife's name and built a house on it with his own money. This was done because the husband was in debt and wished to remove the property from the reach of creditors. It was done with the knowledge and contrivance of the wife. They thereafter divorced, the wife refused to assign the lease to the husband and he sought a declaration that the wife held the property on trust for him. Despite the fact that the wife was implicated in the wrongdoing by her knowing involvement in the fraud on the creditors, and would, by the refusal of relief, achieve a windfall of the entire property without having paid for it, the Court refused to grant relief on the basis that the husband had unclean hands.

It is perhaps a reflection of the discretionary latitude accorded to the court that no consistent approach can be gleaned from the decisions concerning the misconduct of the defendant. Parties will likely continue to rely on

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<sup>518</sup> Ibid [79]-[80]. See also *Re Ledir Enterprises Pty Ltd* [2013] NSWSC 1332, [213]-[214].

<sup>519</sup> *Gascoigne v Gascoigne* [1918] 1 KB 223.

precedents where they align most closely with their own agenda. However, as close as the facts may be, courts are not bound by decisions based on the exercise of discretion, and it will remain a matter for each court to determine taking into account all relevant considerations. That is sufficient justification to exercise caution in framing any aspect of clean hands in mandatory terms.

### 8.3 Consequences Of Relief

In cases where a party is barred from relief by reason of unclean hands, the law frequently regards it as just that the 'the cards are simply left to lie where they have fallen.'<sup>520</sup> *Gascoigne v Gascoigne*<sup>521</sup> discussed immediately above, is one such case. In *Gascoigne* it was sufficient to bar the claim that the plaintiff could only succeed by proving his own wrongdoing to rebut the presumption of advancement.<sup>522</sup> The court did not consider that the wife's complicity could play any role at all. An almost identical situation and result arose in *Emery v Emery*.<sup>523</sup>

However, there are numerous cases in which the consequences of withholding relief, that is of letting the status quo remain, are taken into

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<sup>520</sup> *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641, 649-650 cited in *Carantinos*, above n 87, [56]; see also *Gascoigne v Gascoigne* [1918] 1 KB 223. Cf *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516, [5] (Gleeson CJ, Gaudron and Hayne JJ), [75] (Gummow J).

<sup>521</sup> *Gascoigne v Gascoigne* [1918] 1 KB 223.

<sup>522</sup> See *Gascoigne v Gascoigne* [1918] 1 KB 223, 226. The Court (Lawrence and Lush JJ) cited *Cottingham v Fletcher* (1740) 2 Atk 156, *Muckleston v Brown* (1801) 6 Ves 52, 68 and *Davies v Otty* (1866) 35 Beav 208 as 'ample authority' for this approach.

<sup>523</sup> [1959] 2 WLR 461.

consideration in determining whether the relief should be granted or, as is often the case, granted conditionally.<sup>524</sup>

In *Carantinos* the plaintiff (Magafas) and defendant (Carantinos) were engaged in a property development partnership/joint venture. They had arranged for the funding of the developments in such a way that false invoices were generated by Carantinos's graphic design business and paid by Magafas's printing business so that potential lenders would be deceived by falsely recorded income on balance sheets and the revenue would be defrauded by falsely recorded expenditure. The partnership broke down and the taking of accounts was one aspect of the relief sought.

At first instance the Court took into account, in the exercise of its discretion, 'the injustice of permitting Mr Carantinos against the case proven by the plaintiffs, to avoid the obligation to account.'<sup>525</sup> On appeal the Court held that the unclean hands of Magafas had been established but that the Court would grant conditional relief having regard, amongst others matters, to 'the unfairness of leaving Carantinos with the full benefit of the money provided by Magafas.'<sup>526</sup>

In *Kation v Lamru*, Allsop P stated that '[t]he necessary measure of the conduct's removal from, or proximity to, the equity will be affected, as here, by the consequences of withholding relief.'<sup>527</sup>

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<sup>524</sup> See eg, *Nelson*, above n 7; *Carantinos*, above n 87; *Kation*, above n 7.

<sup>525</sup> *Carantinos*, above n 87, [51] quoting [193] of the decision at first instance.

<sup>526</sup> *Ibid* [62].

<sup>527</sup> *Kation*, above n 7, 340 [3]. See also *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501, 509 where Wootten J proceeded on the basis that 'it is necessary to have regard to the consequences of refusing relief.'

In each of *Carantinos* and *Kation* the Court treated the consequences of withholding relief as a relevant factor in determining whether the clean hands defence should apply. However, the reasoning in *Kation* requires further comment. Allsop P seems to proceed on the basis that the practical consequences of withholding relief, such as a benefit to a co-wrongdoer, are relevant to the question whether there is a sufficient connection between the wrongdoing and the relief sought. Hodgson JA held that the fact that evidence was given under the protection of a s128 certificate, an immunity section, was a 'reason for regarding the relation as being sufficiently close to enliven a direct discretion to refuse relief ...'

Allsop P and Hodgson JA treat the consequences of withholding relief as a matter relevant to the nexus requirement. This approach is inconsistent with the Privy Council's view expressed in *Sang Lee*<sup>528</sup> where the sequence of questioning is to inquire first, whether the nexus and depravity requirements are satisfied and if they are, then secondly, consider any relevant discretionary considerations. The question whether there is a sufficient connection is more logically answered by whether, and to what degree, the plaintiff is taking advantage of its own wrong. The consequences of withholding relief are better accommodated within the general discretionary considerations that apply where the 'elements' of the clean hands defence are otherwise established.

If the consequences of not granting relief are relevant to the exercise of the discretion, then the consequences of granting relief must also be relevant. It is after all a matter of weighing all the circumstances in the scales of equity's conscience.

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<sup>528</sup> Above n 72.

An example of a court considering the consequences of relief is *Robson v Robson*.<sup>529</sup> In that case one of the reasons the husband's earlier failed attempt at hiding assets from his ex-wife did not bar relief was because the consequences of granting relief would 'not facilitate a fraud.'<sup>530</sup>

#### 8.4 Third Party Rights

The decisions in *Robson v Robson*<sup>531</sup> and *Singh v Singh*<sup>532</sup> demonstrate that the rights of third parties are relevant to the exercise of the discretion whether to grant equitable relief.

In *Robson* as discussed above,<sup>533</sup> equitable relief was granted notwithstanding the plaintiff's wrongdoing, because to do otherwise would harm the plaintiff's former wife's prospects of enforcing her rights against the wrongdoer's assets.

In *Singh* a wife was pursuing the division of matrimonial property and a question arose as to whether the husband was beneficially entitled to a property owned by the husband's brother. The husband had given evidence, with a view to deceiving both his wife and the Court, that he was not beneficially entitled to any part of the property. Subsequently the husband fell out with his brother and in related proceedings petitioned the Court asserting a beneficial entitlement to the property. Anthony Lincoln J decided not to refuse relief notwithstanding the obvious 'unclean

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<sup>529</sup> [2012] QCA 119.

<sup>530</sup> See [79]-[80].

<sup>531</sup> *Robson v Robson* [2012] QCA 119.

<sup>532</sup> *Singh v Singh* (1985) 15 Fam Law 97.

<sup>533</sup> Above n 517.

hands' because 'the denial of relief would harm the wife who came to Court with clean hands, being not merely innocent of any fraud but actually its intended victim.'<sup>534</sup>

In each of those cases, the wives of roguish husbands stood to lose if the husbands were precluded from equitable relief. And in each case, the court held that the relief should be granted because to do otherwise would harm the third party wives. It is not difficult to find a justification for such an approach. As has been noted '[j]ustice is not served by substituting an injury to a third party for an injury to the plaintiff.'<sup>535</sup>

Just as benefits to third parties may influence the decision to grant relief, detriments to third parties may also influence the decision to preclude it. Spry notes that 'the fact that a plaintiff is seeking to further oppressive behaviour against particular persons or members of the public may be taken into account as tending to show that the grant of equitable relief would be unjust.'<sup>536</sup>

## 9 Where Clean Hands Does Not Apply

As discussed above, there are numerous instances in which courts have expressed rules in mandatory terms about the requirements for the application of clean hands. The difficulties associated with those characterisations are clear. Rules have also been expressed in absolute terms as to the circumstances in which clean hands will not be available at all. These characterisations also tend to overstate the matter, and are

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<sup>534</sup> Ibid.

<sup>535</sup> Note, 'Clean Hands in Equity' (1923) 16 *Law & Banker* 154.

<sup>536</sup> *Spry*, above n 1, 425 nn 5, 7.



difficult to reconcile with the underlying principle of clean hands and the discretionary nature of the jurisdiction in which it operates.

As stated above<sup>537</sup>, there are five circumstances in which the clean hands doctrine has been identified as unavailable. They are: in suits for ‘cancellation and delivery up of documents;’<sup>538</sup> in suits for merely declaratory relief;<sup>539</sup> ‘in suits for purely statutory relief;’<sup>540</sup> ‘in suits to prevent multiplicity of actions;’<sup>541</sup> and ‘wherever the court considers that the principles which would lead to relief in the given case outweigh the public policy that equity ought not to assist a wrongdoer.’<sup>542</sup>

## 9.1 Cancellation and Delivery Up of Documents

The first circumstance in which clean hands is said not to apply is in suits for cancellation and delivery up of documents. The rationale for this exception is that a plaintiff’s misconduct is outweighed by the need to prevent others being deceived by a false document.<sup>543</sup> The earliest case

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<sup>537</sup> See chapter 4.3.

<sup>538</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *St John v St John* (1805) 11 Ves Jun 526; 32 ER 1192; *Money v Money (No 2)* [1966] 1 NSWLR 348.

<sup>539</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300.

<sup>540</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *Re the Will of FB Gilbert (decd)* (1946) 46 SR (NSW) 318 (FC).

<sup>541</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43; *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSWLR 224, 233 (Street J); *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501 (SC NSW).

<sup>542</sup> *Parkinson*, above n 127, 1024 [2935] citing *Money v Money (No 2)* [1966] 1 NSWLR 348, Jacobs J at 351-352; *New South Wales Dams v Murray Goulburn Co-operative Co Ltd* (1990) 171 CLR 363.

<sup>543</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *St John v St John* (1805) 11 Ves Jun 526; 32 ER 1192; *Money v Money (No 2)* [1966] 1 NSWLR 348.

upon which this principle rests is *St John v St John*.<sup>544</sup> In that case Lord and Lady St John had lived apart under articles of separation. They reconciled and executed another instrument with two trustees for the conduct of any further separation that included the ability of Lady St John to separate from Lord St John and take the children with her. Lady St John subsequently separated from her husband and sought delivery up of the instrument from the trustees and various findings as to the cause of separation. Lady St John succeeded before the Master and Lord St John appealed. One of the questions for the court was whether the second deed was void, the argument being that as a married woman she had no capacity to enter into such a deed, in addition to which 'the contract of marriage cannot be affected by any contract between the parties' but only by a decree of separation for adultery or cruelty.<sup>545</sup> On that basis, Lord Eldon held that it was impossible for the Court to maintain, or specifically enforce, the contract.<sup>546</sup>

The questions for consideration included whether the conduct of a party applying for delivery up of a void document could prevent such delivery up. Lord Chancellor Eldon held:

Where the transaction is against policy, it is no objection that the Plaintiff himself was a party in that transaction, which is illegal. In *Shirley v Ferrers*, in the Court of Exchequer, a few years ago, the case of a marriage brocage bond, the Plaintiff was a party to the transaction, Particeps Criminis: but the Court held, that, where the relief is upon the policy of

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<sup>544</sup> (1805) 11 Ves Jun 526; 32 ER 1192.

<sup>545</sup> Ibid Ves Jun 532; ER 1195.

<sup>546</sup> Ibid Ves Jun 535; ER 1196.

the Law that is not material: the public interest requires, that the relief should be given; and it is given to the public through that party.<sup>547</sup>

The other case relied upon is *Money v Money (No 2)*<sup>548</sup> which concerned an agreement between a separating husband and wife to transfer a property to the wife in exchange for the wife agreeing not to make any maintenance claim. The husband argued that the transfer documents and title should be delivered up. The wife argued that equity should not grant relief because the husband was a party to the agreement which was illegal and void. Jacobs J found that the agreement was illegal and therefore void and, notwithstanding the husband was a party to the agreement (and there had been some part performance) and ordered the delivery up of the documents. Jacobs J expressed the reason for making such an order as follows:

[I]t does not follow that under no circumstances will any form of relief be given where an illegal purpose had been partly carried out. Even in that situation it might be appropriate for this Court to require delivery up and cancellation of the memorandum of transfer and certainly the appropriate Court would order the delivery up of the Certificate of Title. The reason why this Court would then interfere would be to prevent the memorandum of transfer continuing in existence as the source of confusion and possible fraud.<sup>549</sup>

These cases demonstrate that in some instances, the clean hands defence will not be available in answer to suits for delivery up and cancellation of documents, however, they do not support the exception stated as broadly

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<sup>547</sup> Ibid ER 1194.

<sup>548</sup> *Money v Money (No 2)* [1966] 1 NSW 348.

<sup>549</sup> Ibid 351.

as it is. The case of *Money v Money* in particular suggests that the exclusion of the clean hands defence in the context of the suits for delivery up and cancellation will depend upon the need to prevent documents 'continuing in existence as the source of confusion and possible fraud.' That is the policy that weighs against the application of the clean hands defence. Absent such risk it is unlikely that a Court would be compelled to preclude a clean hands argument.

Further, there is in principle little justification for the total fettering of the Court's discretion in relation to equitable relief in every suit where delivery up is sought. Questions of the extent of the wrongdoing (which a Court by refusing to apply a clean hands defence may implicitly further) and the risk and gravity of any possible fraud that may flow from the documents continuing to exist, should be taken into account by the Court in deciding whether to order delivery up notwithstanding the existence of unclean hands. This would be consistent with the approach of Dawson and Toohey JJ in *New South Wales Dairy Corp. v Murray Goulburn Co-op Co Ltd* where, in considering the circumstances in which blameworthy conduct on the part of the registered proprietor of a trade mark may preclude relief in equity, stated obiter:

[I]t may be more important that equity grant a remedy in the public interest than that it does not aid a wrongdoer: see *Money v Money* (No.2) ... But this is merely to emphasize that in equity the remedy is discretionary, notwithstanding that it was exercised along defined lines.<sup>550</sup>

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<sup>550</sup> *New South Wales Dairy Corp. v Murray Goulburn Co-Op. Co. Ltd* ('Moo case') [1990] HCA 60; (1990) 171 CLR 363, 409.

The Court also retains the power to grant conditional relief which may accommodate the policy imperative of not deceiving the public.

The better approach regarding the application of clean hands where delivery up is sought would be to permit the availability of the defence subject always to the (perhaps weighty) policy consideration that the public should not be exposed to confusion or potential fraud by the document.

## 9.2 Suits for Merely Declaratory Relief

The second circumstance in which the clean hands defence is said not to be available is in suits for merely declaratory relief.<sup>551</sup> The case cited as authority for this proposition is *Lodge v National Union Investment Co Ltd*.<sup>552</sup>

The nature of declaratory relief and the occasions for its exercise are not straightforward. As stated by McLure P in *QBE Insurance* ‘it is a challenge to disentangle issues of jurisdiction, power and standing.’<sup>553</sup> While it is adequately clear that declarations may be made by the court pursuant to

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<sup>551</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300. See also *Dhami v Martin* [2010] NSWSC 770.

<sup>552</sup> *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300.

<sup>553</sup> *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* [2012] WASCA 186, [18] (McLure P) citing *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564, 581-582.

statutory powers or in its auxiliary/ancillary equitable jurisdiction,<sup>554</sup> the distinction has relevance for the clean hands defence.<sup>555</sup>

Insofar as a declaration is granted pursuant to a statutory power, it is consistent with principle that the clean hands defence should not apply.<sup>556</sup> That is so because the equitable defence of cleans hands is available only to equitable claims.<sup>557</sup> Accordingly, if what is meant by ‘merely statutory relief’ is the statutory power to grant a declaration,<sup>558</sup> the fact that the clean hands defence does not operate in such circumstances is not so much an exception to the application of the clean hands defence as it is a necessary consequence of the extent of equitable jurisdiction.

In so far as the relief sought is a declaration in the exercise of equitable jurisdiction, it is not clear in principle why the clean hands defence should not apply. As stated by Vickery J in *Ambridge Investments*:

On the other hand where a declaration is made which is ancillary to or part of equitable relief, the usual equitable defences may apply. Although the categories are not closed, two examples of such relief are: the grant of an injunction, where a declaration may be made in aid of the injunction;

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<sup>554</sup> See for example the discussion in *Ambridge Investments Pty Ltd (in liq) (recor app’td) v Baker* [2010] VSC 59, [61]-[88].

<sup>555</sup> See for example *QBE Insurance (Australia) Ltd v Lois Nominees Pty Ltd* [2012] WASCA 186, (McLure P) and see *H Stanke & Sons v O’Meara* [2007] SASC 246; (2007) 98 SASR 450.

<sup>556</sup> *Ambridge Investments Pty Ltd (in liq) (recor app’td) v Baker* [2010] VSC 59, [61]-[88]. That applies also to declarations of equitable rights made pursuant to a statutory power to make declarations: see *Ambridge* at [72].

<sup>557</sup> *Ambridge Investments*, [70] citing Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002), 102 [3-135]. See also *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300; *Ansford v Plymouth Finance Co Ltd* [1933] NZLR 209; *Re Gilbert* (1946) 46 SR (NSW) 318; *Tito v Wadell (No 2)* [1977] Ch 106; *Mayfair Trading Co Pty Ltd v Dreyer* [1958] HCA 55; (1958) 101 CLR 428, 450-6.

<sup>558</sup> See eg, *Netline Pty Ltd v QAV Pty Ltd* [2014] WASC 280, [7]-[8] (Beech J).

and secondly where a declaration is made as a means of imposing a constructive trust as an equitable remedy in the appropriate case.<sup>559</sup>

The case of *Lodge v National Union* does not seem to support the proposition for which it is proffered. In *Lodge* the plaintiff mortgaged a reversionary entitlement to stocks and securities to Greene to secure 750l and interest at 10 per cent. With a view to raising more money, the plaintiff sought a loan of up to 2000l from the defendants part of which was to be applied to pay off the original mortgage to Greene which was to be transferred to the defendant. A deed of transfer of the reversionary interest was executed subject to the mortgage to Greene. The defendants subsequently paid off the money due on Greene's mortgage and it was transferred to the defendants.

Shortly after that, the plaintiff issued proceedings seeking:

- (a) a declaration that the contracts and transactions were illegal and void and delivery up of the assignments and securities;
- (b) alternatively, a declaration that the assignments are a mortgage, an account of what is due, and the right to redeem the property.

The plaintiff sought to retain all moneys advanced, and to be entitled to delivery up of the mortgage and deed of transfer which would result in the receipt of an enormous windfall to the plaintiff. The Court held that the mortgage and deed of transfer were illegal (as being in contravention of the *Money-lenders Act 1900*), but that the 'whole action is put forward as

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<sup>559</sup> *Ambridge Investments Pty Ltd (in liq) (recvr app'td) v Baker* [2010] VSC 59, [73].

an equitable claim' by reason of which the Court could impose conditions on relief.

Ultimately the Court ordered that:

- (a) upon payment of all moneys due, the defendants deliver up relevant documents;
- (b) in default of the payments mentioned in (a) being made, the action would be dismissed 'except in so far as it relates to the mortgage to Greene.'

The basis for the exception was that

It is not disputed that the defendants are entitled to the benefit of that security, and in that respect the plaintiff will have the usual redemption decree.<sup>560</sup>

There are a number of reasons *Lodge* is not sound authority on which to base a general rule regarding the application of the clean hands maxim where declarations are sought.

First, the rationale applied in the case is not that a party coming to equity must come with clean hands, but rather that those who seek equity must do equity.<sup>561</sup>

Secondly, more recent authority such as *Nelson v Nelson*<sup>562</sup> approach questions of illegality on the basis that where illegality is involved there is no need to resort to equitable maxims such as clean hands, as the results of

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<sup>560</sup> Ibid 312.

<sup>561</sup> See [1907] 1 Ch 300, 308.

<sup>562</sup> *Nelson*, above n 7, 611-612 (McHugh J); *Gnych v Polish Club Ltd* [2015] HCA 23 (17 June 2015), [35]-[41] (French CJ, Keane, Kiefel and Nettle JJ), [66] (Gageler J).



the illegality will be determined by the policy of the legislation.<sup>563</sup> That is, if the policy of the legislation is to render illegal contracts void and not subject to any restitution then the losses will lie where they fall. If the policy of the legislation is otherwise, the Courts may fashion relief to meet those legislative imperatives.

Finally, the relief ultimately granted does not in any way support the proposition that clean hands has no application where declaratory relief is sought. It appears that no declarations were made *Lodge* and that the order amounted to the granting equitable relief on conditions. That is, an order was made that the lender deliver up the contracts on condition that the borrower pay back amounts due to the lender under the arrangement. The plaintiff was entitled to redeem the mortgaged property upon an account being taken and payment being made.

In *H Stanke v O'Meara*<sup>564</sup> the plaintiffs sought declarations pursuant to s31 of the *Supreme Court Act 1935* (SA) in relation to the ownership of land claiming that such declarations were justified because it would be unconscionable for the defendant to retain it, that the defendant was estopped from denying the plaintiffs' ownership, and that there was a resulting trust.<sup>565</sup> The defendants argued that the plaintiffs were barred by their unclean hands from relief. The plaintiffs argued that the claim was statutory and therefore not susceptible to equitable principles such as clean hands.

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<sup>563</sup> Ibid.

<sup>564</sup> *H Stanke & Sons v O'Meara* [2007] SASC 246; (2007) 98 SASR 450, 460 [44] (Duggan and White JJ with whom Kelly J agreed at 480 [138]).

<sup>565</sup> Ibid [39]-[41].

*Stanke* raises the question of whether the clean hands defence should apply where there is a statutory power to order a declaration but the cause of action is substantially equitable in nature and which, absent the statutory power, would itself justify an equitable declaration. The Court held that notwithstanding that a statutory power to make a declaration existed, and even if that power is invoked, the fact that the cause of action was ‘essentially equitable in nature,’ being based on principles of unconscionability and estoppel, meant that equitable defences, including clean hands, were available.

Accordingly the proposition that the equitable defence of clean hands is not available where equitable declaratory relief is sought does not appear to be sustainable on the authority of *Re Lodge* or in principle. The proposition that the clean hands defence is not available in claims for statutory declarations is unremarkable as clean hands only operates in response to equitable claims.

### 9.3 Suits for Purely Statutory Relief

The third circumstance in which clean hands is said not to be available is ‘in suits for purely statutory relief’.<sup>566</sup> As with the case of statutory declarations, this is unremarkable having regard to the fact that clean hands as an equitable defence is available in response only to equitable claims.<sup>567</sup> The suggestion that statutory claims are an ‘exception’ to the application of the clean hands defence, as opposed to being outside

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<sup>566</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *Re the Will of FB Gilbert (decd)* (1946) 46 SR (NSW) 318 (FC).

<sup>567</sup> See n 557.

equitable jurisdiction in general, suggests a misunderstanding of the limited reach of purely equitable defences.<sup>568</sup> If it were legitimately to be considered an exception then a further exception should be that clean hands is not available to claims for purely legal relief. The better approach is to acknowledge at the outset that clean hands is an equitable defence available to equitable claims only, and to consider exceptions only to the extent they arise within that framework.

#### 9.4 Suits to Prevent Multiplicity of Actions

The fourth circumstance in which clean hands is said not to be available is 'in suits to prevent multiplicity of actions.'<sup>569</sup>

The first case relied on in support of this exception is *Angelides*.<sup>570</sup> In that case the plaintiff sought an injunction to prevent the defendant wrongfully breaching its trademark 'Minties', by use of the word 'Mentes.' The defendant alleged that the plaintiff had not been truthful as the word Minties was not the registered trademark, and on that basis the Court should not grant injunctive relief.

Isaacs ACJ dissenting on other grounds, considered the circumstances in which a Court will grant an injunction notwithstanding the wrongful conduct of a plaintiff and concluded that the Court would do so to avoid a multiplicity of actions but *only* where the plaintiff has a legal cause of

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<sup>568</sup> See *Lewis v Nortex Pty Ltd (in liq)* [2005] NSWSC 482, [7].

<sup>569</sup> *MGL*, above n 7, 83 [3-120]; *Parkinson*, above n 127, 1024 [2935] citing *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43; *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSW 224, 233 (Street J); *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501.

<sup>570</sup> *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43.

action that it can and will pursue. That is, if the plaintiff pursued a legal action at common law and succeeded, he could then come to equity seeking an action on the ground of avoiding the necessity of bringing a sequence of legal actions in relation to each subsequent breach. The rationale for granting an injunction in such circumstances was stated by Isaacs CJ to be that it is 'in aid and protection of the legal right.'<sup>571</sup> Isaacs CJ did not proceed on the basis that there is an absolute exclusion to prevent a multiplicity of actions and the case does not support any such general rule. It is unlikely a Court would ignore unclean hands in the circumstances if the other proposed action were one also seeking equitable relief.

The second case cited in support of this exception is *Hewson*.<sup>572</sup> In that case, the defendant sought to rely on *Kettles* and *Angelides* as authority for the proposition that clean hands defence is not available in suits to restrain the breach of a negative stipulation.<sup>573</sup> Street J rejected that argument and in doing so set out clearly the limitations of the 'multiplicity of actions' exception as follows:

It is clear from those two authorities, and from others to similar effect, that in the trademark and passing off field of litigation where a suit is brought in equity to restrain conduct which is actionable at law, and the head of equity upon which such suit depends is the prevention of multiplicity of actions at law, then fraudulent conduct of the type discussed in those cases will not afford a defence.<sup>574</sup>

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<sup>571</sup> Ibid 66, 63, 67.

<sup>572</sup> *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSW 224, 233 (Street J).

<sup>573</sup> Ibid 233.

<sup>574</sup> Ibid 233.

In *Conagra v McCain*, a passing off case, Gummow J makes clear the rationale for the multiplicity of actions exception:

First, the absence or presence of fraud in the common law sense will be determinative of the plaintiff's equitable rights in cases where a charge of unclean hands is made out against the plaintiff; this is because whilst the plaintiff's unclean hands ordinarily would disentitle him to relief in equity, the existence of the fraud on the part of the defendant would give the plaintiff a right to damages at law. In that action the equitable defence would be of no effect. The plaintiff may then have an injunction to avoid the necessity of repeated actions at law, notwithstanding the plaintiff's unclean hands. That is what is established in *Kettles ...* with reference to the analysis of *Ford v Foster* (1872) LR 7 Ch App 611, by Isaacs A.C.J. in *Angelides ...* at 65-66.<sup>575</sup>

These cases do not establish an absolute exclusion of the clean hands defence in cases where what is sought is an injunction to prevent a multiplicity of proceedings. As was held by Street J in *Hewison*, they are limited to 'the trade mark and passing off fields of litigation' and operate in very specific circumstances. They establish that unclean hands will not deprive a plaintiff of injunctive relief where that plaintiff is entitled to equivalent common law relief, and the equitable relief is sought to prevent a multiplicity of actions which could be brought to enforce those common law rights.

The third case relied on in support of this exclusion is *Dow Securities*,<sup>576</sup> which is in a different 'field' of litigation and suggests an extended, but

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<sup>575</sup> *Re Conagra Inc v McCain Foods (Aust) Pty Ltd* [1992] FCA 159; (1992) 33 FCR 302, [47].

<sup>576</sup> *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501.

not unlimited operation of the exception. In *Dow* the plaintiff (Dow) and defendant (MIL) entered into an agreement in 1976 whereby MIL retained consulting services of Dow for 5 years for \$20,000 per year so long as Mr Brown (the owner of Dow) was available to provide those services. There was a term of the 1976 agreement that if control of MIL changed during the term of the agreement, Dow could terminate the agreement and MIL would have to pay Dow \$100,000. In 1978 and 1979 MIL loaned Dow \$99,566.23. In 1979 another company purchased MIL triggering the termination clause. MIL presented a petition for the winding up of Dow on the basis of the admitted \$99,566.23 debt and Dow sought an injunction to prevent the petition proceeding on the basis that Dow had a valid counterclaim for \$100,000. MIL raised various arguments in answer to the injunction application including that Dow had unclean hands by reason of it being a party to the loans (\$99,566.23) which breached s125 of the *Companies Act 1961 (NSW)* which prohibited loans from a company to another company in which a director had a substantial shareholding.

Wootten J held that the \$100,000 was a valid claim and not a penalty. His Honour also held that Dow's involvement in the \$99,566.23 loan constituted unclean hands, however he concluded that the unclean hands did not have an immediate and necessary connection to the relief sought in the counterclaim which was entirely independent of the loan. In addition to rejecting the submission on that basis, his Honour rejected it because to do otherwise would result in a multiplicity of proceedings.

The courts have recognized several exceptions which reflect the fact that the doctrine will not be applied if the result would conflict with other policies of equity. ... In the present case the consequence of refusing relief

would be an additional proceeding, viz, the presentation of a petition for winding up in which Dow could be expected to argue the same matters in opposition to the petition as have been argued before me. If Dow showed that it had a substantial counter-claim the court would find that it had not 'neglected' to pay the debt, and it would be appropriate to dismiss the petition or stay proceedings on it pending the determination of the common law proceedings. A company against which a petition is presented cannot be wound up merely because its hands are not clean. Dow would not there be seeking equitable relief, and the doctrine would be irrelevant. The result would only be the re-litigation of issues before the same division of the court, even conceivably before the same judge, according to the same principles. In my view it is not appropriate to apply the maxim in such circumstances.<sup>577</sup>

The decision of *Dow* is consistent with *Angelides*, *Hewson* and *Conagra* insofar as the issues in the equity proceedings would be the same if litigated under the statutory winding up regime. But that does not mean that unclean hands are irrelevant in every case where the question of the avoidance of a multiplicity of proceedings arises.

In *Conagra* Gummow J held that the injunction is 'to avoid the necessity of repeated actions at law.' It seems that the finding in that case was based on the fact that if an injunction was not granted, then the plaintiff would in theory be compelled, in the face of ongoing passing off by the defendant, to institute a series of actions claiming damages at law for that passing off without any ability to prevent such conduct by injunctive relief. The same questions would be raised in each proceeding and in those circumstances the policy of avoiding likely multiple common law

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<sup>577</sup> Ibid 509.

proceedings on the same issues by granting injunctive relief, outweighed the policy of precluding litigants with unclean hands.

In *Dow* the position was that the plaintiff was permitted an injunction (notwithstanding unclean hands) because if the Court declined to grant the relief sought in the injunction proceedings, the very same issues would be raised in the creditor's petition proceedings. Again the primary policy was avoiding multiple consideration of the same issues.

Although the policy of avoiding a multiplicity of actions will in some circumstances outweigh unclean hands, it is going too far to state as a general rule that unclean hands are irrelevant in suits to prevent a multiplicity of actions. The better approach is to state, as an apposite policy, the desire of equity to avoid a multiplicity of proceedings. The competing policies must always be weighed, and it is difficult to justify an approach that grants one policy inevitable ascendancy over all other policies and discretionary considerations.

### **9.5 Wherever the Equitable Principles Supporting Relief Outweigh the Public Policy that Equity Ought Not Assist a Wrongdoer**

The fifth circumstance in which clean hands is said not to be available is 'wherever the court considers that the principles which would lead to relief in the given case outweigh the public policy that equity ought not to



assist a wrongdoer.<sup>578</sup> The authorities cited for this proposition are *Money v Money (No 2)* and *New South Wales Dairy Corp. v Murray Goulburn Co-op Co Ltd*.<sup>579</sup>

In *Money v Money (No.2)* Jacobs J held:

There is in my view a further principle in Equity that even though a transaction be tainted with illegality on the ground that its performance is contrary to public policy, Equity will interfere if on the same grounds of public policy the transaction ought not to be allowed to stand. In these circumstances a party will not be debarred from relief simply because he is *particeps criminis*.<sup>580</sup>

In *New South Wales Dairy Corp. v Murray Goulburn Co-op Co Ltd* Dawson and Toohey JJ I said:

[I]t may be more important that equity grant a remedy in the public interest than that it does not aid a wrongdoer: see *Money v Money (No.2)* ... But this is merely to emphasize that in equity the remedy is discretionary, notwithstanding that it was exercised along defined lines.<sup>581</sup>

As considered above,<sup>582</sup> in *Dow Securities* Wootten J referred to the 'several exceptions' to the application of clean hands, citing cancellation and delivery up of documents and avoiding a multiplicity of proceedings.<sup>583</sup> Wootten J identified the basis for these exceptions as being a reflection of

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<sup>578</sup> *Parkinson*, above n 127, 1024 [2935] citing *Money v Money (No 2)* [1966] 1 NSWLR 348, 351-2 (Jacobs J); *Moo Case*, above n 550.

<sup>579</sup> [1990] HCA 60; (1990) 171 CLR 363.

<sup>580</sup> *Money v Money (No 2)* [1966] 1 NSWLR 348, 351.

<sup>581</sup> *Moo Case*, above, n 550, 409.

<sup>582</sup> At n 576.

<sup>583</sup> *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501, 509.

‘the fact that the doctrine will not be applied if the result would conflict with other policies of equity.’<sup>584</sup>

These cases however do little more than identify matters of ‘public policy’ as being relevant in the exercise of the discretion to grant equitable relief where unclean hands has been established. In that regard, they are entirely consistent with the approach expressed by the Privy Council in *Sang Lee* that the first step in clean hands is to determine whether the nexus and depravity requirements are met, if they are, the next step is to consider all relevant discretionary matters.

Once it is accepted that equitable relief is discretionary, and equitable defences such as clean hands are available to equitable claims and not statutory or common law claims, each of these so-called ‘exceptions’ can be seen to be either natural incidents of the scope of equitable jurisdiction, or as matters relevant to the exercise of the discretion in relation to any claim for equitable relief. Articulating them as ‘exceptions’ to the clean hands defence risks unduly fettering the discretion which is to be exercised by the Court where such relief is sought.

The better approach therefore is to say that the circumstances giving rise to these so-called ‘exceptions’ (multiplicity of proceedings, delivery up of documents, policy reasons) if they arise, are factors which must be weighed by the Court in the exercise of equitable jurisdiction, to determine whether the clean hands defence, which is otherwise established, should be applied. The authorities on these factors support

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<sup>584</sup> Ibid.

the conclusion that they are weighty factors, however, there may be situations in which they are not determinative.

## 10 Pound's Critique of Clean Hands

A prominent article on clean hands is the 1926 article *On Certain Maxims of Equity* by Roscoe Pound.<sup>585</sup> By its polemic tone, one would be forgiven for thinking Pound wished it to be the final nail in the coffin of long dead and irrelevant equitable maxims kept alive only by misguided and unnecessarily Anglophilic American jurists. Many of the criticisms lack force, at least in relation to the clean hands maxim, and have not been made out by history.

Pound's first point is that maxims

[h]ave ceased to play any great part in the English reports and are now to be found chiefly in students' books. In the United States, on the contrary, they are constantly quoted in judicial opinions, and text books on equity still expound them.<sup>586</sup>

Pound's article was published in 1926. It is curious that he made this assertion given that in the preceding 30 years, there were numerous cases in England, and the leading Australian case for that matter, which discussed and applied the clean hands maxim including: *Cochrane v Macnish* (1896),<sup>587</sup> *Towers v African Tuf Co* (1904),<sup>588</sup> *Lodge v National Union*

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<sup>585</sup> Then Dean of the Law School of Harvard and Carter Professor of Jurisprudence in Harvard University. The article is replicated almost verbatim in Pound, *Jurisprudence* (1959) St Paul, Minn.: West Pub Co. Vol 3, 545-557 (reprinted by The Law Book Exchange, Ltd, Union New Jersey 2000).

<sup>586</sup> Pound, above n 63, 259.

<sup>587</sup> *Cochrane v Macnish* [1896] AC 225.

*Investment Co Ltd* (1907),<sup>589</sup> *Glyn v Weston Feature Film Co* (1916),<sup>590</sup> *Moody v Cox* (1917),<sup>591</sup> *Gascoigne v Gascoigne* (1918),<sup>592</sup> and, from Australia, *Meyers v Casey* (1912).<sup>593</sup> The suggestion that the maxims generally (which must include clean hands) had completed their decline into irrelevance in England by 1926 has also not been borne out having regard to the prominence of clean hands to the present day.<sup>594</sup>

Pound describes the maxims of equity generally as -

traditional proverbial ways of putting, on the one hand certain results of equitable doctrines, and, on the other hand, certain policies of the courts in the exercise of equity jurisdiction.<sup>595</sup>

Pound places the clean hands maxim in the latter category. As to its history, Pound asserts that equitable maxims, including clean hands, are relatively new, having been created by Francis<sup>596</sup> and perpetuated by Story.<sup>597</sup> Pound emphasises that the clean hands maxim as expounded by Francis was 'He that hath committed iniquity shall not have equity'<sup>598</sup> and also that:

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<sup>588</sup> *Towers v African Tuf Co* [1904] 1 Ch 558.

<sup>589</sup> *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300.

<sup>590</sup> *Glyn v Weston Feature Film Co* [1916] 1 Ch 261, 270.

<sup>591</sup> *Moody v Cox* [1917] 2 Ch 71.

<sup>592</sup> *Gascoigne v Gascoigne* [1918] 1 KB 223.

<sup>593</sup> *Meyers v Casey*, above n 7.

<sup>594</sup> See especially *The Royal Bank of Scotland*, above n 7, in relation to contemporary English reliance on clean hands. Pound expressed precisely the same views in his 1956 book *Jurisprudence* notwithstanding the intervening decisions of the United States Supreme Court in *Loughran v Loughran* [1934] USSC 99 ; 292 US 216, 229 (1934); and *Keystone Driller Co v General Excavator Co* (1933) 290 US 240, 245.

<sup>595</sup> Pound, above n 63, 259.

<sup>596</sup> Ibid 259, 263-264, 269, 275. See Francis, above n 61.

<sup>597</sup> Ibid 269.

<sup>598</sup> Ibid 263.

[B]efore *Dering v Earl of Winchelsea* the books put the doctrine in the wholly different form in which we find it in Francis' Maxims in 1728.<sup>599</sup>

A part of Pound's criticism is that the maxim is 'not older than the 18<sup>th</sup> century, and in its usual form it speaks from the end of that century.'<sup>600</sup> But if the maxim denotes or describes a policy of the court exercising equitable jurisdiction, it should not matter when the particular form was first expressed. The question is what is the policy expressed by the clean hands maxim and does that maxim, in whatever form, adequately denote or describe that policy?

Despite saying that the clean hands maxim is a proverbial way of putting a policy of the court of equity, Pound makes no attempt to express what that principle is, whether the different expressions of the clean hands maxim adequately express it, nor whether that principle should continue to be applied. Pound suggests that the underlying principle remains operative when he concludes that the proverbial maxim is not very useful and now 'rarely invoked'<sup>601</sup> but that '[t]he doctrines are well understood and may be vouched without resorting to proverbial formulations.'

It is not clear whether Pound's reference to 'doctrines' is a reference to the substantive law of equity which Lord Eldon crystallised out of the amorphous sea of equitable conscience in the early 19<sup>th</sup> century, or whether it is a reference to the equitable 'policies' which underlie the maxims. If it is the former then Pound's argument appears to be that there

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<sup>599</sup> Ibid.

<sup>600</sup> Ibid 264.

<sup>601</sup> Ibid 276.

is no need for the clean hands maxim because the substantive law of equity covers the field. That is demonstrably wrong.<sup>602</sup>

If it is the latter, then the point is little more than semantics, and Pound's point is that a maxim that denotes a known policy should not be used because the policy can be referred to instead. Pound's best point in this regard may be that if the principle or policy were referred to there would be a reduced chance of decisions being made inconsistently with the policy by judge's who do not know what policy the maxim denotes.

There is some force to the suggestion that the expression of an equitable maxim should as closely as possible mirror the content of that principle. In that regard Pound might say that the various sub-rules and interpretations of the clean hands maxim discussed above demonstrate the problem with the clean hands maxim. That problem being that the focus on the words of the maxim has distracted from the underlying principle and occasionally led to rigidity and error.

Although Pound was wrong about the decline into irrelevance of clean hands, he was right about the potential problems that reliance on maxims can cause. A contemporary example is provided by *Kation*. The approach of Allsop P in *Kation* sits at the cross-roads of the clean hands maxim as expressed in *Dering*, and the demands of the underlying principle, and is an example of the difficulties that can arise when a maxim becomes the rule itself, and is divorced from its rationale. Allsop P tries to pay due regard to the long established form of the clean hands maxim as well as

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<sup>602</sup> It is generally well understood that where a substantive rule of equity applies there is no need to rely on maxims such as clean hands: see, eg, *Kation*, above n 7, [148] (Basten JA). See *Spry*, above n 1, 253.

giving effect to the substantive rationale and mandates of conscience underlying it. While Allsop P's approach is preferable to a rigid adherence to a slightly outmoded and inadequate expression the maxim, it is difficult to serve two masters, and a fresh formulation would be preferable.

## 11 Conclusion

From the history of the clean hands maxim it is apparent that the underlying principle is that the court will not assist a party to take unconscientious advantage of their wrong.<sup>603</sup> For more than 200 years *Dering v The Earl of Winchelsea* has been relied on as the primary expression of clean hands. Numerous attempts have been made to refine it and articulate sub-rules to better express it. However, the *Dering* formulation, and the various refinements and sub-rules, have not been entirely successful.

One of the primary difficulties of the application by the courts of the clean hands defence under the *Dering* formulation is the frequency with which sub-rules and interpretations are expressed in absolute and mandatory terms. It has been shown that in relation to the nexus requirement, numerous sub-rules have been expressed which are not sustainable as principles of general application.<sup>604</sup> They include rules that:

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<sup>603</sup> See chapter 2.

<sup>604</sup> See chapter 5.3.

- The conduct must be done to the defendant;<sup>605</sup>
- the defendant must have been injured;<sup>606</sup>
- the conduct must have been done by the plaintiff;<sup>607</sup>
- there must be a lack of clean hands in the relationship/transaction between the two parties to the proceeding;<sup>608</sup>
- the equity must be brought into existence by the misconduct;<sup>609</sup>
- it must be necessary to prove, plead or rely on the questionable conduct.<sup>610</sup>

Each of these rules, expressed as they are in mandatory terms, overstep the mark and unduly fetter the discretion necessary for the proper application of the clean hands defence consistently with its underlying principle and the conscience of equity. The recent case of *Kation v Lamru* demonstrates the way in which too literal an adherence to the particular language<sup>611</sup> (immediacy and necessity) can obscure and obstruct the application of the underlying principle and the demands of conscience.<sup>612</sup>

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<sup>605</sup> See chapter 5.3.1.

<sup>606</sup> See chapter 5.3.2.

<sup>607</sup> See chapter 5.3.3.

<sup>608</sup> See chapter 5.3.4.

<sup>609</sup> See chapter 5.3.5.

<sup>610</sup> See chapter 5.3.6.

<sup>611</sup> See *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] AC 537, [28] (Baroness Hale of Richmond DPSC); *Halser v Singtel Optus Pty Ltd* [2014] NSWCA 266, [66] citing *Beck v Henley* [2014] NSWCA 201, [32] and [36] regarding similar issues for accessorial liability for breach of trust and the rule in *Saunders v Vautier*.

<sup>612</sup> See chapter 5.4.



That does not mean that each of the cases in which such rules were expressed was incorrectly decided nor that the factors identified as 'rules' are irrelevant. The factors identified remain relevant as indicia of connection to which courts may have regard in determining whether there is a sufficient connection to justify the application of the clean hands defence. However they should in no respect be seen as determinative.<sup>613</sup>

Other limitations, inappropriately expressed in absolute terms, as to the availability of the clean hands defence include:

- That if unclean hands are to be washed they must be washed prior to the institution of proceedings;<sup>614</sup>
- that mitigating factors are irrelevant to the exercise of the discretion;<sup>615</sup>
- that the clean hands defence is not available in suits for cancellation and delivery up of documents;<sup>616</sup>
- that the clean hands defence is not available in suits for merely declaratory relief;<sup>617</sup>
- that the clean hands defence is not available in suits to prevent a multiplicity of actions.<sup>618</sup>

These limitations may be justified to a degree by reference to various policy considerations and moral imperatives. However it has been

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<sup>613</sup> See chapter 5.5.

<sup>614</sup> See chapter 7.

<sup>615</sup> See chapter 8.

<sup>616</sup> See chapter 9.1.

<sup>617</sup> See chapter 9.2

<sup>618</sup> See chapter 9.4.

demonstrated that none of those policies or imperatives warrant a rule in absolute terms. The particular policies or imperatives may have greater weight in the particular circumstances, however paying due regard to that weight does not require the exclusion of all discretion.

It has also been shown that the language of *Dering* in expressing the depravity requirement suggests a high level of moral wrongdoing which does not encompass types of misconduct which undoubtedly can amount to unclean hands for the purposes of the defence. In particular, equitable fraud where there is no element of intention does not naturally come within the description 'moral depravity,' nor does the attempted enforcement of rights innocently obtained but enforced in unconscionable circumstances.<sup>619</sup> In that regard the ongoing resort to the phrase 'legal and moral depravity' to describe the quality of misconduct necessary to constitute unclean hands must be called into question. Having regard to the fact that the conscience of equity is the primary guide to the application of clean hands,<sup>620</sup> the better approach would be to identify the requisite transgressive quality of the conduct by reference to more modern designations of the requirements of the conscience of equity, being 'unconscionable' or 'unconscientious'.

The final way in which the *Dering* formulation falls short is in failing to accommodate within its terms the circumstances where unclean hands is constituted by the plaintiff misleading or attempting to mislead the court.<sup>621</sup> However that criticism loses some force when it is appreciated

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<sup>619</sup> See chapter 5.6.1.

<sup>620</sup> See chapter 3.

<sup>621</sup> See chapter 6.

that clean hands adds little if anything to existing legal mechanisms for dealing with abuses, or attempted abuses, of court process.<sup>622</sup>

If the *Dering* formulation falls short, what is the alternative? As discussed above in chapter 5.5 Nettle J has suggested a less problematic formulation which, slightly edited, reads

[T]he plaintiff must seek to derive an advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief.<sup>623</sup>

There is some advantage in brevity, however, brevity must be balanced by usefulness and in some respects that formulation may provide limited guidance and not encompass the full range of clean hands and the matters to be taken account in its application. For example, the reference to ‘dishonest conduct’ suggests an element of intention which need not be present.

A more fulsome description could serve to avoid difficulties such as those that have arisen out of *Dering*. Any general formulation of the clean hands maxim that is to accommodate all aspects of the defence must take into account that:

- The misconduct must be against the conscience of equity but need not be dishonest;
- the misconduct should be connected to the relief in such a manner as to warrant withholding relief;

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<sup>622</sup> See chapter 7.4.

<sup>623</sup> *IGA*, above n 297. See above n 330.

- the court must have discretion;
- the defence must be available where the misconduct is constituted by attempts to mislead the court.<sup>624</sup>

A formulation which meets all of these requirements and which avoids the problems apparent on the face of the *Dering* formulation may be expressed in the following terms:

The court may refuse to grant a plaintiff relief where he or she seeks to take advantage of misconduct in circumstances where:

- the temporal, forensic and practical connection of the misconduct to the equity sued for; and
- the manner or fact of enforcement, or the consequences of relief,

are such that enforcement would be unconscientious.

The word 'may' is included to reinforce that the defence is discretionary. The word 'misconduct,' rather than 'legal and moral depravity' or 'dishonesty' is broad enough to encompass the range of equitable transgressions, including those not involving any element of intent. This should avoid any difficulties with the antiquated and pejorative requirement for 'legal and moral depravity' or 'dishonesty.' The nexus element of a 'temporal, forensic and practical' connection is borrowed from *Kation*<sup>625</sup> and is sufficiently broad to encompass those cases in which misconduct does not have a 'necessary' connection to the equity sued for, but nevertheless offends the conscience of equity. The reference to the

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<sup>624</sup> Although as stated this aspect can and should be dealt with at law.

<sup>625</sup> Above n 7.

‘manner or fact of enforcement’ encompasses situations, such as those in *Tanwar*,<sup>626</sup> where the transgression is the enforcement, rather than the creation, of the right. The word ‘manner’ would, if necessary, also cover those situations where the misconduct is constituted by misleading the court. The use of ‘unconscientious’ ties all of those factors into the overriding imperative of a court exercising equitable jurisdiction, that it is to act in accordance with conscience.

It is hoped that such a formulation would add some clarity and consistency to the way in which clean hands is considered and applied, and avoid the problems associated with the *Dering* formulation and its progeny.

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<sup>626</sup> Above n 107.

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