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PREVENTING THE INFINITE REGRESS: DISCRETION, BARS TO RELIEF AND THE STRUCTURE OF EQUITY

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ABSTRACT. *A growing body of literature has emphasised the role of equity as a body of second order principles. These scholars argue that what makes equity distinct is that it assumes a particular outcome at common law, but then controls or disables one party's insistence on her legal entitlements. Where do equitable bars to relief fit within such accounts? This article argues that equitable bars to relief fit comfortably with the view that equity is second order law. This is for a simple reason: equity prevents the unjust exercise of legal entitlements. However, equitable rules are also amenable to being exercised unjustly. To prevent equitable rules being abused, equitable doctrines require some limited discretion to be built in. If this were not the case, then the general law would require a third set of rules to control equity and then a fourth set of rules to control those rules (ad infinitum).*

KEYWORDS: *equity, bars to relief, discretion, conscience, common law.*

I. INTRODUCTION

A growing body of academic literature has emphasised the role of equity as a body of second order principles.[1] The purpose of this article is to provide an analytical and doctrinal account of how certain equitable discretions fit with the view of equity as "second order" law. The article does not delve into evaluating competing normative accounts of how equity can be justified. The focus is modest: to provide an account of why certain discretions exist in equity. It is true that judicial discretions exist at both

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[1] See e.g. M. Harding, "Equity and the Rule of Law" (2016) 132 L.Q.R. 278; H.E. Smith, "Equitable Defences as Meta-law" in P.S. Davies, S. Douglas and J. Goudkamp (eds.), *Defences in Equity* (Oxford 2018), ch. 2; B. McFarlane and R. Stevens, "What's Special about Equity? Rights about Rights" in D. Klimchuk, I. Samet and H.E. Smith (eds.), *Philosophical Foundations of the Law of Equity* (Oxford 2020), ch. 9; H.E. Smith, "Equity as Meta-law" (2021) 130 Yale L.J. 1050.

common law and in equity. But one distinguishing feature of equity is that an equitable doctrine may not apply due to a discretionary "bar to relief" such as hardship, laches or unclean hands. A remedy at common law, on the other hand, will not be refused for such a reason. If there is nothing distinctly equitable about such bars to relief, it may be argued that there is nothing objectionable about these principles being fused with what may be seen to be common law analogues.[2]

This article argues that equitable bars to relief fit comfortably with the view that equity is a body of second order principles. This is because one of equity's central functions is, at a high level of generality, to prevent the unjust exercise of legal rights, powers and liberties (collectively "legal entitlements"). But equitable rules are also amenable to being exercised unjustly or otherwise exploited. To prevent equitable rules from being abused, equitable doctrines require some limited discretion to be built into their application. Otherwise the general law would require a third set of rules to control equity and then a fourth set of rules to control those rules (*ad infinitum*). The limited discretion afforded to courts through equitable bars to relief is necessary to break the infinite regress once there is a body of rules about rules. The focus of this article is on the discretionary nature of equitable bars to relief primarily because such principles permeate equity and are somewhat undertheorised.

II. Structure of Equity

Equity has been repeatedly characterised as a body of second order principles.[3] On this account an important distinctive feature of equity is its second order form. Scholars have variously described equity as "a gloss"[4] or a "collection of appendices"[5] on the common law, a body of rights about other rights,[6] "adjectival"[7] to the common law, "a safety valve",[8] a "second-order intervention into the rest of the law"[9] and "supplementary"[10] to the common law. The first edition of *Story's Commentaries on Equity Jurisprudence* put the matter as follows: "The whole system of Equity Jurisprudence proceeds upon the ground, that a party, having a legal right, shall not be permitted to avail himself of it for the purpose of injustice, or fraud, or oppression."[11]

[2] See e.g. *Ball v De Marzo* [2019] EWHC 1587, [2019] Costs L.R. 1019, at [52].
[3] See the authorities collected in note 1 above.
[4] F.W. Maitland, *Equity*, 2nd ed., by J. Brunyate (Cambridge 1936), 18.
[5] Ibid., 19.
[6] McFarlane and Stevens, "What's Special about Equity?", 194.
[7] Harding, "Equity and the Rule of Law", 301.
[8] Smith, "Equitable Defences", 19.
[9] Ibid., 18.
[10] Maitland, *Equity*, 1–19.
[11] J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, vol. 2 (Boston 1836), 548.

The ways in which scholars refer to equity as "second order" differ depending on whether equity is acting in its exclusive or auxiliary jurisdiction. Equity's exclusive jurisdiction typically takes the form of imposing a new jural relation on the parties by assuming a particular primary outcome at common law, but seeking to control or disable one party's insistence on her strict legal rights, liberties[12] or powers.[13] The term "exclusive" is used because the primary level of the common law would not recognise the second order rights existing in equity. Obvious examples are trusts, fiduciary duties and breach of confidence.

Equitable doctrines may also be classified in terms of those which aid the enforcement of primary legal rights. In such cases an equitable remedy is granted for a common law wrong or in aid of a common law right. These circumstances are often described as equity acting in its "concurrent" or "auxiliary" jurisdiction (the latter term is preferred here). In such cases, equitable remedies supplement those at common law, by providing relief in circumstances where common law remedies may be inadequate or non-existent. Examples include an injunction, specific performance, rescission, and rectification, which supplement the relief, or lack thereof, available at common law.[14]

The fact that equity characteristically provides a body of "second order" principles means that it has other salient features. One feature is that equity is described as "modular".[15] That is because equitable rights and powers do not replace the system of primary common law rights but are built on top of that primary system.[16]

The simplest example of the modular nature of equity is the relationship created by the trust.[17] If a settlor declares himself trustee over a right for the benefit of the beneficiary, the imposition of a trust does not alter at common law the identity of the original legal right holder nor the content of the duties which that right imposes on others at common law. So, if the settlor were to declare himself the trustee of a watch in favour of a beneficiary, the theft of that watch only constitutes a legal wrong to the trustee who may alone sue for the common law tort of conversion.[18] The

[12] There are examples where equity is second order in the sense of responding to a liberty (i.e. gap) that is created at common law. The "starting point" in a breach of confidence case is the defendant's liberty to use information: *Racing Partnership Ltd. v Done Bros (Cash Betting) Ltd.* [2020] EWCA Civ 1300, [2021] 2 W.L.R. 469, at [183]. Likewise, where impugned conduct is captured by a common law wrong that will provide a basis for not imposing a novel fiduciary duty: *Breen v Williams* (1996) 186 C.L.R. 71, 110.

[13] H. Potter, *An Introduction to the History of Equity and Its Courts* (London 1931), 11, 104.

[14] In making this observation it ought to be noted that there are some circumstances where similar orders are available at common law. The common law vitiating factor of duress renders a contract voidable: *Pao On v Lau Yiu Long* [1980] A.C. 614, 636 (P.C.).

[15] H.E. Smith, "Property as the Law of Things" (2012) 125 H.L.R. 1691, 1701–02.

[16] Smith, "Equitable Defences", 24.

[17] B. McFarlane, "Property and the New Doctrinalism: Comment" (2015) 163 University of Pennsylvania L.R. Online 293, 296.

[18] *MCC Proceeds Inc. v Lehman Bros International (Europe)* [1998] 4 All E.R. 675, 701 (C.A.).

imposition of the trust in equity (at the secondary level) does not alter the trustee's right to quiet enjoyment of the watch at common law (at the primary level) as against the thief. As explained below, the concept of modularity is also important to equitable bars to relief. This is because the existence of such discretions at the "secondary level" of equity do not undermine the core entitlements held by the parties at the "primary level" of the common law.

III. The Role of Discretion and Bars to Relief

A. Justification

If one accepts the accounts above as to the nature of equity a question remains: where do discretionary bars to relief fit? The answer is that such discretions fit comfortably with the view that equity is a body of second order principles. If it is true that a *raison d'être* of equity is the prevention of the unjust exercise of legal entitlements, then if equitable principles became as formal as legal rules, they would now be amenable to being exercised unjustly or otherwise exploited. To prevent equitable rules from being abused, equitable doctrines require some limited discretion to be built into them. Without this, the general law would require a third set of rules to control equity and then a fourth set of rules to control those rules (*ad infinitum*). Understood this way, bars to relief can be seen as "equity on equity". Henry Smith has observed similarly that "equity is itself recursive. It applies to itself. Part of equitable analysis is making sure that equity does not produce inequity. … We could call this 'meta-meta-law' and so on. There is nothing vicious about this regress, as long as the system is an open one and we know on what to draw".[19]

If equitable principles were indistinguishable from common law principles, albeit the former were second order, one could imagine a curious exchange between St. German's Doctor and Student (1528). The student first defends equity by mounting the classical defence that "[i]t is not possyble to make any generall rewle of the lawe but that it shall fayle in some case".[20] But, if the equitable principles were as formal as common law rules one could imagine the Doctor's retort: "but are not equitable rules as general as those at common law, do they not readily fail as often?" The student may now need to defend a hypothetical third body of rules to prevent equitable rules from being abused or taken advantage of owing to the rigidity of equity.

[19] Smith, "Equity as Meta-law", 1110.
[20] T.F.T. Plucknett and J.L. Barton (eds.), *St German's Doctor and Student* (first published 1528, London 1974), 97.

Given this thesis, three equitable bars to relief merit further examination. They are laches, unclean hands, and hardship. These examples have several common attributes that are consistent with the thesis put forward in this article.

First, discretionary bars to relief operate only to disable a claimant's entitlement to an equitable remedy. They serve to limit court orders but otherwise leave intact substantive rights. This is important. Equitable bars to relief operate in a manner which minimises the ripple effects across the general law because they do not, for example, affect a claimant's entitlements at the primary level of the common law (e.g. a bar to relief will leave intact a claim for common law damages).[21] Given equitable bars to relief operate within a narrow scope there is only a limited extent to which such discretions detract from the certainty of the law.

Second, when applying each bar to relief equity does not commit itself to a bright line rule. Rather, they tend to be more discretionary than common law rules. The lack of formalism, coupled with the scope of such rules, is best explained by the fact that equity is trying to prevent its own supplementary system from being taken advantage of.

Finally, equitable bars to relief appear to work differently between equity's exclusive and auxiliary jurisdictions. Discretion will more readily apply to deny relief in equity's auxiliary as opposed to its exclusive jurisdiction. This makes good sense once it is recognised that where a discretion prevents relief in equity's exclusive jurisdiction, a claimant is potentially left with no remedy, whereas a discretion that prevents relief in equity's auxiliary jurisdiction will leave a claimant with her remedy at common law.

B. Laches

Laches operates to disable a claimant from taking advantage of her equitable[22] rights (broadly understood) by virtue of delay. The doctrine reflects the historical maxim that "equity aids the vigilant, not the indolent"[23] or "equity regards length of time".[24] Laches has (incorrectly) been observed as an equitable equivalent to a limitation period.[25] But laches is distinct from the rules created by limitation of action statutes for three reasons.

First, most limitation of action statutes do not affect "the rules of equity concerning the refusal of relief on the ground of laches".[26] Second, the

[21] *Vigers v Pike* (1842) 8 E.R. 220, 251–52.
[22] *Fisher v Brooker* [2009] UKHL 41, [2009] W.L.R. 1764, at [64], [79].
[23] *P & O Nedlloyd BV v Arab Metals Co.* [2006] EWCA Civ 1717, [2007] 1 W.L.R. 2288, at [60].
[24] R. Francis, *Maxims of Equity* (London 1728), 38.
[25] D. Klimchuk, "Equity and the Rule of Law" in L.M. Austin and D. Klimchuk (eds.), *Private Law and the Rule of Law* (Oxford 2015), ch. 11, 263.
[26] See e.g. Limitation Act 1980, s. 36(2).

doctrine is not justifiable on an equivalent basis to a limitation period in that laches does more[27] than protect a defendant's "interest in getting on with her life, … or [to] make determinate the rights of parties to the dispute".[28] Third, the doctrine of laches does not operate as a bright line rule but involves a discretionary weighing up of factors. Laches requires something more[29] on the part of the claimant than mere delay. As Lord Selborne observed in *Lindsay Petroleum Co. v Hurd*,[30] laches would apply to bar an equitable claim where "it would be practically unjust to give a remedy",[31] and, in every case where a defence "is founded upon mere delay … the validity of that defence must be tried upon principles substantially equitable".[32] His Lordship then provided criteria that were to be balanced in this assessment, including "the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy".[33]

The observations of Lord Selborne are still reflected in the modern criteria required to establish laches. Those criteria fit comfortably with the thesis put forward in this article: laches exists to prevent the abuse by a claimant of her "second order" equitable rights as against the defendant. There are three criteria. First, whether the claimant has knowledge of, or the means of obtaining knowledge of,[34] the defendant's impugned conduct.[35] Second, to what extent has there been a delay in time between the conduct and the claimant bringing her claim.[36] Third, whether the delay will result in prejudice to the defendant such that it could be said to be "unconscionable" for the claimant to assert her equitable rights in the circumstances (this assessment also requires the court to consider any benefits[37] that may have enured to the defendant as a result of the delay).[38]

The nature of the equitable rights in play is also relevant to the evaluative inquiry. This is for good reason: different types of equitable intervention have different second order effects. Where a claim arises in equity's exclusive jurisdiction it has been observed, in the context of breach of

[27] *Cattley v Pollard* [2006] EWHC 3130 (Ch), [2007] 3 W.L.R. 317, at [154].
[28] Klimchuk, "Equity and the Rule of Law", 263.
[29] *Fisher v Brooker* [2009] UKHL 41, at [64], [78]; *Sze Tu v Lowe* [2014] NSWCA 462, 89 N.S.W.L.R. 317, at [415].
[30] (1874) L.R. 5 P.C. 221, 239.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] *Crawley v Short* [2009] NSWCA 410, 262 A.L.R. 654, at [180]; *Labrouche v Frey* [2016] EWHC 268 (Ch), at [320].
[35] *Crawley v Short* [2009] NSWCA 410, at [163]–[164].
[36] Ibid.
[37] *Fisher v Brooker* [2009] UKHL 41, at [79].
[38] *Crawley v Short* [2009] NSWCA 410, at [163]–[164].

trust, that only "gross laches" will suffice to defeat that claim.[39] This higher threshold to refuse relief is justifiable on the basis that laches in equity's auxiliary jurisdiction will leave a claimant with her remedy at common law but may serve wholly to defeat a claim in equity's exclusive jurisdiction.[40] Although there is older authority that support the proposition that laches can never defeat the right of a beneficiary, this appears too restrictive.[41] The modern approach appears to be to apply a higher threshold to establish laches in trust claims.[42] The Court of Appeal has, in this regard, observed that it would be "extremely rare for laches and delay on the part of the beneficiary to make it unconscionable for that beneficiary to assert his claim to the beneficial interest, or for the trustee to claim that he has been released from the equitable obligations that bind his conscience".[43]

A good example where laches is established in equity's exclusive jurisdiction is when a principal knowingly observes her fiduciary make profits in breach of duty as a form of speculative "risk free" investment. Equity is unwilling to allow a situation whereby the no-profit rule is being (ab)used to "play a game in which [the principal] alone risks nothing".[44] Similar reasoning has been applied in a commercial context to defeat a claim by beneficiaries to trust property.[45]

C. Unclean Hands

The doctrine of unclean hands disables a claimant from receiving relief in equity on account of her moral culpability in creating the situation from which she now seeks relief. The doctrine reflects the equitable maxim that a claimant "must come into a Court of Equity with clean hands"[46] or "he that hath committed an iniquity shall not have equity".[47] Given the seemingly amorphous[48] nature of the doctrine, it has been observed that care needs to be taken not to press the doctrine "too far".[49] The application of the doctrine can, however, be made more precise once its function is appreciated.

[39] *Orr v Ford* (1989) 167 C.L.R. 316, 340; *Patel v Shah* [2005] EWCA Civ 157, at [23]–[41]; *Rochefoucauld v Boustead* [1897] 1 Ch 196, 212.
[40] *Patel v Shah* [2005] EWCA Civ 157, at [25].
[41] *Mills v Drewitt* (1855) 52 E.R. 748, 750.
[42] *Orr v Ford* (1989) 167 C.L.R. 316, 340.
[43] *Patel v Shah* [2005] EWCA Civ 157, at [33].
[44] *Clegg v Edmondson* (1857) 44 E.R. 593, 604. See also *Re Jarvis* [1958] 1 W.L.R. 815, 821 (Ch.); *Warman International Ltd. v Dwyer* (1995) 182 C.L.R. 544, 561; *Recovery Partners GP Ltd. v Rukhadze* [2023] EWCA Civ 305, at [77]–[81].
[45] *Patel v Shah* [2005] EWCA Civ 157, at [33]–[41].
[46] *Dering v Earl of Winchelsea* (1787) 29 E.R. 1184.
[47] Francis, *Maxims of Equity*, 5.
[48] *Kation Pty Ltd. v Lamru Pty Ltd.* [2009] NSWCA 145, 257 A.L.R. 336, at [148].
[49] *Memory Corporation plc v Sidhu (No 2)* [2000] EWCA Civ 9, [2000] 1 W.L.R. 1443, 1457.

The justification for the doctrine of unclean hands is consistent with the nature of equity as second order law. If equity is going to prevent a defendant from exploiting or otherwise abusing primary legal entitlements then, by parity of reasoning, the claimant ought to be subject to a similar standard with respect to secondary equitable rules. This means that if a claimant is seeking to use equitable rules "to derive advantage from his dishonest conduct in so direct a manner",[50] it will be considered just to bar him from relief. The symmetry of treatment between claimant and defendant was appreciated in the first edition of *Pomeroy's Equity Jurisprudence* where it is observed that the doctrine:

> [A]ssumes that the suitor asking the aid of a court of equity, has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief with reference to the subject-matter or transaction in question. . . .
>
> While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies.[51]

Given the rationale for unclean hands is to prevent a claimant's abuse of equitable principles, the defence only applies to disable the availability of equitable relief but will otherwise leave intact the primary legal claims between the parties.[52] Nick McBride has taken this point further and observed that unclean hands ought only operate more narrowly to deny a remedy where an equitable principle is providing a claimant with a bonus remedy,[53] whether or not that bonus remedy arises in equity's exclusive or auxiliary jurisdiction.[54] While the case law goes some way to vindicating McBride's position in that the "typical" unclean hands decision involves a refusal to grant an injunction or specific performance (leaving intact a common law or equitable money award), the doctrine can clearly still apply to deny wholesale a substantive equitable monetary remedy (e.g. the payment of an equitable debt on falsification of a trust fund has been denied on this basis).[55]

[50] *UBS A.G. (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 C.L.C. 584, at [171].

[51] J.N. Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America*, vol. 1 (San Francisco 1881), 433–34.

[52] *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328, [2013] 1 C.L.C. 596, at [158]–[159].

[53] N.J. McBride, "The Future of Clean Hands" in Davies, Douglas and Goudkamp (eds.), *Defences in Equity*, ch. 13, 285.

[54] Ibid., 285–91.

[55] See e.g. *Cory v Gertcken* (1816) 56 E.R. 250; *Overton v Banister* (1884) 67 E.R. 479. Likewise, a proprietary estoppel may be defeated by unclean hands: *Gonthier v Orange Contract Scaffolding Ltd.* [2003] EWCA Civ 873, at [39].

There are two necessary modern criteria to establish the defence.[56] Each criterion is applied by a multi-factorial assessment[57] not apt for bright line application. First, the impugned conduct must have an "immediate and necessary relation to the equity sued for".[58] The requirement that the impugned conduct has a connection to the equity being claimed provides a justifiable and important limiting[59] principle for the defence. The causal connection is a necessary requirement to establish unclean hands because the doctrine is not concerned about an impugned party's general moral turpitude.[60] It is concerned with the claimant's specific taking advantage of the equitable principle on which relief is being granted. If there is no necessary connection[61] between the impugned conduct and the relief claimed, then equity need not protect itself by denying relief.

The second requirement to establish the defence of unclean hands is that the impugned conduct involves "a depravity in a legal as well as in a moral sense".[62] This formulation ought not be read as requiring that the impugned party must have committed a legal (i.e. common law or public) wrong. The fact that a claimant's conduct need not be wrongful or illegal distinguishes unclean hands from illegality.[63]

A detailed collection of illustrative case examples on this point is set out by Campbell J. in *Black Uhlans Inc. v New South Wales Crime Commission*[64] and can be pursued by the intrepid reader. It is for this reason that the formulation that the claimant must not "derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief"[65] represents the law. If equity is protecting its own rights from being abused, then the existence of a legal or public wrong is not a necessary condition for the bar to be established. The account provided here also explains an essential analytical distinction between the doctrine of illegality and unclean hands, as the latter is only concerned with a claimant's abuse of equitable principles unclean hands leaves intact common law entitlements. Illegality, on the other hand, can extinguish rights at both common law and in equity.[66]

[56] *UBS v Kommunale Wasserwerke Leipzig* [2017] EWCA Civ 1567, at [171].
[57] *Royal Bank of Scotland v Highland Financial Partners* [2013] EWCA Civ 328, at [158]–[159].
[58] *Dering* (1787) 29 E.R. 1184, 1184–85; *UBS v Kommunale Wasserwerke Leipzig* [2017] EWCA Civ 1567, at [171].
[59] *Royal Bank of Scotland v Highland Financial Partners* [2013] EWCA Civ 328, at [158]–[159].
[60] *FAI Insurances Ltd. v Pioneer Concrete Services Ltd.* (1987) 15 N.S.W.L.R. 552, 554; *CF Partners (UK) LLP v Barclays Bank Plc* [2014] EWHC 3049 (Ch), at [1133].
[61] For an example of where relief was refused on this basis, see *Meyers v Casey* (1913) 17 C.L.R. 90.
[62] *Dering* (1787) 29 E.R. 1184, 1184–85.
[63] R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity: Doctrines and Remedies* (Sydney 1975), 67. For the opposite view see A. Burrows, "Remedial Coherence and Punitive Damages in Equity" in S. Degeling and J. Edelman (eds.), *Equity in Commercial Law* (Sydney 2005), ch. 15, 386.
[64] [2002] NSWSC 1060, 12 B.P.R. 22421, at [160].
[65] *UBS v Kommunale Wasserwerke Leipzig* [2017] EWCA Civ 1567, at [171].
[66] *Nelson v Nelson* (1995) 184 C.L.R. 538, 550.

D. Hardship

Denying equitable relief on the basis of a defendant's "hardship" is distinguishable from laches and unclean hands as it is narrower in scope. Hardship applies only to disable a claimant's entitlement to a grant of coercive equitable relief (e.g. an injunction or specific performance),[67] but the modern doctrine will not apply to limit the availability of a money award (e.g. equitable compensation). The narrower scope of hardship is justifiable. First, the defence applies in circumstances where there is little which is objectionable about the claimant's conduct (although the defence can also apply where the claimant has caused the defendant's hardship).[68] Second, the refusal to grant a coercive remedy such as an injunction or specific performance still leaves open the possibility of Lord Cairns Act damages (equitable damages in lieu of an injunction),[69] equitable compensation (for an equitable wrong), or common law damages (for a common law wrong).[70]

In short, equity is more willing to deny relief for a discretionary reason where it is providing a "bonus" remedy as an addition (or alternative) to a money award irrespective of whether that money award is based on equitable or common law principles. There is thus a subtlety to how the bar to relief operates as, where hardship applies, the injustice between the claimant and defendant is still corrected by a substantive monetary remedy. That injustice is, however, corrected in a manner which is less onerous to the defendant when contrasted with coercive relief.[71] The structure of how the defence of hardship applies illustrates a benefit of equity's second order system: a system that minimises ripple effects by leaving in place a claimant's primary entitlement to damages at common law (albeit the preserved entitlement to a monetary remedy could arise in equity too). This is why a doctrine like hardship can, for example, apply in equity's auxiliary jurisdiction but is inapt to apply at common law. The application of hardship at common law for a damages claim would significantly curtail a claimant's rights by leaving her without a remedy.

Given that the defendant's hardship is relevant to the relief granted, it follows that the claimant ought not be treated unequally and that the hardship of both parties ought be considered when applying the defence.[72] It follows that the modern approach to determining whether hardship will bar a claim for coercive equitable relief is to balance the hardship caused to the defendant if a coercive remedy were granted with

[67] *Patel v Ali* [1984] Ch. 283, 286.
[68] Ibid., 287.
[69] See e.g. Chancery Amendment Act 1858, s. 2.
[70] *Norton v Angus* (1926) 38 C.L.R. 523, 450; *Patel v Ali* [1984] Ch. 283, 286–88.
[71] *Patel v Ali* [1984] Ch. 283, 286–88.
[72] *Eastes v Russ* [1914] 1 Ch. 468, 480 (C.A.).

the hardship caused to the claimant if such relief were refused.[73] It is, however, a truism that all curial remedies will have some negative effect on the defendant. A coercive remedy will not be refused on the basis of hardship merely because it will impose an inconvenience on a defendant.[74] Rather, the hardship suffered needs to meet the high threshold of being "extraordinary"[75] in light of the benefits that enure to the claimant if such relief were granted.[76] In making this assessment the court can consider the events that have transpired at the date of the order and future events which can be foreseen at that point in time.[77] A vital consideration in this assessment will be whether the claimant will still have an effective remedy against the defendant (e.g. common law damages) if the coercive remedy is not granted, such that the common law or non-bonus remedy will nonetheless cure the injustice between the parties.[78]

Finally, in considering whether coercive relief should be denied on the basis of hardship the court can consider not just the hardship of the defendant but also potential hardship that will be suffered by third parties when making this assessment.[79] The relevance of third parties when determining the remedy between claimant and defendant is difficult, if not impossible, to justify from the perspective of corrective justice. But such a denial is less objectionable if the remedy being denied is seen as denying to a claimant a "bonus" entitlement.[80]

IV. Conclusion

If there are circumstances in which one ought not be a stickler for her legal rights,[81] there will also likely be circumstances where one ought not to be a

[73] Ibid., 480. In making this point one needs to be mindful that certain types of rights violations lead to a presumption that a coercive remedy (an injunction or order for specific performance) is the default remedy. For example, for some proprietary torts (particularly torts relating to real property such as trespass and nuisance) an injunction is often considered the presumptive remedy due to the (typically) continuing nature of the wrong: *Mayfair Trading Co. Pty Ltd. v Dreyer* (1958) 101 C.L.R. 428, 451; *Lawrence v Fen Tigers Ltd.* [2014] UKSC 13, [2014] A.C. 822, at [101] contra [161]. Likewise, specific performance is the presumptive remedy where the subject matter of the contract is not obtainable on the open market (provided the contract is not for personal services): *Dougan v Ley* (1946) 71 C.L.R. 142, 151–52.

[74] *Patel v Ali* [1984] Ch. 283.

[75] Ibid., 288.

[76] Ibid., 286; *Boyarsky v Taylor* [2008] NSWSC 1415, (2008) 14 B.P.R. 26553, at [31].

[77] *Webb v Direct London & Portsmouth Railway Co.* (1852) 42 E.R. 654; *Patel v Ali* [1984] Ch. 283, 286–88. It could be questioned whether in *Patel* the refusal of specific performance for a failure to complete a sale of real property was properly refused on the basis that equity was "self-regulating". This is because it appears Goulding J. was largely concerned about the vastly changed (and rather unique) circumstances since the contract for the sale of real property was made (changes that were not the fault of either party). Although common law damages and taxed costs were awarded to the plaintiffs (plus some security to support such an order), there was little discussion about whether such a remedy was adequate in the circumstances.

[78] *Neale v Mackenzie* (1837) 48 E.R. 389; *Mehmet v Benson* (1965) 113 C.L.R. 295, 308.

[79] *Miller v Jackson* [1977] Q.B. 966, 988 (C.A.).

[80] For a similar point, see McBride, "Future of Clean Hands", 290.

[81] L. Smith, "Equity Is Not a Single Thing" in Klimchuk, Samet and Smith (eds.), *Philosophical Foundations of the Law of Equity*, ch. 7, 146–47.

stickler for her equitable rights. As has been illustrated, discretionary bars to relief provide a mechanism by which equity can self-regulate, thereby ensuring that its second order system is not exploited. Without the existence of limited discretions, of which equitable bars to relief are an example, equity would risk being self-defeating. It would prevent the exploitation of legal entitlements only to leave itself vulnerable to the same vice.

This article also has implications for those who wish for substantive fusion of equity and the common law (thereby "flattening" the law by removing the second order system). Equitable bars to relief serve a distinct function given equity's second order structure. This means that there are limits on the extent to which those discretionary bars could be readily transplanted wholesale into the common law without creating unnecessary uncertainty.

It is important, however, to note that the justification for equitable bars to relief provided in this article depends on the function of equitable rules and not merely on a simplistic substantive divide between common law and equity. This leaves open the prospect for similar discretions to operate in some common law cases. Such an analysis would need to consider closely the purpose and function of any common law rule.