THE EQUITABLE LIEN REDISCOVERED: A REMEDY FOR THE 21ST CENTURY

FIONA R BURNS*

I INTRODUCTION

In recent years the equitable lien has been the subject of increasing interest. This renewed attention has been generated primarily by significant developments in case law and by the inclination of litigants to seek a proprietary remedy in the form of the equitable lien, particularly in bankruptcy and insolvency matters.[1] However, the equitable lien itself has often remained overshadowed and obscured by the consideration of policy issues, and the coexistence of the common law lien and the constructive trust. Therefore, it is not surprising that there are very few articles which have mapped the evolution of the lien or have been entirely devoted to an analysis of it.[2] Yet recent trends suggest that in some

* Senior Lecturer, Faculty of Law, University of Sydney. I would like to thank Professor Patrick Parkinson and the two anonymous referees for their helpful comments on earlier drafts of this paper.

1 For developments in Australia see, eg, Michael Christie, 'The Equitable Lien in a Commercial Context: Some Recent Australian Developments' (1986) 14 *Australian Business Law Review* 435; I J Hardingham, 'Equitable Liens for the Recovery of Purchase Money' (1985) 15 *Melbourne University Law Review* 65; Donovan W M Waters, 'Where is Equity Going? Remedying Unconscionable Conduct' (1988) 18 *University of Western Australia Law Review* 3; John Glover, 'Equity, Restitution and the Proprietary Recovery of Value' (1991) 14 *University of New South Wales Law Journal* 247; David Wright, 'Proprietary Remedies and the Role of Insolvency' (2000) 23(2) *University of New South Wales Law Journal* 143. In relation to the United Kingdom see W M C Gummow, 'Names and Equitable Liens' (1993) 109 *Law Quarterly Review* 159. In relation to Ireland see Paul R Coughlan, 'Equitable Liens for the Recovery of Booking Deposits' (1988) 10 *Dublin University Law Journal* 90. In relation to Singapore see Adrian Wong 'An Introduction to Liens in Commercial Transactions' (1999) 20 *Singapore Law Review* 134. In relation to the United States see Frank R Lacy, 'Constructive Trusts and Equitable Liens in Iowa' (1954–55) 40 *Iowa Law Review* 107; Priscilla A Brown, 'The Use of *Lis Pendens* in Actions Alleging Constructive Trusts in Equitable Liens: Due Process Considerations' (1984) 24 *Santa Clara Law Review* 137; Jeffrey Davis, 'Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy Distribution Policy' (1989) 41 *Florida Law Review* 1; Howard W Brill, 'Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien and Subrogation' [1992] *Arkansas Law Notes* 1.

2 Two clear exceptions are Barbara E Cotton, 'The Equitable Lien: New Life in an Old Remedy?' (1994) 16 *Advocates' Quarterly* 385 and Sarah Worthington, 'Equitable Liens in Commercial Transactions' [1994] *Cambridge Law Journal* 263, but even here only discrete aspects of the equitable lien are considered. Alfred H Silverstown, *Law of Lien* (1988) is a relatively short text which considers both the common law and equitable lien from a practitioner's perspective and does not take into account important recent developments.

circumstances the equitable lien will become a more common form of equitable relief.[3] Accordingly, it is not only appropriate, but necessary to revisit this often neglected equitable remedy.

Focusing exclusively on the progressive development of the equitable lien, this article seeks to fill a significant gap in the legal literature. In particular, the article addresses both the relevance of the equitable lien in modern times and the contemporary issues which have shaped it. It will be argued that it is necessary to understand the historical origins of the equitable lien in order to appreciate its remarkable flexibility and utility. It will also be argued that the growing recognition of the equitable lien has reflected the renaissance of equity in Australia (and to a lesser extent England)[4] and the demand for fair and proportionate relief. Moreover, the existence of the equitable lien has, in part, fuelled the ongoing debate concerning the nature and extent to which proprietary relief should be available outside traditionally recognised categories.[5]

This article is divided into six parts. Parts II, III and IV of the article respectively describe the lien, outline its historical origins and compare and contrast it to the trust. Part V is devoted to the expansion of the equitable lien in the 20th century and to outlining its potential in the future. While the application of the equitable lien has not been without controversy, the article concludes in Part VI that it has contributed to the modernisation of our legal system.

II DESCRIPTION OF THE EQUITABLE LIEN

Both common law and equity developed separate jurisdictions in which the lien was, and continues to be, utilised. At common law, a creditor is entitled to

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3 See below Part V(C); Wright, 'Propriety Remedies and the Role of Insolvency', above n 1, 143, points out that the equitable lien is one of three emerging modern proprietary remedies.

4 See, eg, P D Finn, 'Commerce, Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87; C J Rossiter and Margaret Stone, 'The Chancellor's New Shoe' (1988) 11 *University of New South Wales Law Journal* 11; R P Austin, 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66; Sir Anthony Mason, 'The Place of Equity and Contemporary Equitable Remedies in the Common Law World' (1994) 110 *Law Quarterly Review* 239; David Wright, *The Remedial Constructive Trust* (1998) [1.28].

5 See, eg, R M Goode, 'The Right to Trace and its Impact in Commercial Transactions' (1976) 92 *Law Quarterly Review* 360, 528; R M Goode, 'Ownership and Obligations in Commercial Transactions' (1987) 103 *Law Quarterly Review* 433; David M Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors' (1989) 68 *Canadian Bar Review* 315; Emily L Sherwin, 'Constructive Trusts in Bankruptcy' [1989] *University of Illinois Law Review* 297; R M Goode, 'Property and Unjust Enrichment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) 215; S R Scott, 'The Remedial Constructive Trust in Commercial Transactions' [1993] *Lloyds Maritime and Commercial Law Quarterly* 330; Peter Birks, 'Property Rights as Remedies' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 214; Gerard McCormack, 'The Remedial Constructive Trust and Commercial Transactions' (1996) 17 *The Company Lawyer* 3; Peter Birks, 'The End of the Remedial Constructive Trust' (1998) 12 *Tolley's Trust Law International* 202; Wright, 'Propriety Remedies and the Role of Insolvency', above n 1; Davis, above n 1.

retain the debtor's goods under a possessory lien until the debt is paid.[6] The common law lien has expanded into two kinds of possessory lien[7] – a particular possessory lien[8] and a general possessory lien.[9] Under the former, the creditor has the right to retain goods until the debt directly associated with those goods has been paid.[10] Under the latter, the creditor has the right to retain goods until all debts have been repaid.[11] This kind of lien provides clear advantages because it applies to all goods in the possession of the creditor, whether or not the goods involved are directly associated with the debt which is claimed.[12] Common law liens are created by virtue of a common law right,[13] express agreement[14] or by statute.[15] However, the common law lien is limited in operation because the party claiming the lien must have the property subject to the lien in his or her possession.[16]

In comparison to the common law lien, the equitable lien has a potentially wider application. The equitable lien has been described as

> an equitable right, conferred by law upon one person, to a charge upon the real or personal property of another until certain specific claims have been satisfied ... An equitable lien differs from a common law lien in that a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment, whereas an equitable lien, which exists quite irrespective of possession confers on the holder the right to a judicial sale.[17]

One author has indicated that the equitable lien has no resemblance to its common law counterparts.[18] It was the product of equity, as 19th century common

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6 See generally Butterworths, *Halsbury's Laws of England* (4th ed reissue, 1997) vol 28, Libel and Slander to Limitation of Actions, 'Lien' [702], [716]; Edward I Sykes and Sally Walker, *The Law of Securities* (5th ed, 1993) 737. It is important to note that common law liens appear to have been the dominant form of lien early in the history of English law. From material dating from 1531, the concept of lien is defined in *The Oxford English Dictionary* (1933) vol 6, 258, as: 'A right to retain possession of property (whether land, goods, or money) until a debt due in respect of it to the person detaining it is satisfied'.

7 Sykes and Walker, above n 6, 739–40.

8 Butterworths, *Halsbury's Laws of England*, above n 6, [717], [737]–[744].

9 Ibid [727]–[736].

10 *Jones v Tarleton* (1842) 9 M & W 675; 152 ER 285; Wong, above n 1, 138.

11 In relation to general liens in favour of solicitors see Wong above n 1, 139–40; *Cowell v Simpson* (1809) 16 Ves 275, 280; 2 Ves Jr Supp 441; 33 ER 989, 991 (Lord Eldon); 34 ER 1170; *Hughes v Hughes* [1958] P 224. In relation to bankers see *Brandao v Barnett* (1846) 12 CL & F 787; 8 ER 1622; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413. In relation to stockbrokers, see *Jones v Peppercorne* (1858) John 430; 70 ER 490; *Re London and Globe Finance Corporation* [1902] 2 Ch 416; *John D Hope & Co v Glendinning* [1911] AC 419.

12 Wong, above n 1, 138.

13 In relation to bankers and solicitors see above n 11.

14 *Green v Farmer* (1768) 4 Burr 2214, 2221; 98 ER 154, 158 (Lord Mansfield); *Hougton v Matthews* (1803) 3 Bos & P 485, 494; 127 ER 263, 268 (Heath J); *Kirchner, Sharp and Waterston v Venus* (1859) 12 Moo 261; 14 ER 948; *United States Steel Products Co v Great Western Railway Co* [1916] 1 AC 189, 196 (Lord Buckmaster).

15 For a discussion of worker's liens in various jurisdictions see Sykes and Walker, above n 6, 774–82; Ronald Donovan Elliot, *The Artificers Lien* (1967); John Nigel Wilson, *Contractors Liens and Charges* (1976); Douglas N Macklem and David I Bristow, *Construction and Mechanics Liens in Canada* (5th ed, 1985); Kevin Patrick McGuinness, *Constructive Lien Remedies in Ontario* (1983).

16 Sykes and Walker, above n 6, 737–8; Wong, above n 1, 136–8.

17 Butterworths, *Halsbury's Laws of England*, above n 6, [754].

18 Wong, above n 1, 141.

law judges explicitly refused to countenance the development of the lien as a hypothecation at common law.[19] Both the equitable charge and the equitable lien are hypothecations securing an equitable interest in property to satisfy a debt owed by the chargee or lienee.[20] Neither requires a transfer of ownership or possession and both arise irrespective of whether the party claiming the charge or lien has possession of the disputed goods or money.[21] While the equitable charge is the creation of the mutual intention of the chargor and the chargee,[22] an equitable lien arises by implication of law,[23] although there has been confusion in the terminology used.[24] An equitable lien confers a power of sale and an appointment of a receiver through an order of the court.[25] Where the lien is over a fund, a court order may be obtained seeking payment out of the fund.[26]

III THE ORIGINS OF THE EQUITABLE LIEN

To understand its potential importance as a modern remedy, it is necessary to appreciate the complex origins of the equitable lien.[27] A brief review of its likely origins accentuates its distinctive characteristics and potential role in a modern legal system.

A Roman Origins

There have been a variety of theories as to how and why the equitable lien arose. Barbara Cotton has argued that the equitable lien stemmed from decisions of the Courts of Chancery in the 1800s,[28] while William Holdsworth has contended that the equitable lien grew out of the common law notion of lien in response to mercantile needs during the 18th and 19th centuries.[29] While there can be no doubt that it was during the 18th and 19th centuries that the equitable lien grew in importance (as the burgeoning case law indicates),[30] the more likely

19 *Howes v Ball* (1827) 7 B & C 481, 484; 108 ER 802, 804 (Lord Tenterden CJ); *Donald v Suckling* (1866) LR 1 QB 585, 613 (Blackburn J).

20 Sykes and Walker, above n 6, 192, 197, 199; Wong, above n 1, 142.

21 Sykes and Walker, above n 6, 199; *Hewett v Court* (1983) 149 CLR 639, 645 (Gibbs CJ), 663 (Deane J).

22 Sykes and Walker, above n 6, 193–7.

23 *Hewett v Court* (1983) 149 CLR 639, 645 (Gibbs CJ); Sykes and Walker, above n 6, 199; Wong, above n 1, 141–2; Cotton, above n 2, 386; Waters, 'Where is Equity Going?', above n 1, 26; Hardingham, above n 1, 65. However, parties may contractually agree that a lien will not arise and the operation of a statutory scheme in relation to property may preclude its operation: *Davies v Littlejohn* (1923) 34 CLR 174.

24 See, eg, *Re Hallett's Estate: Knatchbull v Hallett* (1880) 13 Ch D 696; Cotton, above n 2, 386; Sykes and Walker, above n 6, 192.

25 *Davies v Littlejohn* (1923) 34 CLR 174, 184 (Knox CJ); Hardingham, above n 1, 65. It is a *jus in re aliena*: see Sykes and Walker, above n 6, 197, 199.

26 *Hewett v Court* (1983) 149 CLR 639, 663 (Deane J).

27 So far there appears to be no authoritative or comprehensive text on the issue.

28 Cotton, above n 2, 385.

29 William Holdsworth, *A History of English Law* (2nd ed, 1932) vol 7, 513. See also Waters, 'Where is Equity Going?', above n 1, 22.

30 See, eg, below nn 50–4.

origins of the equitable lien appear to lie in the Roman law of securities. Roman law developed a number of securities over property, including the *hypotheca*, of which lawyers and judges were aware in the 18th century.[31] A *hypotheca* was created by pledging the item without the need for its physical transfer to the creditor.[32] Edward Sykes and Sally Walker have stated:

> In the third general class of security (hypotheca) ... [t]he property is appropriated to the creditor so that on default he or she is entitled to pursue certain remedies against it and not merely against the debtor. The creditor has certain rights of a proprietary character, but they can be realised only in the event of default. To this general type of security the term 'charge' is frequently applied, but that phrase is itself of ambiguous import and is better used to denote one particular type of hypothecation.[33]

While legal historians have suggested different origins for the *hypotheca*,[34] it laid the foundations for modern securities which did not require possession, most notably the mortgage[35] and the equitable lien.[36] It was equally important that the *hypotheca* was capable of being created by the agreement of the parties[37] or created by law.[38] The latter was known as a legal or tacit *hypotheca* (or *hypotheca tacita* or *legitima*). In turn, the tacit *hypotheca* was divided into two kinds: the special *hypotheca*, which was a security imposed by law over specific property;[39] and the general *hypotheca*, which was a charge over the whole of the debtor's property to secure liability.[40] Both the tacit *hypotheca*[41] and the general *hypotheca*[42] presaged modern developments.[43] Indeed, historians of Roman law have drawn modern comparisons between the equitable lien and the Roman

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31 While Blackstone did not discuss the equitable lien, he was aware of the existence of the *pignus* and the *hypotheca* as security devices in Roman law which he briefly mentioned in the context of mortgages: William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 2nd ed, 1768) vol 2, 159. See also the reference to the *hypotheca* in *Ryall v Rowles* (1750) 1 Ves Sen 349, 358; 27 ER 1074, 1080; see generally W W Buckland, *Equity in Roman Law* (1911).

32 R W Lee, *The Elements of Roman Law* (4th ed, 1956) [261]; H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed, 1972) 302–4.

33 Sykes and Walker, above n 6, 14.

34 It has been argued that the *hypotheca* appeared during the Praetorial period: Barry Nicholas, *An Introduction to Roman Law* (1962) 152–3; Rudolph Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law* (3rd ed, 1907) 354; cf the view of Jolowicz and Nicholas, above n 32, 304, that the existence of a pledge without possession arose during the time of Cato (123–49 BC). There are also different views regarding whether it was Greek or Roman in origin. For some, the word, which is of Greek origin, indicates that the Greek trade and commercial rules influenced Roman law: Jolowicz and Nicholas, above n 32, 303; Sohm, 354. Others have argued out that despite the derivation of the Greek word, the institution was a Roman creation: see, eg, J A C Thomas, *Textbook of Roman Law* (1976) 332; see also Nicholas, 152; Lee, above n 32, [261].

35 Charles Phineas Sherman, *Roman Law in the Modern World* (1917) vol 2, § 616.

36 Ibid.

37 Lee, above n 32, [261]; Jolowicz and Nicholas, above n 32, 302–3.

38 Lee, above n 32, [263]; D H Van Zyl, *History and Principles of Roman Private Law* (1983) 199.

39 Lee, above n 32, [263].

40 For examples of the general *hypotheca* see Lee, above n 32, [263]; Van Zyl, above n 38, 199.

41 See below Part III(B).

42 See below Part V(D).

43 More than one *hypotheca* could arise over property and Roman law dealt with this difficulty by developing a system of administration under which the earlier *hypotheca* took priority: Nicholas, above n 34, 153.

hypotheca.[44] However, it is unclear to what extent the *hypotheca* was known to English lawyers prior to the 18th century.[45]

B The Equitable Lien in the 19th Century

As Holdsworth has suggested, it is probable that the modern equitable lien grew in response to mercantile needs during the 18th and 19th centuries,[46] but that the legal inspiration for the equitable lien rested in Roman law. The development of the equitable lien was apparent,[47] but slow. Prior to and during the 18th century there was some case law which confirmed the legitimacy of the vendor's equitable lien over the land for the purchase price[48] and the trustee's lien for expenses properly incurred.[49] Later, well into the 18th century, it seems that the purchaser's lien[50] and the partnership lien[51] appeared. In the 19th century, the equitable lien had a sustained application. There are numerous cases which deal with, in one way or another, the vendor's equitable lien,[52] the purchaser's equitable lien,[53] partnership liens[54] and a trustee's right to be indemnified.[55] In

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44 See, eg, Buckland, above n 31, 63: 'The whole law of hypotheca both tacit and express, being independent of possession bears a very close affinity with the equitable rules as to liens and charges'. Thomas, above n 34, 332, commented that:

> Though generally used for land, hypothec [sic] could be utilised to create a security over any form of *res*, including debts: indeed, there was possible the equivalent of the 'floating charge' of English law, ie, a lien on the debtor's stock-in-trade for the time being; anything that could be the object of a sale could be pledged or hypothecated.

See also Jairus W Perry (ed), *Joseph Story: Commentaries on Equity Jurisprudence as Administered in England and America* (13th ed, 1877) vol 2, § 1221–4; Spencer W Symons, *John Norton Pomeroy: A Treatise of Equity Jurisprudence* (5th ed, 1941) vol 4, § 1234.

45 It appears that the Roman *hypotheca* was lost, or nearly lost, even though early predecessors of the common law lien were in operation during the medieval and Tudor periods: Holdsworth, above n 29, 511–13. The notion of a non-possessory security was evident in medieval times: Sir F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1898) vol 2, 117–18. The logical answer may be that what had been labelled a *hypotheca* in Roman law was then called something quite different in medieval English law. After all, no explanation has been found as to why the offspring of the Roman *hypotheca* became known as a lien. Perhaps, after the Norman invasion, non-possessory securities were known according to a French nomenclature and the Law French: see Bryan A Garner, *A Dictionary of Modern Usage* (2nd ed, 1995) 504–5. In J A Simpson and E S C Weiner, *The Oxford English Dictionary* (1989) vol 8, 907, the word lien is given both a French and a Latin derivation.

46 Holdsworth, above n 29, 513.

47 See, eg, *Ryall v Rowles* (1750) 1 Ves Sen 348; 27 ER 1074; Charles Viner, *A General Abridgment of Law and Equity* (1743) vol 15, 96–9 (lien on lands), vol 4, 449–76 (charge).

48 *Hearle v Botelers* (1604) Cary 25; 21 ER 14; *Chapman v Tanner* (1684) 1 Vern 267; 23 ER 461.

49 *How v Godfrey* (1678) Rep Temp Finch 361; 23 ER 198.

50 *Burgess v Wheate, AG v Wheate* (1759) 1 Eden 177, 211; 28 ER 652, 665 (Lord Mansfield).

51 *West v Skip* (1749) 1 Ves Sen 239; 27 ER 1006.

52 See, eg, *Mackreth v Symmons* (1808) 15 Ves Jr 329; 2 Ves Jr Supp 410; 33 ER 778; 34 ER 1155; *Kettlewell v Watson* (1884) 26 Ch D 501.

53 See, eg, *Wythes v Lee* (1855) 2 Drewry 396; 61 ER 954; *Westmacott v Robins* (1864) 4 De G F & J 390; 45 ER 1234; *Rose v Watson* (1864) 10 HL Cas 672; 11 ER 1187; *Aberaman Ironworks v Wickens* (1868) LR 4 Ch App 101; *Rodger v Harrison* [1893] 1 QB 161.

54 See, eg, *Ex parte Williams* (1805) 11 Ves Jr 3; 32 ER 988; *Ex parte King* (1810) 17 Ves Jr 115; 34 ER 45; *Kelly v Hutton* (1868) LR 3 Ch App 703; *Harvey v Crickett* (1816) 5 M & S 336; 105 ER 1074; *Hague v Dandeson* (1848) 2 Ex 741; 154 ER 689.

addition, Joseph Story identified the equitable lien as a remedy for mistaken improvements to land[56] and Jessel MR recognised its usefulness in equitable tracing.[57]

The reason the equitable lien remained a significant equitable remedy during the 19th century heyday of freedom of contract and laissez-faire capitalism[58] does not appear to have been authoritatively considered by legal historians. But some suggestions may be proffered. First, the equitable lien may have survived because it was useful and was supported by indisputable 18th century precedent. Secondly, it was applied only in well-defined and limited situations, such as in vendor-purchaser contracts for sale of land, between partners and between beneficiaries and trustees.[59] In this sense, such categories were hardened into status-based categories in the same way that there were – and still are – status-based categories in relation to fiduciary obligations.[60] Therefore, legal certainty was preserved and the possible application of the equitable lien was contained.[61] Furthermore, the imposition of a lien in the seminal vendor and purchaser cases[62] did not detract from the enforcement of the contract. It assisted in the performance of the contract because it provided an additional equitable remedy where the common law on its own was deficient.[63] Arguably, it was limited to those contracts which were specifically enforceable.[64]

Finally, the lien and the constructive trust were confused with each other. This phenomenon has gone largely unnoticed. However, Donovan Waters[65] has argued that judges in the 19th century often confused the concepts of equitable lien and trust when considering vendor and purchaser liens over land.[66] The

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55 See, eg, *Dawson v Clarke* (1811) 18 Ves Jr 247; 34 ER 311; *Staniar v Evans: Evans v Staniar* (1886) 34 Ch D 470; *Budgett v Budgett* [1895] 1 Ch 202.

56 See Perry, above n 44, § 1237. See also 53 CJS *Liens* § 8(b) (1987); 51 Am Jur 2d *Liens* § 50 (2000); R J Sutton, 'What Should be Done for Mistaken Improvers' in P D Finn (ed), *Essays on Restitution* (1990) 241.

57 *Re Hallett's Estate: Knatchbull v Hallett* (1880) 13 Ch D 696, 709.

58 P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 393–7.

59 For example, the treatment of the equitable lien in the first edition of The Earl of Halsbury, *The Law of England* (1911) vol 19, Lien, 'Part V: Equitable Lien' [20]–[39], epitomised the 19th century approach. The limited occasions where the equitable lien could arise were set out in detail with many supporting authorities. The historical origins of the equitable lien and the principles which rekindled it were left untouched.

60 See Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 325, [1003].

61 Certainly, where the law concerning trusts and partnerships was concerned, the equitable lien was being used in cases which were incontestably the province of equitable jurisdiction anyway. For the role that equity developed in the legal framework of partnership in the 18th and 19th centuries see Keith L Fletcher, *Higgins and Fletcher: The Law of Partnership in Australia and New Zealand* (7th ed, 1996) 6–7; Holdsworth, above n 29, vol 8, 217–18.

62 See, eg, *Hearle v Botchers* (1604) Cary 35; 21 ER 14; *Chapman v Tanner* (1684) 1 Vern 267; 23 ER 461; *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652.

63 See Symons, above n 44, vol 4, § 1234.

64 This was a contentious issue as it appeared that this restriction applied to vendor's liens, but not purchaser's liens: see, eg, Sarah Worthington, *Proprietary Interests in Commercial Transactions* (1996) 232.

65 D W M Waters, *The Constructive Trust: The Case for a New Approach in English Law* (1964).

66 Ibid 27–8, 85–6, 96–100, 131–6.

interchangeability of the trust and the lien was clearly evident in a leading text of the time. In *Joseph Story: Commentaries on Equity Jurisprudence*[67] the equitable lien was discussed in the context of implied trusts,[68] even though it was clear that the author understood the difference between the equitable lien and the trust in proprietary terms.[69] Thus, the lien was portrayed as a minor part of the law of trusts. Even when the lien was the appropriate device, judges often preferred using the language of trust.[70]

However, there were two noteworthy features of the equitable lien in the 19th century which laid the foundation for further developments in the 20th century. First, despite the 19th century tendency to limit the discussion of policy issues in decisions,[71] some judges still posited reasons for the imposition of the equitable lien. These reasons were framed in terms of preventing injustice between the parties and indicated, albeit in a perfunctory way, a justification for the equitable lien. In *Todd v Moorhouse*[72] Jessel MR held that a tenant for life under a settlement comprising shares, who had made an advance to a trustee, had an equitable lien over the shares for repayment of the advance with interest. In relation to argument by counsel, his Honour stated:

> The proposition he [counsel] affirms is this, that if one of the *cestuis que trust* advances money for the purpose of paying a sum properly payable out of the *corpus* of the trust funds, then, unless it can be shewn that the trustees could not raise the money in any other way, the person advancing his money is to lose it. That is, the *cestuis que trust* are to be enriched by the amount advanced merely because the trustees by some possible means or other could otherwise have raised that amount, and the *cestuis que trust* can, therefore, keep both the money advanced and the property which ought to have been sold to raise money. Common sense, common honesty, and sound law are altogether against any such extravagant notion.[73]

In *Mackreth v Symmons*[74] the court pointed out that a vendor's lien over land was founded on the principle that 'a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration'.[75] In another early case, *Rose v Watson*,[76] concerning the purchaser's lien over land paid in instalments, the court pointed out that such a lien was based on 'solid and substantial justice'.[77] Such a broad reference to 'justice' left open the possibility

67 Perry, above n 44.
68 Ibid §§ 1216–44; cf Symons, above n 44, § 1234.
69 Perry, above n 44, § 1217.
70 Waters, *The Constructive Trust*, above n 65, 85–6, 96–100, 131–6.
71 Atiyah, above n 58, 388.
72 (1874) LR 19 Eq 69.
73 Ibid 71. See also *Re Johnson; Shearman v Robinson* (1880) 15 Ch D 548, 555–6 (Jessel MR).
74 (1808) 15 Ves Jr 329; 33 ER 778.
75 Ibid 349; 782; cited by Gibbs CJ in *Hewett v Court* (1983) 149 CLR 639, 645.
76 (1864) 10 HL Cas 672; 11 ER 1187. Vaughan Williams LJ in the early 20th century confirmed this approach when he said, in *Whitbread & Co Ltd v Watt* [1902] 1 Ch 835, 838, that a purchaser's lien was 'not the result of any express contract: it is a right which may have been invented for the purpose of doing justice'. For a consideration of the lien in the context of unjust enrichment in United States case law see the American Law Institute, *Restatement (Second) of Restitution* (Tentative Draft No 2, 1984) vol 2, § 30, comment b(6); 53 CJS *Liens* § 8 (1987); 51 Am Jur 2d *Liens* §§ 38 (2000).
77 (1864) 10 HL Cas 672, 684; 11 ER 1187, 1192 (Lord Cranworth).

that situations where a lien would arise by operation of law or be imposed by courts could expand in the future.

Secondly, equity provided an impetus for the development of a general lien in contrast to a lien over a specific asset. While a general possessory lien operated at common law, the equitable lien functioned as a charge over specific property only. This approach continued in the 20th century and was deemed justifiable where land was concerned.[78] However, in the 19th century a general hypothecation in equity was applied, in the form of the floating charge over corporate assets.

The modern corporation was a product of 19th century mercantile developments.[79] William Gough[80] has pointed out that by the mid-19th century there was a specific equitable charge available over specific corporate property.[81] However, it was quickly discovered that the corporate asset base was neither stable nor specific.[82] The problem was how to provide security over fluctuating assets. Gough argues that the floating equitable charge was born in the 1870s.[83] Prior to that time, the Court of Chancery was unable to countenance the existence of a floating security.[84] However, spurred on by developments in equity that allowed a party to assign future property,[85] the floating charge evolved.[86] It was justified on the basis that it avoided the paralysis of the company's business operations; otherwise, the consent of the creditor would be necessary each time the company wished to dispose of an asset.[87]

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78 See *Hearle v Botelers* (1604) Cary 25; 21 ER 14; *Chapman v Tanner* (1694) 1 Vern 267; 23 ER 461; *Mackreth v Symmons* (1808) 15 Ves Jr 329; 2 Ves Supp 410; 33 ER 778; 34 ER 461; *Kettlewell v Watson* (1884) 26 Ch D 501; *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652; *Westmacott v Robins* (1864) 4 De G F & J 390; 45 ER 1234; *Rose v Watson* (1864) 10 HL Cas 672; 11 ER 1187; *Aberaman Ironworks v Wickens* (1868) LR 4 Ch App 101.

79 For a historical discussion see Paul Davies, *Gower's Principles of Modern Company Law* (6th ed, 1997) chh 2, 3.

80 William James Gough, *Company Charges* (2nd ed, 1996).

81 Ibid 27–8; *Brown v Bateman* (1867) LR 2 CP 272. The development of the specific company charge was, no doubt, inspired by developments in the law of real property. During this period Sir Robert Torrens advocated the Torrens title mortgage: Douglas J Whalan, *The Torrens System in Australia* (1982) 167–8; Robert T J Stein and Margaret A Stone, *Torrens Title* (1991) 165–6. The Torrens mortgage operates as a security without the need for the transfer of ownership: *CL Forrest Trust: Trustees Executors & Agency Co Ltd v Anson* [1953] VLR 246, 256 (Herring CJ); *The English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302, 321–2 (Dixon, Evatt and McTiernan JJ).

82 See H A J Ford, R P Austin and I M Ramsay, *Principles of Corporations Law* (9th ed, 2000) [1.320].

83 Gough, above n 80, 102–8.

84 *King v Marshall* (1864) 33 Beav 565; 55 ER 488; *New Clydach Street and Bar Iron Co* (1868) LR 6 Eq 514.

85 *Holroyd v Marshall* (1862) 10 HL Cas 191; 11 ER 999; *Reeve v Whitmore* (1863) 33 LJ Ch 63; *Tailby v Official Receiver* (1879) 13 App Cas 523; Gough, above n 80, 106–8.

86 In a series of important cases starting with *Re Panama; New Zealand and Australian Royal Mail Co* (1870) 5 Ch App 318. See also *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979; *Re General South American Co* (1876) 2 Ch D 337; *Re Florence Land and Public Works Co; Ex parte Moor* (1878) 10 Ch D 530; *Re Colonial Trusts Corporation; Ex parte Bradshaw* (1879) 15 Ch D 465.

87 *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284; Gough, above n 80, 90.

A floating charge is created by the contractual and mutual intention of the parties to charge the company's asset as a going concern.[88] It is not only a security over the whole of the assets of the chargor. It also secures assets which become part of the corporate asset base *after* the execution of the charge. Hence the charge remains both general and floating. It is only upon default that the charge crystallises.[89] The development and judicial recognition of the floating charge is testimony to the fact that the general hypothecation created by mutual intention could accommodate the need for more mercantile flexibility. In the 20th century the question has been whether a general hypothecation may operate irrespective of intention.[90]

IV THE EQUITABLE LIEN AND THE TRUST COMPARED

The contemporary utility of the equitable lien becomes evident when compared and contrasted with the trust. The equitable lien differs from the express trust in that it may arise without the necessity of the parties having an intention to create it. In this respect, an equitable lien appears similar to both the constructive trust and the resulting trust.[91] Moreover, the interests of a party under a constructive trust and an equitable lien will be defeated by a bona fide purchaser of the legal interest for value without notice.[92]

However, a lienee acquires different rights to a beneficiary under a trust. John Norton Pomeroy has pointed out that the equitable lien was never a species of trust

> because the very essence of every real trust, express, resulting or constructive is the existence of two estates in the same thing – a legal estate vested in the trustee, and an equitable estate held by the beneficiary. In an equitable lien there is a legal estate with possession in one person, and a special right over the thing held by another; but here the resemblance, which at most is external, ends. This special right is not an estate of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. To call this a trust, and the owner of the thing a trustee for the lien-holder, is a misapplication of terms which have a very distinct and certain meaning.[93]

In describing the difference between trusts and liens, Pomeroy drew on the old, but significant, distinction between 'estates' and 'interests'.[94] A trustee

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88 *Re Panama; New Zealand and Australian Royal Mail Co* (1870) LR 5 Ch App 318; Gough, above n 80, 120.

89 Gough, above n 80, 102, chh 8, 11; *Stein v Saywell* (1969) 121 CLR 529, 556 (Kitto J).

90 See below Part V(D).

91 See, eg, *Fulp v Fulp*, 140 SE 2d 708 (NC, 1965); *Minton v Stewart*, 359 SW 2d 925 (Tex Civ App, 1962); *Holder v Williams*, 334 P 2d 291, 292–3 (Cal Dist Ct App, 1959); 53 CJS *Liens* §§ 1–3 (1987);

92 The American Law Institute, *Restatement (Second) of Restitution* (Tentative Draft No 2, 1984) vol 2, § 30c.

93 Symons, above n 44, § 1234 (fn 5). See also ibid § 30a; Davis, above n 1, 4.

94 The medieval concept of estates described an interest separate from land which entitled the holder to possession (or seisin) of the land for a particular duration: see generally Kevin Gray and Susan Francis Gray, *Elements of Land Law* (3rd ed, 2001) 63–5; Peter Butt, *Land Law* (4th ed, 2001) [603]–[604].

holds a bare or nominal legal estate subject to the terms of the trust instrument.[95] The 'equitable estate' or 'beneficial interest' acquired by the beneficiary entitles him or her, inter alia, to the use and enjoyment of the property and to take action in respect of the trust.[96] In contrast, equitable interests were recognised by the Court of Chancery to redress situations where it was unconscionable for a legal owner of property to retain the property while ignoring a claim of another to that property. The evolution of the equitable lien was an example of such an equitable interest. However, while the lienee acquired an 'equitable interest' in the property, the lienee was never a full beneficial owner and was, at most, entitled to exercise the right to a judicial sale.[97]

The nature of the interest acquired by a lienee has a number of significant consequences for the operation of the lien. First, because the equitable lien does not provide the lienee with a beneficial interest, the value of the lien is not tied to the underlying value of the property upon which the lien is fixed. In contrast, a beneficiary has an equitable interest which is fixed to the value of the property of the trust. Therefore, where the underlying property appreciates in value, it has been appropriately argued that a trust regulates the relationship. Alternatively, where the underlying property has depreciated, parties have contended that a lien has arisen.[98] Secondly, a beneficiary is entitled to the income of the underlying property.[99] Conversely, a lienee is not entitled to the product or income produced by the underlying property.[100] Thirdly, it has been suggested that the equitable lien cannot be sustained outside the limitation period set by statute.[101] Fourthly, a trustee has far more onerous duties in relation to the underlying property than the lienor.[102] The equitable lien is part of the modern law of securities,[103] while the trust is not generally considered to be a security device.[104] Accordingly, the lien

95 See *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510.

96 Where a trustee has no active duties to perform and the beneficiary is sui juris and absolutely entitled, the beneficiary is entitled to the trust property: *Turner v Noyes* (1903) 20 WN (NSW) 266. A beneficiary may compel performance of the trust, restrain a breach of trust and approach the court for determination of questions of construction and administration: see generally R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (6th ed, 1997) ch 23.

97 See, eg, Meagher and Gummow, above n 96, [227]–[230]. Accordingly, C Reinold Noyes has stated that the equitable lien 'is that peculiar right to bring an action which is in form *in personam* and in effect *in rem*': C Reinhold Noyes, *The Institution of Property: A Study of the Development, Substance and Arrangement of the System of Property in Modern Anglo-American Law* (1936) 370.

98 See Waters, *The Constructive Trust*, above n 65, 27; Lacy, above n 1, 145–55 and the cases discussed therein; Malcolm Cope, *Proprietary Claims and Remedies* (1997) 112.

99 See, eg, the discussion in Lacy, above n 1, 145–52.

100 Ibid.

101 Butterworths, *Halsbury's Laws of England*, above n 6, [784] noting the *Limitation Act 1980* (UK) s 20(1).

102 *Lord Napier and Ettrick v Hunter* [1993] AC 713, 738 (Lord Templeman).

103 Sykes and Walker, above n 6, 199–206.

104 Ibid 12. However, there are signs that the trust is being used for security purposes: see the comments of Kirby J in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588, 626–7.

as a bare security has been helpfully utilised in statutes, without the attendant obligations associated with the trust.[105]

Finally, while the lien has traditionally been available only in discrete circumstances,[106] the constructive trust has recently been the subject of some judicial creativity. The constructive trust has been a remedial response to unconscionable conduct in Australia[107] and unjust enrichment in other jurisdictions,[108] although the situations where the constructive trust would be available remain to be settled.[109]

V TOWARDS THE DEVELOPMENT OF A MODERN EQUITABLE LIEN

A Introduction

In the 20th century there was, with respect to the equitable lien, a continuation of some of the trends evident in the preceding century. As Waters noted perceptively in 1964:

> English law has no counterpart of the carefully interrelated American remedies of lien and constructive trust ... In English textbooks, however, the equitable lien is tucked away under various sub-headings; away from the constructive trust and away from the following of funds.[110]

However, in the last 20 years the equitable lien has been reinvigorated as a result of several important shifts in the administration of equitable doctrines. Litigants have sought to expand the operation of the equitable lien by recognising the similarity of the lien to the constructive trust and its usefulness in tracing and providing security over money. The attempt to broaden the

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105 For a discussion of Canadian statutory liens see Douglas N Macklem and David I Bristow, *Construction and Mechanics' Liens in Canada* (1985) chh 2, 3. For a general discussion of statutory hypothecations in Australia see Sykes and Walker, above n 6, 750–2. In relation to liens in colonial times see Alex C Castles, *An Australian Legal History* (1982) 172–5. In Anglo-Australian law there are also special non-statutory and statutory maritime liens: for a discussion of the Australian position see Sykes and Walker, above n 6, 753–8; D A Butler and W D Duncan, *Maritime Law in Australia* (1992) particularly [3.3.2]. For a discussion of the English position see D R Thomas, *Maritime Liens* (1980). In American statutes, the lien, both in equity and common law, has been used with great effectiveness: see 53 CJS *Liens* §§ 9 (1987); 51 Am Jur 2d *Liens* §§ 52–6 (2000).

106 See, eg, P V Baker and P St J Langan, *Snell's Equity* (29th ed, 1990) ch 10; cf the situation in the United States in Davis, above n 1, 20–1.

107 See, eg, *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

108 For Canada see, eg, *Pettkus v Becker* [1980] 2 SCR 834; *Peter v Beblow* [1993] 1 SCR 980. For the United States see 51 Am Jur 2d *Liens* § 38 (2000); the American Law Institute, *Restatement (Second) of Restitution* (Tentative Draft No 2, 1984) vol 2, § 30.

109 See, eg, *Muschinski v Dodds* (1985) 160 CLR 583; *Pettkus v Becker* [1980] 2 SCR 834; *Soulas v Korkontzilas* [1997] 2 SCR 217; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 716 (Lord Browne-Wilkinson); Malcolm Cope, *Constructive Trusts* (1992) chh 1, 2. Indeed, in relation to England and New Zealand, it is still being debated to what extent, if at all, the remedial constructive trust is part of the legal framework: compare and contrast the views of Birks, 'The End of the Remedial Constructive Trust', above n 5, and Wright, 'Propriety Remedies and the Role of Insolvency', above n 1.

110 Waters, *The Constructive Trust*, above n 65, 27–8.

applicability of the equitable lien has arisen in three main ways which are not necessarily mutually exclusive and which were, to a limited extent, already anticipated in the 19th century.

Notions of unconscionable conduct have been restructured and broadened to take into account new situations. As part of this process, it has been argued that an equitable lien may be awarded as proprietary relief outside the established categories (where a lien automatically arises by implication of law) on the basis of redressing unconscionable conduct or unjust enrichment.[111] Therefore, while the equitable lien is still highly relevant to the kinds of situations where it has traditionally operated, it is beginning to be disentangled from the limited traditional applications of the past.[112]

Additionally, the equitable lien has been used as a viable alternative remedy to the constructive trust, not only in cases involving breach of fiduciary obligations and the application of tracing rules. Finally, it has been suggested that the operation of the equitable lien should not be limited to a specific asset and that it could operate as a general charge over the entire assets of a defendant where there was proof of wrongdoing. This last possible expansion of the equitable lien has proved to be the most contentious, because it challenges the orthodox view that there must be a pre-existing proprietary base before litigants may claim a proprietary interest and has the potential to refashion considerably the outcome for secured creditors in insolvency cases.

B Expanding the Lien Beyond Established Relationships

The first important expansion of the equitable lien pertains to the kinds of cases in which it may arise. Plaintiffs may argue that traditional limitations on the imposition of a lien ought to be removed and that their situations are sufficiently close to or analogous to the established categories so that the equitable lien is the appropriate remedy.

The most important example of this phenomenon arose in the High Court's decision in *Hewett v Court*.[113] A builder of prefabricated houses agreed to pre-construct a house and transport it to the purchasers for practical completion. The purchase price was payable in instalments. The contract provided that the house remained the property of the builder until completion. The purchasers made the first two payments before the builder became insolvent. The parties agreed that the purchasers would pay for the work undertaken and take the house in its incomplete state. Later, liquidators were appointed who argued that the purchasers had obtained a preference. The purchasers contended that they had an equitable lien over the house.[114]

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111 See, eg, Wright, *The Remedial Constructive Trust*, above n 4, [3.64].

112 See generally Cotton, above n 2.

113 (1983) 149 CLR 639. For discussion of the case see Sykes and Walker, above n 6, 202, 205–6; Hardingham, above n 1, 66–9; Christie, above n 1, 437–43; Waters, 'Where is Equity Going?', above n 1, 32–7; Coughlan, above n 1, 95–7.

114 Note also the earlier decisions in *Court and Evans v Hewett* [1981] WAR 237 (Wickham J); *Court and Evans v Hewett* [1982] WAR 151 (Court of Appeal).

A majority of the High Court agreed with this contention, and held that the purchasers had an equitable lien over the house for the amount of the purchase money paid.[115] In so deciding, the majority removed two significant barriers to the purchasers' case. First, the Court held that, contrary to some obiter dicta in previous cases,[116] specific enforceability of the contract was not a condition precedent to a lien arising in favour of a purchaser.[117] In particular, Deane J pointed out that an equitable lien was different from an equitable estate which arises when a contract is specifically enforceable.[118] Secondly, a majority of the Court held that the contract for the construction and installation of the house was a contract for the provision of work and materials rather than a contract for the sale of goods.[119]

Having decided these issues, the question was whether equitable proprietary relief was warranted. Gibbs CJ observed that it was difficult to find a general principle which explained the variety of situations in which a lien had been created.[120] However, he noted that the traditional cases

> do not closely resemble the present, but their existence shows that the rules governing the circumstances in which equity has considered that justice requires the recognition of the existence of a lien are not confined to one narrow category. Indeed ... the list may not be a closed one.[121]

Gibbs CJ decided that the facts before him strongly resembled the old case of *Swainton v Clay*[122] in which it was held that a purchaser of an unfinished ship had a lien over the ship against the trustee for bankruptcy for payments made.[123] Deane J also acknowledged that it was difficult to set down definitively the precise circumstances in which an equitable lien would arise.[124] However, his

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115 The dissenting judges, Wilson and Dawson JJ held that there was insufficient authority to warrant an equitable lien arising. When the first instalment was paid there was nothing to which the lien could attach: *Hewett v Court* (1983) 149 CLR 639, 656–8.

116 For a helpful list see Worthington, *Proprietary Interests in Commercial Transactions*, above n 64, 232, (fn 51).

117 *Hewett v Court* (1983) 149 CLR 639, 646–50 (Gibbs CJ), 664–6 (Deane J), 651 (Murphy J).

118 Ibid 666. Moreover, there was sufficient previous authority against the view that no equitable interest could arise without specific performance.

119 *Hewett v Court* (1983) 149 CLR 639, 649 (Gibbs CJ), 662 (Deane J). See also Hardingham, above n 1, 78–80; Waters, 'Where is Equity Going?', above n 1, 32–7; Worthington, 'Equitable Liens in Commercial Transactions', above n 2, 268–71. It was not a contract for the sale of goods, which would have led to the conclusion that the *Sale of Goods Act 1985* (WA) would preclude a lien. See also *Re Wait* [1927] 1 Ch 600, 639 (Atkin LJ).

120 Cf Lord Denning in *Hussey v Palmer* [1972] 1 WLR 1286, 1290 who stated that the constructive trust and equitable lien arose 'because justice and good conscience so require'.

121 *Hewett v Court* (1983) 149 CLR 639, 646.

122 (1863) 4 Giff 187; 66 ER 672; 3 De G J & Sm 588; 46 ER 752.

123 *Hewett v Court* (1983) 149 CLR 639, 648–9 (Gibbs CJ), cf 650 (Murphy J). Analogous reasoning was also applied in *Shirlaw v Taylor* (1991) 31 FCR 222 in which the Full Federal Court held that in the same way that a court-appointed receiver has an equitable lien for expenses and remuneration, a provisional liquidator appointed by the court also has such a lien. In both cases, the lien survives the termination of the appointment.

124 *Hewett v Court* (1983) 149 CLR 639, 668 (Deane J).

judgment contains a seminal description of the major preconditions for an equitable lien:

> (i) that there be an actual or potential indebtedness on the part of the party who is the owner of the property to the other party arising from a payment or promise of payment either of consideration in relation to the acquisition of the property or of an expense incurred in relation to it ... (ii) that that property (or arguably property including that property ...) ... be specifically identified and appropriated to the performance of the contract; and (iii) that the relationship between the actual or potential indebtedness and the identified and appropriated property be such that the owner would be acting unconscientiously or unfairly if he were to dispose of the property (or, if it be appropriate, more than a particular portion thereof) to a stranger without the consent of the other party or without the actual or potential liability having been discharged ... they [the tests] are formulated as a statement of what is sufficient rather than of what is essential.[125]

He held that each of the criteria had been satisfied on the facts before him. Upon repudiation of the contract, the builder became liable to repay the deposit and instalment which the purchasers had paid. The home was sufficiently identified with the payments and appropriated to the contract.[126] Accordingly, the builder would be acting unconscientiously if it disposed of the home without the consent of the purchasers.[127]

Hewett v Court was one of several important decisions in which the High Court restated and re-fashioned equitable doctrines responding to unconscionable conduct and effectively expanded the reach of equitable remedies.[128] The outcome of the case gave rise to a permanent loosening of the principles governing the operation of the equitable lien.[129] The decision represented a monumental shift away from the limited use of the lien in specifically enumerated situations towards the development and application of broad, but meaningful, standards. Accordingly, the situations which could trigger the equitable lien were left open, but subject to the influential general criteria which Deane J articulated.[130]

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125 Ibid.

126 Note also that Murphy J expressed a similar opinion, ibid 650.

127 Ibid 669. Murphy J held (650) that an equitable lien arose because it would be necessary to protect consumers who would not be expected to inquire into the solvency of the person with whom they were dealing.

128 See, eg, *Taylor v Johnson* (1983) 151 CLR 422; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Legione v Hateley* (1983) 152 CLR 406; *Chan v Zacharia* (1984) 154 CLR 178; *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Stern v McArthur* (1988) 165 CLR 489.

129 The decision has been criticised for operating beyond established norms: Sykes and Walker, above n 6, 206; J C Starke, 'Current Topics' (1983) 57 *Australian Law Journal* 433, 434–6. But other authors praised the outcome of the majority judgments as a significant step towards the principled liberalisation of proprietary remedies: Waters, 'Where is Equity Going?', above n 1, 32–41; Coughlan, above n 1, 95–8.

130 Quoted with approval in *Cadorange Pty Ltd v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26, 36 (Young J); Sykes and Walker, above n 6, 205–6; Hardingham, above n 1, 67; Wong, above n 1, 143.

C The Equitable Lien as an Alternative to a Constructive Trust

The equitable lien has been broadened to become an alternative to the constructive trust[131] on two separate but potentially overlapping bases. First, the equitable lien has been applied where the circumstances require proprietary relief, but preclude the operation of the constructive trust. Secondly, in the last decade the equitable lien has re-emerged as an effective alternative to the constructive trust.

1 *Proprietary Relief Required But the Facts Preclude the Imposition of a Trust*

As stated earlier, the equitable lien has traditionally been confused with the operation of the trust.[132] However, even in the 19th century it was recognised that the equitable lien had an important function where the facts of the case indicated proprietary relief was appropriate but precluded the operation of a constructive trust. The lien created a security over the fund or asset in favour of a party who was able to show that he or she was entitled to an interest in the property on the basis of equitable principles.

(a) Breach of Fiduciary Obligations and Tracing

Probably the most well-known example of the imposition of an equitable lien as an alternative to a constructive trust has arisen where there had been a breach of fiduciary obligations. In *Re Hallett's Estate: Knatchbull v Hallett* ('*Hallett*'),[133] Jessel MR held that a person who was owed fiduciary obligations was able to trace assets in which he or she had a beneficial interest. He pointed out that in such a situation, a beneficiary had two possible remedies where trust funds had been used to acquire property:

> [T]he beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money.[134]

However, where the trustee had mixed trust funds with his own, Jessel MR held that the party could not claim a complete beneficial interest in the fund or in a subsequently acquired asset. In such a situation, the equitable lien became a useful proprietary alternative to the constructive trust. The equitable lien

131 See the insightful observations of Gummow J in *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, 554. See also the discussion in Wright, *The Remedial Constructive Trust*, above n 4, [3.61]–[3.64].

132 See above Part III(B).

133 (1880) 13 Ch D 696.

134 Ibid 709.

provided a security over the whole of the fund or asset for the amount representing the misappropriated trust moneys. Jessel MR commented that:

> [T]he *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust-money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust-money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee.[135]

This approach has been approved in subsequent cases concerning breach of fiduciary obligation and equitable tracing.[136] However, recently in *Foskett v McKeown* (*'Foskett'*)[137] a majority of the House of Lords held that a claimant was not limited to a lien, but could claim a proportionate share in the increased value of the mixed fund or asset under an express trust. As will be shown below, this decision did not refute the usefulness of the lien, but carefully applied established tracing principles.[138]

(b) Proprietary Estoppel

It has not been sufficiently appreciated that in the 19th century the equitable lien was also available in what have become generally known as proprietary estoppel cases.[139] For example, owners of land were not permitted to rely on their strict legal rights when another party spent money in the mistaken belief that he or she was entitled to or had an interest in the land and the owner acquiesced.[140] Likewise, where the owner of land induced a party to spend money on improving it in the belief that he or she would acquire an interest in the land in the future, the owner was estopped from denying the truth of the assumption created.[141] In both situations, equity would intervene and prevent the owner from resiling from his or her representation. Courts would tailor the

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135 Ibid.

136 See, eg, *Sinclair v Brougham* [1914] AC 398, 442 (Lord Parker); *Re Tilley's Will Trusts; Burgin v Croad* [1967] 1 Ch 1179; *Lofts v MacDonald (trustees); Re MacDonald* [1974] 3 ALR 404; *BC Teachers' Credit Union v Betterly* (1975) 61 DLR (3d) 755; *Liggett v Kensington* [1993] 1 NZLR 257, 274 (Cooke P); *Re Erie Trust Co of Erie; Claim of Gingrich's Heirs*, (1937) 191 A 613.

137 [2001] 1 AC 102.

138 See below 21–2.

139 Patrick Parkinson, 'Estoppel' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 201, [712]; Sykes and Walker, above n 6, 204–5.

140 *Neeson v Clarkson* (1845) 4 Hare 97; 67 ER 576; *Hamilton v Geraghty* (1901) SR (NSW) Eq 81; *International Corona Resources Ltd v Lac Minerals Ltd* (1988) 44 DLR (4th) 592, 661; Butterworths, *Halsbury's Laws of England*, above n 6, [775]; Perry, above n 44, vol 2, § 1237; Sykes and Walker, above n 6, 204; George W Keeton and L A Sheridan, *Equity* (2nd ed, 1976) 172–4; Sutton, above n 56.

141 See, eg, *Dillwyn v Llewllyn* (1862) 4 De G F & J 517; 45 ER 1285; *Ramsden v Dyson* (1865) LR 1 HL 129. For more modern cases see *Canadian Pacific Railway Co v The King* [1931] AC 414; *Ward v Kirkland* [1967] 1 Ch 194; *Crabb v Arun District Council* [1976] Ch 179; *Pascoe v Turner* [1979] 1 WLR 431; *Hussey v Palmer* [1972] 1 WLR 1286.

remedy to suit the particular circumstances of the case.[142] For instance, the courts have had the power to impose an equitable lien to secure funds spent by the innocent party.[143] This remains the case today.[144]

Courts have used the equitable lien where a plaintiff has shown that it would be unconscionable for the landowner to insist on his or her strict legal rights, but where imposing a constructive trust and conferring a beneficial interest in the land would be a drastic remedy. Generally the constructive trust is made effective by an order for the conveyance of the property to the plaintiff.[145] In such cases the courts have recognised that the plaintiff should be able to recoup his or her expenditure and that, until the landowner has made monetary compensation, the equitable lien will secure the plaintiff's investment in the property. However, it must be emphasised that whether an equitable lien will sufficiently address the plaintiff's case will be a matter of fact. In *Plimmer v Mayor of Wellington* ('*Plimmer*')[146] the Privy Council advised that 'the Court must look at the circumstances of each case to decide in what way the equity can be satisfied'.[147]

There are some important, relatively recent examples of courts deliberately avoiding the imposition of a constructive trust, preferring an equitable lien. In *Morris v Morris*[148] a widower paid money towards the extension of the home of his son and daughter-in-law on the basis that he would use that accommodation

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142 In *Inwards v Baker* [1965] 2 QB 29 a father encouraged his son to construct a bungalow on the father's land. The son went into occupation in the expectation that he could remain on the property during his lifetime. The father died and under his will the land was held in trust for persons other than the son. The trustee sought an order for possession of the bungalow and the English Court of Appeal held that the son was entitled to stay in the bungalow for as long as he wished. In *Hussey v Palmer* [1972] 1 WLR 1286 an elderly widow was encouraged to live with her daughter and son-in-law. The widow paid for an extension to the house. The relationship between the parties soured and the widow left. She claimed that the cost of the extension was a loan which the defendant son-in-law ought to repay. A majority of the English Court of Appeal (Lord Denning MR, Phillimore LJ; Cairns LJ dissenting) held that although there had been no arrangement for the repayment of the expenditure, it was not a gift and it would have been unconscionable for the defendant to retain the benefit without repayment. Accordingly, the Court held that the property was held on resulting or constructive trust for the widow.

143 See, eg, *Ludlow v Grayall* (1822) 11 Price 58; 147 ER 400; *Unity Joint Stock Banking Association v King* (1858) 25 Beav 72; 53 ER 563; Sykes and Walker, above n 6, 204–5; *Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26, 36 (Young J).

144 *Chalmers v Pardoe* [1963] 1 WLR 677; *Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26; *Jackson v Crosby (No 2)* 21 SASR 280. In *Hussey v Palmer* [1972] 1 WLR 1286, 1290 Lord Denning pointed out that earlier cases had 'emphasised that the court must look at the circumstances of each case to decide in what way the equity can be satisfied. In some by an equitable lien. In others by a constructive trust. But in either case it is because justice and good conscience so require'.

145 See, eg, *Dillwyn v Llewellyn* (1962) 4 De G F & J 517; 45 ER 1285 and the comments of the High Court in *Giumelli v Giumelli* (1999) 196 CLR 101 ('*Giumelli*'), 112. However, there have been some decisions where courts have imposed a constructive trust because of the strong representations made by the landowner that the plaintiff would acquire a proprietary interest in the land: see, eg, *Hussey v Palmer* [1972] 1 WLR 1286, 1291, the discussion in *Jackson v Crosby (No 2)* [1979] 21 SASR 280 and the comments of Kirby P in the decision of the NSW Court of Appeal in *Baumgartner v Baumgartner* [1985] 2 NSWLR 406, 415, 419–20.

146 (1884) 9 App Cas 699.

147 Ibid 714.

148 [1982] 1 NSWLR 61.

indefinitely. The subsequent breakdown of the son's marriage made it impossible for the father to live on the premises and the father claimed reimbursement for the money expended. McLelland J recognised that 'it would be unconscionable and inequitable that the defendants should now retain the benefit of the expenditure by the plaintiff of his money on their property free of any obligation of recoupment to him'.[149] Accordingly, an equity arose in favour of the widower. McLelland J held that the facts were analogous to those authorities where it was held that it was unconscionable to encourage a person to expend funds on land in the expectation of an interest and then resile from the obligation created.[150] In such cases, courts had opined that they must look at the circumstances of each case to decide in which way the equity could be satisfied.[151] In this case, an equitable lien would be sufficient to secure the moneys owing to the widower and to 'satisfy the demands of justice and good conscience'.[152]

Morris v Morris has become an important decision in relation to the application of equitable liens for three reasons. First, McLelland J reasoned analogously, in order to extend slightly the kinds of cases that would require equitable intervention in the form of an equitable lien. In this respect, he anticipated the approaches of Gibbs CJ and Deane J in *Hewett v Court*.[153] Secondly, the judgment was handed down well before the significant judgment of Deane J in *Muschinski v Dodds*,[154] which held that contribution towards a joint endeavour that failed without fault of the parties would give rise to a constructive trust. As *Morris v Morris* showed, proprietary relief in the form of the equitable lien was available to remedy what can broadly be described as unconscionable conduct.[155] Thirdly, McLelland J made a deliberate choice between the constructive trust and the equitable lien. While McLelland J did not fully explain his decision, it is clear that he only wished to secure the widower's entitlement and did not wish to convey the property to the widower or to prevent the son and daughter-in-law from dealing with the property. He considered that the equitable lien would sufficiently secure the widower's expenditure.[156]

(c) Giumelli v Giumelli

In the light of the preceding discussion of what can broadly be described as proprietary estoppel cases, the recent decision of the High Court in *Giumelli v Giumelli* ('*Giumelli*')[157] becomes, in part, explicable. Mr and Mrs Giumelli made

149 Ibid 64. He held that it was impossible to infer an intention on the part of the parties to create a common intention trust.

150 His Honour referred extensively to *Chalmers v Pardoe* [1963] 1 WLR 677 which in turn referred to *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699.

151 *Morris v Morris* [1982] 1 NSWLR 61, 64.

152 Ibid.

153 (1983) 149 CLR 639, 648 (Gibbs CJ), 668 (Deane J). See above Part V(B).

154 (1985) 160 CLR 583, 623–4 (Deane J). Mason J (599) agreed with Deane J.

155 Patrick Parkinson, 'The Conscience of Equity' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 28, [212].

156 *Morris v Morris* [1982] 1 NSWLR 61, 64.

157 (1999) 196 CLR 101.

several promises about their land to their son, upon which the son actively relied. The cumulative effect of these promises was that the land would be subdivided to create a lot which would be registered in the son's name. The promises remained unfulfilled. The son brought an action based on equitable estoppel and sought proprietary relief. Importantly, other relatives who resided on the proposed lot were involved in the family business and in an ongoing partnership dispute. The son argued that he had suffered detriment because he had expended funds building a dwelling on the land and had rejected a job offer in order to continue working in the family business.

The trial judge, Nicholson J, held that only the expenditure on the dwelling constituted detriment warranting equitable relief. He held that it was not appropriate to order that the whole of the land be vested in the son and that the son's expectation could be met by compensation. Accordingly, he ordered a valuation of the dwelling and ordered the payment of compensation which would have placed the son in the position of owning an asset which he was able to realise.[158] The son successfully appealed to the Full Court of the Supreme Court of Western Australia. The parents were ordered to hold the land on constructive trust for the son and undertake what was necessary to effect the subdivision of the land and transfer of the lot.[159] In their appeal to the High Court, the parents argued that while the son may have had the right to relief based on equitable estoppel,[160] the relief granted by the Full Court was disproportionate and went beyond redressing any detriment suffered by the son.[161] The High Court agreed and held that the son's contribution and expectation of an interest in the land could be satisfied by monetary compensation secured by a charge over the land. While the High Court upheld the finding of the Court of Appeal that the son had suffered detriment because he had paid for the dwelling and rejected a job offer,[162] it was guided by the need for a proportional remedy which would redress the unconscionable conduct of the parents.

Although the case has excited debate about the ongoing development of a modern broad doctrine of equitable estoppel and discretionary remedialism,[163] the fact that the choice between the imposition of a constructive trust over land and an equitable lien securing monetary compensation was not new, has been

158 *Giumelli v Giumelli* (Unreported, Supreme Court of Western Australia, Nicholson J, 10 September 1993). For the relevant excerpts of the judgment and a consideration of its effect see also *Giumelli* (1999) 196 CLR 101, 117–19 (Gleeson CJ, McHugh, Gummow and Callinan JJ).

159 *Giumelli v Giumelli* (1996) 17 WAR 159, 173–5 (Ipp J with whom Franklyn J concurred). Rowland J agreed with the relief suggested by Ipp J, whether based on a constructive trust due to the breakdown of a joint endeavour or on equitable estoppel: 167. The Court of Appeal found that the son had suffered detriment on both bases he claimed: 174 (Ipp J with whom Franklyn J concurred) and 166 (Rowland J).

160 *Giumelli* (1999) 196 CLR 101, 114.

161 Ibid.

162 Ibid 118.

163 One important issue has been whether equitable estoppel ought to redress the 'expectation' interest or the 'reliance' interest: see James Edelman, 'Remedial Certainty or Remedial Discretion in Estoppel after *Giumelli*?' (1999) 15 *Journal of Contract Law* 179; David Wright, '*Giumelli*, Estoppel and the New Law of Remedies' [1999] *Cambridge Law Journal* 476; Susan Barkehall Thomas and Vicki Vann '*Giumelli v Giumelli* – Estoppel Doctrine Not Clarified: Court Refuses to Grant Expectation Relief' (1999) 4 *Newcastle Law Review* 87.

overlooked. Indeed, the High Court in *Giumelli* recalled the influential statement of the Privy Council in *Plimmer* that the Court had to consider the full circumstances of the case in order to decide what was the appropriate remedy to satisfy the party's equity.[164] Moreover, the Court acknowledged that the operation of the constructive trust in such cases amounted to a conveyance of the land to the claimant.[165] In *Giumelli*, the crucial factor which precluded the operation of a constructive trust leading to subdivision and conveyance of the land was the interest of third parties. However, the decision was also informed by the Court's resolve to impose a constructive trust only in circumstances where there is no other appropriate remedy.

It could be argued that in *Foskett* a majority of the House of Lords embarked in the opposite direction to the High Court in *Giumelli* because the House of Lords appeared not to protect the interests of innocent third parties and found that a trust, rather than a lien, operated in favour of the claimants. Significantly, unlike *Giumelli*, *Foskett* concerned the application of tracing rules. The facts briefly stated were that Murphy acquired control of land development companies which marketed plots of land in Portugal to 220 purchasers. The purchasers entered into contracts of purchase in respect of the plots they wished to acquire and paid the purchase price. The purchase price was held under a trust deed which stated that the purchase funds (amounting in aggregate to approximately £2.6 million) would be held in a separate bank account until either the relevant plot of land was transferred or a period of two years had expired. The land in Portugal was never developed and it was discovered that the trust fund had been almost dissipated. However, it was proved that £20 440 of the funds had been used to pay several of Murphy's life insurance premiums. Murphy committed suicide, but before his death he had settled the policy on trust in favour of his wife (one-tenth) and his children (nine-tenths). The amount paid under the insurance policy was a little over £1 million and the amount in dispute was the children's share.

The major issue was whether the purchasers were entitled to an amount represented by the misappropriated fund, namely £20 440, which would be secured by a lien or a proportionate interest in the insurance proceeds payable to the children. In *Hallett*, Jessel MR had suggested that in the case of mixed substitution, a beneficiary was limited to a lien to recover the trust money.[166] In *Foskett*, a majority of the House of Lords held that English law did not have such a rule. The purchasers had the option to claim either a proportionate share of the insurance premiums or to enforce a lien upon them to secure a personal claim against the trustee for the amount of the misapplied money.[167] Therefore, the purchasers were able to claim a pro rata share of the insurance premiums. In so doing, an express trust was found in favour of the purchasers and they took

164 (1884) 9 App Cas 699, 714. See above 18.

165 *Giumelli* (1999) 196 CLR 101, 112.

166 (1880) 13 Ch D 696, 709. It has been pointed out that this view was strictly obiter and it has not been followed in other jurisdictions, see, eg, Michael Christie, 'Tracing' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 816, [2324].

167 *Foskett* [2001] 1 AC 102, 131 (Millet LJ), 110 (Browne-Wilkinson LJ), 115 (Lord Hoffman).

priority over the deceased's children. Although the Court recognised an express trust rather than an equitable lien, the decision may be distinguished from *Giumelli*. In *Foskett* it was not incumbent on the Court to make a choice between imposing a trust or an equitable lien.

First, as Millet LJ pointed out, the fundamental issue in *Foskett* was 'vindicating rights of property'.[168] A trustee had misappropriated trust funds which were ultimately traced to the insurance premiums and proceeds.[169] Unlike Jessel MR in *Hallett,*[170] Millet LJ held that the purchasers were entitled to a proportionate share and that the pro rata division was the best outcome for the wrongdoer. Otherwise the purchasers would be entitled to the whole fund or amount.[171] In comparison, in *Giumelli* the High Court was not concerned with vindicating pre-existing property interests but with determining what was the appropriate remedy to redress detrimental reliance.

Secondly, the position of the innocent third parties was very different in each case. While the children in *Foskett* were innocent of the wrongdoing, they were volunteers only. In accordance with earlier authority, the purchasers were able to trace the trust funds into the insurance proceeds because their interest took priority over the children as volunteers.[172] To decide in favour of the children would have provided a convenient means and justification for a wrongdoing trustee transferring assets beyond the reach of aggrieved beneficiaries. In *Giumelli* other persons had been involved in the family business and partnership. Their interests (which were the subject of ongoing litigation in the lower courts) would have been affected by the imposition of a constructive trust in favour of the son. Therefore, the equitable lien was the appropriate remedy.

2 *A Limitation of the Constructive Trust as a Remedy*

In *Giumelli*, the circumstances of the case precluded the imposition of a constructive trust. Acknowledging the vulnerability of the plaintiff and the equitable proprietary nature of the claim, courts instead chose the equitable lien as an efficacious and workable remedy.

However, in recent times courts have embraced the general application of the equitable lien as an alternative to the constructive trust in situations where either remedy could arguably be applied.[173] In *Muschinski v Dodds*, land had been registered in the names of Mrs Muschinski and Mr Dodds. Later, Mrs Muschinski claimed that she was entitled to the beneficial interest in property

168 Ibid 132.

169 Ibid 134–5.

170 (1880) 13 Ch D 696, 709.

171 *Foskett* [2001] 1 AC 102, 133. The decision is consistent with the view that in tracing cases, where the underlying trust property appreciates, a trust secures the property in favour of the beneficiary: see above Part IV.

172 See, eg, *Black v Freeman & Co* (1910) 12 CLR 105; *Re Diplock's Estate* [1948] Ch 465. See also Meagher and Gummow, above n 96, [2713]–[2714]; H A J Ford and W A Lee, *Principles of the Law of Trusts* (3rd ed, 1996) [17280].

173 Austin, above n 4, 85.

because she had provided most of the purchase price.[174] Although she could not claim a purchase price resulting trust,[175] Deane J (with whom Mason J agreed) imposed a constructive trust based on the breakdown of a joint endeavour.[176] In contrast, Gibbs CJ held that Mrs Muschinski was merely entitled to a contribution from Mr Dodds secured by a charge over the land.[177] His decision was subsequently influential when the High Court, in *Bathurst City Council v PWC Properties Pty Ltd* ('*Bathurst*'),[178] made a positive direction that 'before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy'.[179]

The Court also expressed this sentiment in *Giumelli*[180] and left no doubt that this general approach to the imposition of constructive trusts also informed the Court's decision in that case. While it is unwise to pre-empt future trends based on one decision and the comments in *Bathurst*, it is arguable that the High Court has set an important benchmark by suggesting that the constructive trust ought to be a remedy of last resort. Therefore, unless the facts of the case show that there is no appropriate relief other than a constructive trust, courts ought to consider other relief including whether monetary compensation secured by a lien would suffice.[181]

Equally significant has been the well-known judgment of the House of Lords in *Lord Napier and Ettrick v Hunter* ('*Napier*').[182] In this case the plaintiff insurers met claims made by members of an insured syndicate. The syndicate had also commenced proceedings against the syndicate's managing agents claiming negligence and breach of duty resulting in the loss to the syndicate. The proceedings were settled in the syndicate's favour. The plaintiffs then brought an action against the syndicate, arguing that pursuant to the doctrine of subrogation, they were entitled to the settlement moneys. Under this doctrine, an insured party is prevented from retaining double compensation received from the insurer and

174 Mrs Muschinski had provided approximately ten-elevenths of the purchase price: *Muschinski v Dodds* (1985) 160 CLR 583, 611 (Deane J).

175 Ibid 591 (Gibbs CJ), 612 (Deane J).

176 Ibid 614–24. Deane J stated that the parties were to hold 'their respective legal interests as tenants in common upon trust (after payment of any joint debts incurred in improvement of the property) to repay to each her or his respective contributions and as to the residue for them both in equal shares': 624.

177 Ibid 598. As the question of contribution had not been argued, his Honour stood the matter over to enable the parties to agree on an order. Otherwise, the matter would have been remitted to the Supreme Court of New South Wales for consideration. His Honour suggested that the agreed figures as to the contribution to the purchase price paid might serve as a basis for the charge.

178 (1998) 195 CLR 566.

179 Ibid 585.

180 (1999) 196 CLR 101, 113 citing *Bathurst* (1998) 195 CLR 566, 585.

181 Courts have heeded the comments of the High Court in relation to the constructive trust in equitable estoppel cases: *Commissioner of Taxation v Service* (1991) 99 ATC 4886, 4894; *Patrick Jones Photographic Studios v Catt* [1999] NSWSC 421 (Unreported, Windeyer J, 10 May 1999) [54]; *Flinn v Flinn* [1999] 3 VR 712, 749–50; *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357, 361–2.

182 [1993] AC 713.

the wrongdoer.[183] Once the insurer has paid the indemnity to the insured, it is entitled to assert the insured's rights against the wrongdoer. The result is that the wrongdoer becomes directly liable to the insurer and ultimately liable for the loss.[184]

In *Napier*, the House of Lords held that the doctrine of subrogation applied, that it would be unconscionable for the insured syndicate to refuse to recoup the settlement for the insurers and that the insurers had a proprietary right over the settlement funds. However, the Court also chose to impose an equitable lien over the fund, despite old authority under which an insured held double compensation for loss as trustee for the insurer.[185] The facts of the case did not preclude the characterisation of the insured as a trustee of the settlement fund. Rather, the Court considered that the burdens and liabilities of trusteeship were too onerous for such an insured[186] and that the lien was a 'more appropriate form of proprietary right'[187] because it adequately protected the interests of the insured.[188] The result of the decision has been that the doctrine of subrogation specifically confers an equitable lien over the moneys which an insured receives as double compensation for loss.[189] However, reasoning more broadly, it can be surmised that to the extent (if any) that a remedial constructive trust is available in English law,[190] such a trust will not be imposed unless a court considers that the responsibilities associated with trusteeship are appropriate in the circumstances.

D A Loosening of the Proprietary Nexus

The final major development that has widened the application of the equitable lien is the loosening of the link between the remedy and proprietary interests. In the 19th and 20th centuries the lien operated as a charge over specific property only, as distinct from a person's general assets. Historically, there have been two sources of this restraint. First, the nature of the equitable lien (rather than the

183 R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) [951]; John Glover, 'Subrogation' in Patrick Parkinson (ed) *The Principles of Equity* (1996) 549, [1501].

184 Meagher, Gummow and Lehane, above n 183, [951]; Glover, above n 183, [1501]; *Orakpo v Manson Investments Ltd* [1978] AC 95.

185 See, eg, *Randal v Cockran* (1748) 1 Ves Sen 98; 27 ER 916; *Blaauwpot v Da Costa* (1758) 1 Eden 130; 28 ER 633; *Commercial Union Assurance Co v Lister* (1874) LR 9 Ch App 483; *King v Victoria Insurance Co Ltd* [1896] AC 250. For a helpful discussion of the trust as a remedy in subrogation cases see S R Derham, *Subrogation in Insurance Law* (1985) 25.

186 *Napier* [1993] AC 713, 738 (Lord Templeman), 744–5 (Lord Goff). In comparison, in *Giumelli* (1999) 196 CLR 101, 112 the High Court held that a constructive trust imposed in the context of equitable estoppel would not impose administrative burdens because the constructive trust would result in the conveyance of land.

187 *Napier* [1993] AC 713, 744 (Lord Goff).

188 Ibid.

189 Ibid 738 (Lord Templeman); 743–4 (Lord Goff). The lien awarded in *Napier* has been praised as a viable security alternative to the trust. See Gummow, above n 1, 163; cf Charles Mitchell, *The Law of Subrogation* (1994) 83–4.

190 This remains a contentious issue: see, eg, Birks, 'Property Rights as Remedies', above n 5; Birks, 'The End of the Remedial Constructive Trust', above n 5; Wright, 'Propriety Remedies and the Role of Insolvency', above n 1.

events which triggered it) is akin to the Roman law tacit special *hypotheca* where a charge over specific property was imposed by law.[191] Therefore, the equitable lien has been used to secure an interest in specific land which was the subject of a contract or over partnership assets.[192] Secondly, it was clear that when applying the equitable tracing rules, 19th century lawyers would not extend the operation of an equitable lien imposed by the operation of law to a debtor's assets generally. In some early cases in the 1870s in which the floating charge was given judicial blessing, Jessel MR presided.[193] Although he endorsed the tracing of money in a mixed form in *Hallett*, Jessel MR still retained the specific lien (referred to in the judgment as a charge) as one of two possible remedies. Therefore, a pre-existing proprietary base or specific *res* (which must be capable of being traced in its original, substituted or mixed form) has been traditionally required.[194] Jessel MR never envisaged the beneficiary having a security over the whole of the trustee's assets for the purpose of redressing the breach of trust or fiduciary obligation. However, in recent decades there have been suggestions that the connection between the equitable lien and underlying property could be loosened where it is considered that there is an overriding justification for the imposition of a lien. Two separate and discernible trends are evident.

1 *A Sufficient Nexus and Appropriation of an Asset Justifying a Specific Lien*

As it will be recalled, a majority of the High Court in *Hewett v Court* were willing to accept that an equitable lien could be imposed outside established categories on the basis of redressing unconscionable conduct. Equally important, a majority of the High Court indicated that the kind of direct nexus between the property and the equitable lien, which is the hallmark of traditional tracing rules, was not essential. A lien would operate so long as there was a sufficient nexus between the instalments paid and the asset. Therefore the Court did not insist that the actual instalment payments made by the purchaser were to be used for the construction of the particular prefabricated house which the purchasers would eventually acquire.[195] Rather, they simply required that the house in question be appropriated to the contract between the builder and the purchaser.

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191 See above Part III(A).

192 See above Part III(B). In *Hewett v Court* (1983) 149 CLR 639, Deane J held that a lien arose only where property could be specifically identified as subject to the lien: 668. This requirement is also evident in the United States law: see the American Law Institute, *Restatement (Second) of Restitution* (Tentative Draft No 2, 1984) vol 2, § 30g.

193 See *Re Florence Land and Public Works Co; Ex parte Moor* (1878) 10 Ch D 530, 543; *Re Colonial Trusts Corporation; Ex parte Bradshaw* (1879) 15 Ch D 465, 472.

194 For discussions of the orthodox position see Goode, 'The Right to Trace and its Impact in Commerical Transactions', above n 5; Goode, 'Ownership and Obligations in Commercial Transactions', above n 5; Goode, 'Property and Unjust Enrichment', above n 5; R M Goode, 'Proprietary and Restitutionary Claims' in W R Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 63; Birks, 'Proprietary Rights as Remedies', above n 5, 214; Cope, *Proprietary Claims and Remedies*, above n 98, chh 2, 3.

195 *Hewett v Court* (1983) 149 CLR 639, 648 (Gibbs CJ): '[I]t is immaterial whether the moneys paid were in fact used by the company in the construction of the building. A purchaser's lien does not depend on the ability to trace the property into the property over which the lien is created'.

In this case, the builder appropriated the house to the contract when the builder identified the house as the property built in satisfaction of the contractual obligation.[196]

2 *A General Equitable Lien as Remedy?*

Besides loosening the nexus between the original asset and the lien, there have been suggestions that a general equitable lien could become a remedy to redress unconscionable conduct or unjust enrichment in situations in which the strict tracing rules would not apply. For example, the tracing rules may not apply because there is no pre-existing fiduciary relationship[197] or there is no existing proprietary base.[198] In this sense the proposed general equitable lien is part of the ongoing debate to what extent (if at all) proprietary relief ought to be imposed by courts outside well-established categories recognised in equity.[199] It is not the function of this article to address this wider issue directly. Rather, the purpose of this section is to discuss those cases in which a general equitable lien was considered or applied by judges; and to address some of the problems raised by a general equitable lien if it were utilised in the future.

A significant starting point for the recognition of the general equitable lien was the obiter statement of Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* ('*Space Investments*').[200] He held that a bank which was the trustee of various settlements and which was permitted to invest in any bank (including itself), had properly invested the money in itself. The assets were traceable to the bank in accordance with traditional tracing rules. However, Lord Templeman also considered the situation where, contrary to the terms of the settlement, the trustee bank deposited the funds with itself and mixed the funds with its own assets to the extent that there was no identifiable mixed pool, except perhaps, the entire assets of the bank as a pool of assets. It would be impossible to conform to equity's tracing rules. Noting *Hallett*, Lord Templeman opined:

196 Ibid 648 (Gibbs CJ), 669–70 (Deane J), 650 (Murphy J).

197 See *Re Diplock* [1948] Ch 465, 520–1, 532, 540; cf the comments of Sir Peter Millet, 'Tracing the Proceeds of Fraud' (1991) 107 *Law Quarterly Review* 71, 85; Lord Goff and Gareth Jones, *The Law of Restitution* (1998) 104; Meagher and Gummow, above n 96, [2706]–[2708].

198 See above n 194 for commentary on the orthodox approach requiring a proprietary base.

199 This remains a controversial issue. For example, Professor Peter Birks has argued that recent decisions in the English Court of Appeal and the New Zealand Court of Appeal have resulted in the demise of the remedial constructive trust: see Birks, 'The End of the Remedial Constructive Trust', above n 5; Peter Birks 'The Law of Restitution at the End of an Epoch' (1999) 28 *University of Western Australia Law Review* 13; cf Wright, 'Propriety Remedies and the Role of Insolvency', above n 1. Other writers have accepted a limited role for the remedial constructive trust: see, eg, Paciocco, above n 5; Sherwin, above n 5.

200 [1986] 1 WLR 1072.

> It is therefore equitable that where the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially, merely acknowledging and recording the amount in a trust deposit account with the bank, then the claims of the beneficiaries should be paid in full out of the assets of the trustee bank in priority to the claims of the customers and other unsecured creditors of the bank ... Where a bank trustee is insolvent, trust money wrongfully treated as being on deposit with the bank must be repaid in full so far as may be out of assets of the bank in priority to any payment of customers' deposits and other unsecured debts.[201]

Therefore, in the event that the application of tracing rules did not find a proprietary base, beneficiaries would be entitled to far more than a judgment debt against the trustee. They would be entitled to priority over all the bank's other unsecured creditors. It appears that this priority would extend over all the trustee's own assets including non-monetary assets. This radical proposition was, in part, disguised by the attempt to bring the judgment within the principles in *Hallett*. However, it was not envisaged in that earlier case that a beneficiary could trace into the trustee's assets generally. When Jessel MR referred to the mixing of moneys,[202] he assumed the mixing of moneys in a specific fund or account. In *Space Investments*, Lord Templeman interpreted the words 'mixes trust funds with his own' as not pertaining solely to the specific large fund into which a plaintiff's moneys may be mixed, but the admixture of the moneys with the assets of the trustee as a whole.

Such an interpretation has the potential not only to change radically the nature of equitable tracing (as it is sufficient to show that the trustee received the moneys), but also to change the nature of the lien which will operate as a security over the mixed asset. Such a lien would not simply secure the beneficiaries' interests in a specific asset, but would operate effectively as a security over the whole of the trustee's assets in favour of the beneficiaries who would acquire priority over other creditors. This is what occurred in *Liggett v Kensington* ('*Liggett*')[203] where a majority of the New Zealand Court of Appeal broadly interpreted and applied the obiter in *Space Investments*. In *Liggett*, investors paid funds to a company for the purchase of bullion on the basis, inter alia, that the bullion which they purchased would be segregated from a larger mass of bullion, thus ensuring their title to a specific asset.[204] However, the bullion was not appropriated to them and the company became insolvent. A majority of the New Zealand Court of Appeal held that the bullion company owed fiduciary obligations to the investors.[205] The company had breached these obligations because of its failure to appropriate bullion to each of the accounts. Following the obiter in *Space Investments*, the majority of the Court imposed a general equitable lien (described as a 'charge') over the company's assets and held that the investors – who otherwise would have been unsecured creditors – were entitled to take priority over all creditors including the holder of a floating

201 [1986] 1 WLR 1072, 1074. See also S J Stoljar, *The Law of Quasi-Contract* (2nd ed, 1989) 143.
202 *Hallet* (1880) Ch D 696, 719.
203 [1993] 1 NZLR 257.
204 Ibid.
205 Ibid 272–5 (Cooke P); note also 280–1 (Gault J). McKay J dissented.

charge.[206] Ultimately, what Lord Templeman was advocating in *Space Investments* and what the New Zealand Court of Appeal applied in *Liggett*, was a general lien similar to the Roman tacit general *hypotheca* in its fullest form.[207]

There can be no doubt that the concept of a general equitable lien is attractive to beneficiaries and creditors who are unable to trace into the original assets or the assets in a substituted or mixed form. However, it has not been extensively applied for three reasons.

First, generally speaking, courts exercising equitable jurisdiction have emphasised that equitable remedies are to be used with sensitivity and discretion.[208] Indeed, where claimants have rights to equitable relief due to proof of unconscionable conduct or unjust enrichment, such rights do not automatically translate into a proprietary remedy, particularly in an insolvency situation.[209]

Secondly, the response to the obiter in *Space Investments* has been either to reject it outright or to restrict its scope, insofar as it would only apply to the misappropriation of funds by bank trustees which were traceable into their assets.[210] When delivering the complex judgment of the Privy Council in *Re Goldcorp Exchange Ltd (in receivership)* ('*Goldcorp*')[211] Lord Mustill noted the latter approach.[212] However, the facts of *Goldcorp* clearly did not fall within this limited framework because the bullion dealer was not a bank trustee. Moreover, Lord Mustill said that the obiter dicta in *Space Investments* concerned a mixed rather than a non-existent fund.[213] Here, his remarks related to claims by the customers in *Goldcorp* that the company held their purchase moneys in trust for them. He pointed out that the purchase moneys had been deposited in an overdrawn account which meant that they were no longer traceable.[214]

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206 However, on appeal, the Privy Council held that the company did not owe the investors fiduciary obligations and the investors were merely unsecured creditors: see *Re Goldcorp Ltd (in receivership)* [1995] 1 AC 74.

207 See above Part III(A).

208 See, eg, *Coleman v Myers* [1977] 2 NZLR 225; *Cheese v Thomas* [1994] 1 WLR 129; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Maguire v Makaronis* (1997) 188 CLR 449.

209 See *Bathurst* (1998) 195 CLR 566, 584–5; *Sorachan v Sorachan* [1986] 2 SCR 38, 47 (Dickson CP); *Rawluk v Rawluk* [1990] 1 SCR 70.

210 The obiter in *Space Investments* has been subject to considerable criticism: see, eg, Goode, 'Ownership and Obligation in Commercial Transactions', above n 5, 446–7; Lionel Smith, *The Law of Tracing* (1997) 231, 312–5.

211 [1995] 1 AC 74. This case was an appeal from the decision of the New Zealand Court of Appeal in *Liggett* [1993] 1 NZLR 257.

212 [1995] 1 AC 74, 109 (Lord Mustill):

> In the case of a bank which employs all borrowed moneys as a mixed fund for the purpose of lending out money or making investments, any trust money unlawfully borrowed by a bank trustee may be said to be latent in the property acquired by the bank and the Court may impose an equitable lien on that property for the recovery of the trust property.

213 Ibid.

214 Ibid 104–5. See also *Bishopsgate Investment Management Ltd (in liq) v Homan* [1995] Ch 211; Goff and Jones, above n 197, 115, 201; cf John Breslin 'Tracing into an Overdrawn Bank Account: When Does Money Cease to Exist?' (1995) 10 *The Company Lawyer* 307.

Thirdly, courts in a variety of jurisdictions have emphasised that a proprietary remedy ought not interfere with the rights of third parties.[215] In *Fortex Group Ltd v MacIntosh*,[216] Tipping J accepted the approach in *Space Investments* but noted that the comments made in that case were in an insolvency context where the money in question was trust money and there was no issue of priority over secured creditors.[217] In relation to a general equitable lien, the status of secured third parties is a thorny problem. As the New Zealand Court of Appeal's decision in *Liggett* illustrated, the interests of a secured creditor could be directly affected by the imposition of what amounted to a general equitable lien. It must be emphasised that unlike a trust, a lien does not vest the lienee with an equitable beneficial interest and remove the assets from the claims of creditors.[218] Therefore, there is a potential competition between the securities created by the trustee over its assets and a court-imposed general lien. The extent to which a general equitable lienee ought to acquire an interest in the trustee's assets appears to be directly dependent upon the nature of the interests of other third parties who have dealt with the trustee. From the perspective of the law of securities, there are at least three possible kinds of property over which a general equitable lien could operate.

(a) Unencumbered Assets

Lord Templeman suggested in *Space Investments*[219] that a general lien could operate over unencumbered assets. This proposition is a helpful one because it shows that where there is a breach of trust and there are unencumbered assets, these assets could be utilised first to pay out a beneficiary whose interest will be secured by a general lien. Therefore, even if a beneficiary is unable to use equity's traditional tracing rules, such a party should be treated in priority to other unsecured creditors via a general equitable lien over unencumbered assets.

However, a problem is that the bulk of the assets of the insolvent trustee may already be subject to other securities. Therefore, the value of the assets which may be unencumbered is minimal. Moreover, such assets, where an individual is involved, may be personal effects such as clothes and household property which are exempted from the property available for distribution amongst creditors.[220]

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215 See, eg, *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J); *Giumelli* (1999) 196 CLR 101, 112–13; *Rawluk v Rawluk* [1990] 1 SCR 70, 103–4 (McLachlin J). This issue has been of great concern to commentators considering the effect of constructive trusts: see, eg, Paciocco, above n 5; Sherwin, above n 5; A J Oakley, 'The Precise Effect of the Imposition of a Constructive Trust' in Stephen Goldstein (ed) *Equity and Contemporary Legal Developments* (1992) 427.

216 [1998] 3 NZLR 171.

217 Ibid 178.

218 In relation to trusts see *Bankruptcy Act 1966* (Cth) s 116(2)(a).

219 [1986] 1 WLR 1072, 1074. See also Gareth Jones, 'Tracing Claims in the Modern World' [1988–89] *King's Counsel* 15, 19.

220 *Bankruptcy Act 1966* (Cth) s 116(2)(b).

(b) Assets Subject to a Floating Charge

A more difficult situation arises where the assets of an insolvent company are subject to a floating charge. It will be recalled that in *Liggett* bullion purchasers brought an action seeking proprietary relief over unappropriated gold bullion which they claimed belonged to them. A dispute arose between the customers and the debenture holder which had appointed receivers of the company pursuant to a floating charge. A majority of the New Zealand Court of Appeal held that the customers were entitled to priority over the debenture holder because the customers had not assumed the risk of insolvency while the debenture holder had.[221] They had entered into the transaction on the basis that upon the appropriation and segregation of the bullion, they would obtain title to the asset. In comparison, the debenture holder was aware that despite the flexibility of the floating charge, it had one major drawback: in order to secure fully the interests of the chargee, a floating charge must crystallise and attach to corporate assets, thereby bringing to an end the right of the chargor to dispose of that property.[222] Therefore, Cooke P held that proprietary relief was appropriate, not only on the basis of unconscionable conduct of the insolvent (in this case characterised as misrepresentation and a breach of fiduciary obligations)[223] and notice of the chargee,[224] but also because of an inherent limitation of the floating charge. The customers acquired priority over not only other unsecured creditors, but also over secured creditors who had not obtained a sufficiently effective security.

However, on appeal in *Goldcorp* the Privy Council rejected the views of the majority of the Court of Appeal. Lord Mustill, who delivered the judgment for the Privy Council, stated:

> There remains the question whether the court should create after the event a remedial restitutionary right superior to the security created by the charge. The nature and foundation of this remedy were not clearly explained in argument. This is understandable, given that the doctrine is still in an early stage and no single juristic account of it has yet been generally agreed. In the context of the present case there appear to be only two possibilities. The first is to strike directly at the heart of the problem and to conclude that there was such an imbalance between the positions of the parties that if orthodox methods fail a new equity should intervene to put the matter right, without recourse to further rationalisation. Their Lordships must firmly reject any such approach. The bank relied on the floating charge to protect its assets; the customers relied on the company to deliver the bullion and to put in place the separate stock. The fact that the claimants are private citizens whereas their opponent is a commercial bank could not justify the court in simply disapplying the bank's valid security. No case cited has gone anywhere near to this, and the Board would do no service to the nascent doctrine by stretching it past breaking point.[225]

The Privy Council's attitude was an affirmation that all forms of security are risk minimisation measures.

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221 *Liggett* [1993] 1 NZLR 257, 274–5 (Cooke P), 280–3 (Gault J). McKay J dissented.

222 Gough, above n 80, 135. For a discussion of what crystallisation entails see chh 8, 11 of the same work.

223 *Liggett* [1993] 1 NZLR 257, 267–72.

224 Ibid 274–5.

225 *Goldcorp* [1995] 1 AC 74, 104.

(c) Assets Subject to Fixed Securities

Finally, it is possible that all or a substantial part of the assets of the insolvent trustee are subject to fixed securities. It is anticipated that courts will remain cautious and will choose to assert the traditional priority status of secured creditors over any kind of unsecured creditor and ignore the claim for the imposition of proprietary relief in the form of a general equitable lien. A strong rationale for this approach is that secured creditors have not assumed the risk of the insolvency of the debtor because they have taken measures to minimise risk.[226] Parties often enter into commercial transactions on the basis that the transaction is secured. Therefore, the existence of a legal system under which securities are recognised and given full operation, is essential for commercial activity. Once the effective operation of a fixed security is impaired by the prioritised operation of the general equitable lien, commercial uncertainty follows. The substantial statutory development of securities of all kinds would be undermined by the intervention of equity.[227] Further, secured parties may have no notice of the trustee's unconscionable conduct. The concept of notice is directly linked to the principle that equity does not operate or intervene against a bona fide purchaser for value without notice who acquires the legal estate.[228] It would be incongruous and contrary to the traditional operation of equity if the interests of a bona fide purchaser for value, such as a secured lender, were subordinated to the interests of a general lienee in such circumstances. Accordingly, commercial certainty and the need for enforceable and reliable securities will prevail.

VI CONCLUSION

Overshadowed by the common law lien and the trust (in its various forms), the equitable lien has enjoyed a recent resurgence in a variety of separate but overlapping situations. Despite the many and diverse uses of the equitable lien in our legal system, it is surprising that it has not attracted more scholarly attention. Commentators have been content to focus on specific or incidental aspects of the lien rather than tracking its evolution and investigating its potential. Yet it is clearly worthy of more analysis, not only because of its interesting origins and special characteristics, but because it is an emerging proprietary remedy. Courts have shown a willingness to apply the equitable lien in order to provide proportionate and flexible relief. So far, courts have applied the equitable lien in new situations (which are analogous to established categories) and as a viable proprietary alternative to the constructive trust. However, the use of the equitable lien has been tempered by ongoing concerns about the imposition of

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226 In Australia, the strength of such an argument is augmented by s 90 of the *Bankruptcy Act 1966* (Cth) which entitles secured creditors to realise securities outside the statutory bankruptcy scheme.

227 *Re Osborn; Ex parte Trustee of Property of Osborn v Osborn* (1989) 25 FCR 547, 553–4; *Goldcorp* [1995] 1 AC 74, 103-5 (Lord Mustill).

228 In relation to the doctrine of notice see Patrick Parkinson and David Wright, 'Equity and Property' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 53, [315].

proprietary relief by courts. In particular, the loosening of the original proprietary nexus between the property allegedly subject to the lien and the lien itself raises some problems that are difficult to resolve. Courts have generally taken a cautious approach, mindful of the impact which proprietary relief may have upon secured third parties. However, the potential scope for the equitable lien as a general hypothecation affords courts an opportunity to revisit the extent – if any – to which there can be workable and justifiable exceptions to proprietary base theory. The equitable lien has significantly contributed to the modernisation of the legal system. It is truly a remedy for the 21st century.