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Equity and Mediation: Affinities and Disjunctures

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Abstract

The authors and Professor Denis SK Ong were colleagues at the Bond University Law School. Given their different areas of interest they did not collaborate on intellectual and academic matters. It is, however, to the regret of the current authors that they never discussed the subject of this contribution, namely the relationship between mediation, and other forms of dispute resolution (DR), on one hand and equity and its principles, on the other. This is regrettable as Denis's scholarship and erudition on the topic would have led to a fruitful discussion. This article is written in honour of Professor Ong and his innumerable achievements in many fields of academic life.

I Introduction

A decade and a half ago the question was posed as to whether mediation, in its modern, western incarnation, was the 'new equity'.¹ The question remains today, only partially answered. Both equity and mediation have moved beyond their framers' initial intentions and both are complex adaptive systems which respond to the prods and pressures of the circumstances in which they operate.

Former NSW Supreme Court Chief Justice, Sir Laurence Street, posed a similar conundrum early in the development of the modern mediation movement.² Before becoming Chief Justice, Sir Laurence

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The authors wish to thank Professor John Farrar and Dr Victoria Baumfield, editors of this special issue in honour of Professor Ong. We also thank the anonymous reviewers for their thoughtful and constructive suggestions and comments and Dr Victoria Baumfield, Mr Ian Edwards and the student editor for their thorough editing suggestions. A note on terminology: in this contribution the term 'dispute resolution' is used instead of the dated concept of 'alternative dispute resolution' to refer to all non-determinative processes, including mediation, conciliation, facilitation and some hybrid processes.

¹ Kenneth Dunham, 'Is Mediation the New Equity?' (2007) 31(1) *American Journal of Trial Advocacy* 87. See also, Laurence Boulle and Rachael Field, *Dispute Resolution in Australia: Law and Practice* (LexisNexis, 2017) ch 2 and Rachael Field, *Australian Dispute Resolution* (LexisNexis, 2022) chs 3 and 4; and Laurence Boulle, *Mediation and Conciliation: Principles Process Practice* (LexisNexis, 2023).

² See Laurence Street, 'Alternative Dispute Resolution' (1990) 1(1) *Australian Dispute Resolution Journal* 1. See also Laurence Street, 'The Court System and Alternative Dispute Resolution Procedures' (1990) 1(1) *Australian Dispute Resolution Journal* 5; Laurence Street,

was Chief Judge in Equity in New South Wales and was regarded as high authority in the field.³ After leaving the bench he became a prominent mediator in commercial, organisational and international disputes and was a driving force in the establishment of one of the first Australian dispute resolution (DR) agencies.⁴ He was also an early contributor to the scholarly literature in this area. In his writing, Sir Laurence broached the equitable dimensions of the new DR processes emerging from the old by interrogating their efficacy in terms of providing access to justice, opportunities for participation, and fairness and flexibility in relation to process and outcomes.⁵ Sir Laurence's contributions, both locally and abroad, as a promoter of mediation and other DR services have been well recognised.⁶

Recognising the thought leadership of Sir Laurence, this article pays homage to the work of Professor Ong in the field of equity by comparing and contrasting the origin stories of equity, and of our own field, mediation, as well as looking at how the values and operation of equity and mediation have similarities and differences. In doing so, we consider the consistencies and affinities, as well as some of the dissonances and disjunctures, between equity and mediation. We conclude with some thoughts about trends and future developments.

II Origin Stories

Both common law equity, centuries ago, and contemporary mediation, more recently,⁷ have origin stories which locate them as alternatives to

'Comparison of Dispute Resolution Processes' (1990) 1(4) *Australian Dispute Resolution Journal* 177; Laurence Street, 'Editorial: The Courts and Mediation – A Warning' (1991) 2(4) *Australian Dispute Resolution Journal* 203; Laurence Street, 'Editorial: The Mediation Evolution – Its Moral Validity and Social Origin' (1998) 9(4) *Australian Dispute Resolution Journal* 237. See also David Spencer, 'Looking Backwards to Move Forwards: Reviewing Sir Laurence Street's First Scholarly Contribution to the ADRJ' (2018) 29(2) *Australasian Dispute Resolution Journal* 90; Ruth Charlton, 'Editorial: Vale the Late Sir Laurence Street AC, KCMG, K ST J, QC' (2018) 29(2) *Australasian Dispute Resolution Journal* 71.

³ New South Wales is one Australian jurisdiction which retained some structural differentiation between equity and common law, though these were reduced in 1972 when both Divisions of the Court were allowed to grant relief in either common law or equity. In cases of conflict between the two, equity prevails.

⁴ The Australian Commercial Dispute Centre, currently the Australian Dispute Centre – (Web page, 2023) <<https://disputescentre.com.au/>>. Sir Laurence Street also attended the founding meeting of the Bond University Dispute Resolution Centre and served as its patron for several years.

⁵ See citations at n 3.

⁶ See, eg, former High Court judge Michael McHugh, 'Mediation and Negotiation in Legal Disputes' (2021) 31(2) *Australasian Dispute Resolution Journal* 104, 104.

⁷ Mediation also has ancient origins in first nations and Asian countries. For example, Australia's Aboriginal people have used mediation-like approaches to resolve disputes since time immemorial. Many years ago, David Spencer acknowledged 40,000 years of consensual Aboriginal problem-solving: see David Spencer, 'Mediating in Aboriginal Communities' (1997) 3 *Commercial Dispute Resolution Journal* 245. See also Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995); Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008); Toni Bauman and Juanita Pope (eds), *Solid Work You Mob Are Doing: Case Studies in Indigenous Dispute*

the rigidities of substantive legal rules, procedures and remedies. Both have deep philosophical and moral validities embedded in their foundations, such as fairness, voice and respect – all values that sit squarely within the realm of the rule of law as a central tenet of Western liberal democracies focused on the maintenance of peace, order and freedom in society.⁸ Certainly, substantive legal rules, procedures and remedies are of central importance to upholding the rule of law. However, when substantive rules fail to produce fair processes or outcomes, equity and mediation offer (quite differently but equally legitimately and effectively) ways to correct such failings.⁹

The origin story of equity is easier to identify than that of mediation.¹⁰ Equity developed in the English Court of Chancery, a court which remained central to its narrative for hundreds of years. Equity is now administered concurrently with the common law, and in many jurisdictions has been transferred to the statute book.¹¹ In its evolution,

Resolution and Conflict Management in Australia (Federal Court of Australia, 2009); Mary Graham, Morgan Brigg and Polly O Walker, 'Conflict Murri Way: Managing through Place and Relatedness' in Morgan Brigg and Roland Bleiker (eds), *Mediating Across Difference - Oceanic and Asian Approaches to Conflict Resolution* (University of Hawaii Press, 2011) 75; Neha Sharma, 'Mirror, Mirror on the Wall, Is There No R(e)ality in Neutrality After All? Rethinking ADR Practices for Indigenous Australians' (2014) 25(4) *Australasian Dispute Resolution Journal* 231; Susan Medway, 'Conflict Coaching in Indigenous Australian Settings — Sharing the Lessons from Mediation' (2015) 26(1) *Australasian Dispute Resolution Journal* 38; Morgan Brigg et al, 'Gununa Peacemaking: Informalism, Cultural Difference and Contemporary Indigenous Conflict Management' (2018) 27(3) *Social & Legal Studies* 345; Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16(2) *International Journal of Law in Context* 108.

⁸ See, eg, AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959); John Rawls, *A Theory of Justice* (Harvard University Press, 1971); Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue (Academy of the Social Sciences in Australia)* 8; Jeremy Waldron, 'The Rule of Law in Contemporary Liberal Theory' (1989) 2(1) *Ratio Juris* 79; Jürgen Habermas, 'On the Internal Relation Between the Rule of Law and Democracy' (1995) 3(1) *European Journal of Philosophy* 12; Brian Z Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004); Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67; Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law — Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009).

⁹ See, eg, Debra L Shapiro and Jeanne M Brett, 'Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration' (1993) 65(6) *Journal of Personality and Social Psychology* 1167; Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Bloomsbury Publishing, 2009); Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Routledge, 2016); Kathy Douglas and Jennifer Hurley, 'The Potential of Procedural Justice in Mediation: A Study into Mediators' Understandings' (2017) 29(1) *Bond Law Review* 5.

¹⁰ See generally Denis SK Ong, *Ong on Equity* (Federation Press, 2011). See also, eg, William S Holdsworth, 'Early History of Equity' (1914) 13(4) *Michigan Law Review* 293; George B Adams, 'Origin of English Equity' (1916) 16(2) *Columbia Law Review* 87. Some of the key current texts on equity include: JD Heydon, Mark Leeming, Peter G Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (2015, 5th ed, LexisNexis); Peter Radan, Cameron Stewart and Illija Vickovich, *Principles of Australian Equity and Trusts Cases and Materials* (2018, 4th ed, LexisNexis); Michael Bryan et al, *A Sourcebook on Equity and Trusts in Australia* (Cambridge University Press, 2019); Gino Dal Pont and Tina Cockburn, *Equity and Trusts in Principle* (Thomson Reuters, 2019).

¹¹ See, eg, *Contracts Review Act 1980* (NSW) the long title of which is: 'An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts'. See also s 20, 'Prohibition against unconscionable

equity developed as an alternative to the common law courts, with its own principles, procedures and remedies.¹²

The NSW Supreme Court is one of the common law jurisdictions, few in number, that has kept an Equity Division, and a Chief Judge in Equity. The Division hears equity, probate, admiralty and protective matters coming before the Court. It is the High Court of Australia that ultimately has defined the contours of equitable principles and remedies locally.¹³ Here, there have been differences between those justices attempting to identify unifying concepts and principles and others for whom equity's strength and resilience is based on resistance to over-systematisation.

Mediation's origin story is more elusive, and, as noted above, begins in many traditional societies, including Australia's First Nations peoples.¹⁴ From an international perspective, for example, there is documented evidence of the Mari (now contemporary Syrian) kingdom's use of mediation and arbitration in cross-border disputes in 1800 BCE, illustrating mediation's ancient global antecedents.¹⁵ Further, the literature on Aboriginal-settler relations in post-1788 Australia describes the important mediatory roles of Aboriginal leaders such as Migeo, Boongaree and Bundle in the encounters between European explorers and local Indigenous nations in different parts of the country.¹⁶ Indigenous DR still has a place in traditional societies but has had difficulty bringing its values and procedures into mainstream DR thinking.¹⁷

What might be termed 'modern mediation' had its origins in both common law and civil law jurisdictions in the last decades of the 20th

conduct' and s 21, 'Unconscionable conduct in connection with goods or services' of the *Competition and Consumer Act 2010* (Cth) Schedule 2 'The Australian Consumer Law'.

¹² See generally Ong (n 10). For example, the equity principles associated with express, resulting and constructive trusts, fiduciary law and equitable estoppel; and remedies in the form of injunctions, rescission, rectification and specific performance.

¹³ See, eg, *Muschinski v Dodds* (1985) 160 CLR 583; *Bofinger v Kingsway* (2009) 239 CLR 269 and *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409 (discussed further below).

¹⁴ See references in n 8.

¹⁵ Jerome Barrett (with Joseph Barrett), *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement* (Jossey-Bass, 2005). See also the commentary in Boule's review of this work: Laurence Boule, 'A History of Alternative Dispute Resolution' (2005) 7(7) *ADR Bulletin* 1. See also, eg, Kenneth Cloke, 'Politics and Values in Mediation: The Chinese Experience' (1987) *Mediation Quarterly* 69; Ronda R Callister and James A Wall Jr, 'Japanese Community and Organizational Mediation' (1997) 41(2) *Journal of Conflict Resolution* 311; Bee Chen Goh, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation* (Routledge, 2016).

¹⁶ See Tiffany Shellam, *Meeting the Waylo – Aboriginal Encounters in the Archipelago* (UWA Publishing, 2019). The text provides numerous accounts of intermediary and go-between functions in Aboriginal forms of DR, however, there is some licence in using the term 'mediator' to describe them.

¹⁷ See references in n 8. See also National Alternative Dispute Resolution Advisory Council (NADRAC), *Indigenous Dispute Resolution and Conflict Management* (Commonwealth of Australia, 2006).

century.¹⁸ In Australia, mediation began as an ‘alternative’ to traditional legal methods in community organisations throughout the country, promising easier access to justice without the cost overlays and delays of courts, tribunals and administrative agencies.¹⁹ Following global trends, it was not long before mediation was incorporated into formal legal procedures in the civil and even criminal justice systems, institutionalised into courts and tribunals, and absorbed into the sinews of legal practitioners.²⁰

III Mediation-Equity Affinities

The origin stories of both mediation and equity emphasise their ‘alternative’ natures. They were both premised on the need for greater access to justice systems, less strict adherence to procedural formality, and greater flexibility of outcomes. Needless to say, the common factor of ‘alternativeness’ does not in itself denote substantive similarities. Nonetheless, while the affinities between principles of equity and the value propositions underlying mediation should be expressed in a tentative fashion, commonalities do exist.

Two key alignments of principle stand out. First, both mediation and equity share a philosophical framework that is arguably centred on the

¹⁸ See A Leo Lepin and Russell RA Wheeler, *The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes or Popular Dissatisfaction with the Administration of Justice* (West Publishing Co, 1979).

¹⁹ See, eg, John Schwartzkoff and Jenny Morgan, *Community Justice Centres: A Report on the NSW Pilot Project* (Law Foundation of New South Wales, 1982); David Bryson, ‘Victoria’s Neighbourhood Mediation Centres Project’ (1987) 12(3) *Legal Services Bulletin* 108; Wendy Faulkes, ‘The Modern Development of Alternative Dispute Resolution in Australia’ (1990) 1(2) *Australian Dispute Resolution Journal* 61; Janice Williams, ‘Community Justice Centres: Marking 10 Years of Service’ (1990) 28(11) *Law Society Journal* 48; Wendy Faulkes and Robyn Claremont, ‘Community Mediation: Myth and Reality’ (1997) 8(3) *Australian Dispute Resolution Journal* 177; Eric Stevenson, ‘The Use of Community Mediation in the Family Mediation Centre (NSW)’ (1990) 1(1) *Australian Dispute Resolution Journal* 24. See further *Community Justice Centres Act 1983* (NSW), and the *Dispute Resolution Centres Act 1990* (Qld). On the principles of informal justice, see Richard Abel (ed), *The Politics of Informal Justice* (Academic Press, 1982) vol 1; Anne Bottomley and Jeremy Roche, ‘Conflict and Consensus: A Critique of the Language of Informal Justice’ in Roger Matthews (ed), *Informal Justice?* (Sage, 1988); Sally Engle Merry and Neal Milner (eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (University of Michigan Press, 1993); Timothy Hedeem, ‘Institutionalizing Community Mediation: Can Dispute Resolution “Of, By, and For the People” Long Endure?’ (2003) 108(1) *Penn State Law Review* 265.

²⁰ Geoffrey L Davies, ‘Civil Justice Reform in Australia’ in Adrian Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999); Hazel Genn, ‘What Is Civil Justice For? Reform, ADR, and Access to Justice’ (2012) 24(1) *Yale Journal of Law and the Humanities* 397, 397; Paula Hannaford-Agor, ‘Benefits and Costs of Civil Justice Reform’ (2018) 54(1) *Court Review* 26. See also Sarah E Hilmer, ‘Mediation in the Amended Civil Justice Reform of Hong Kong’ (2009) 20(2) *Australasian Dispute Resolution Journal* 120; Shala Ali and Felicia Lee, ‘Resolving Financial Disputes in the Context of Australian and Canadian Civil Justice Reform’ (2011) 22(2) *Australasian Dispute Resolution Journal* 125; Productivity Commission, *Access to Justice Arrangements, Report No 72* (Commonwealth of Australia, 2014); Victoria State Government, *Access to Justice Review Volume 1 Report and Recommendations* (Victorian Government, 2016).

values and goals of democracy and the rule of law.²¹ Although equity has been critiqued for undermining the rule of law with its acceptance of indeterminacy, discretion and conscience,²² and mediation has similarly been taken to task for the promotion of private settlement outside the rule of law, both systems are premised on inclusion, participation, relative equality, protection of liberty and respect for autonomy within a societal context of collective responsibility and accountability.²³ As potential conduits for the enactment of democratic principles, equity and mediation are each contributors to stability, societal order and peace.²⁴ As such, both systems play a part in making the possibility of democracy a reality.

The second key alignment of principle in equity and mediation is the pursuit of justice.²⁵ Concomitantly with democracy and the rule of law, justice denotes participation, accountability, transparency, rationality, equality and due process²⁶ – all significant elements of the operation of

²¹ In terms of mediation, see, eg, Richard C Reuben, 'Public Justice: Toward a State Action Theory of Alternative Dispute Resolution' (1997) 85(3) *California Law Review* 577; Richard C Reuben 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' (1999) 47(4) *UCLA Law Review* 949; Richard C Reuben, 'Democracy and Dispute Resolution: Systems Design and the New Workplace' (2005) 10 *Harvard Negotiation Law Review* 11. In relation to equity, Aristotle in *Rhetoric* referred to cases requiring particular insight on the part of determiners as *epieikeia* (which can be translated as equity). See also Lawrence B Solum, 'Equity and the Rule of Law' in Ian Shapiro (ed), *Nomos XXXVI: The Rule of Law* (New York University Press, 1994) 120–47.

²² See, eg, Roscoe Pound, 'The Decadence of Equity' (1905) 5 *Columbia Law Review* 20; Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *UWA Law Review* 1.

²³ See generally Charles Tilly, *Democracy* (Cambridge University Press, 2007); Marc Weller and Stefan Wolff (eds), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005).

²⁴ Donald Horowitz, 'Democracy in Divided Societies' (1993) 4(4) *Journal of Democracy* 18; Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (Times Books, 2008).

²⁵ It is beyond the scope of this modest article to explore the complex nature of 'justice' in any detail and the vast body of scholarship on the concept ranges from Plato's *Republic* (trans Robin Waterfield) (Oxford University Press, 1984) through to one of Dworkin's last and most expansive works — Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011). For some additional key seminal works see, eg, Ronald L Cohen, 'Distributive Justice: Theory and Research' (1987) 1(1) *Social Justice Research* 19; John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999); John Rawls, *Justice as Fairness: A Restatement* (Belknap Press, 2001); Amartya Sen, 'What Do We Want from a Theory of Justice?' (2006) 103(5) *The Journal of Philosophy* 215; Gustavo Pereira, *Elements of a Critical Theory of Justice* (Springer, 2013); Eric Heinze, *The Concept of Injustice* (Routledge, 2013); Onora O'Neill, 'The Method of a Theory of Justice' in Otfried Höffe (ed), *John Rawls: Eine Theorie der Gerechtigkeit* (Akademie Verlag, 2013) 25–40; Robert Meister, *Justice is an Option: A Democratic Theory of Finance for the Twenty-First Century* (University of Chicago Press, 2021). The Productivity Commission noted in 2014: "'Justice' is what people are seeking access to', but it is a concept that 'can be easier to recognise than to define': Productivity Commission (n 20) 75.

²⁶ See, eg, Watt (n 9); Allan Beaver, 'Aristotle on Equity, Law and Justice' (2004) 10(1) *Legal Theory* 33. See also Nancy A Welsh, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' (2004) 54 *Journal of Legal Education* 49; Mary Anne Noone and Lola Akin Ojelabi, 'Alternative Dispute Resolution and Access to Justice in Australia' (2020) 16(2) *International Journal of Law in Context* 108.

both equity and mediation. As such, the concept of justice should not be dismissed as a ‘sweet, old-fashioned notion’²⁷ because it is genuinely present in the contexts of equity and mediation. Indeed, Ronald Dworkin’s notion of ‘law as integrity’ is apt in integrating an understanding of justice as fairness across both systems.²⁸

These alignments of principle establish a solid foundation for a sense of affinity between equity and mediation. There are, in addition, some more specific alignments of interest. For example, the maxim that those who come to equity must come with clean hands²⁹ has an affinity with the mediation principles of good faith and genuine effort.³⁰ Equality in equity is similar to the notion that parties in mediation are nominally equal in determining outcomes in terms of the self-determination principle.³¹ The equity principle that it looks at intent rather than form is matched by a mediation principle of nominal equality of status and participation in the mediation room or screen.³² The notion that delay defeats equity has a counterpart principle in terms of the ‘quick justice’ promised in mediation.³³ The principle that equity acts *in personam* is matched by the emphasis in mediation on the process having at its centre of gravity the needs, interests and priorities of the mediating parties themselves. Finally, the notion that equity follows the law is

²⁷ Welsh (n 26) 49.

²⁸ See Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) and Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006).

²⁹ The equitable maxim that those who come to equity must come with clean hands is dealt with comprehensively in Heydon, Leeming and Turner (n 10) [3-090 – 3-124]. See also Zechariah Chafee Jr, ‘Coming into Equity with Clean Hands’ (1948) 47(8) *Michigan Law Review* 1065; William J Lawrence III, ‘Application of the Clean Hands Doctrine in Damage Actions’ (1981) 57(4) *Notre Dame Law Review* 673; T Leigh Anenson, ‘Announcing the Clean Hands Doctrine’ (2018) 51 *UCD Law Review* 1827; Nicholas McBride, ‘The Future of Clean Hands’ in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Bloomsbury, 2018) ch 13; T Leigh Anenson, *Judging Equity: The Fusion of Unclean Hands in US Law* (Cambridge University Press, 2018).

³⁰ See Kimberlee K Kovach, ‘Good Faith in Mediation-Requested, Recommended, or Required-A New Ethic’ (1997) 38(2) *South Texas Law Review* 575; Ulrich Boettger, ‘Efficiency Versus Party Empowerment - Against a Good-Faith Requirement in Mandatory Mediation’ (2004) 23(1) *The Review of Litigation* 1; Penny Brooker, ‘Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from Other Common Law Countries’ (2014) 43(2) *Common Law World Review* 120.

³¹ The equitable maxim that equity is equality (*acquitus est aequalitas*) is dealt with in Heydon, Leeming and Turner (n 10) [3-130 – 3-144]. See also Edward E Sampson, ‘On Justice as Equality’ (1975) 31(3) *Journal of Social Issues* 45; Susan Sturm, ‘Equality and the Forms of Justice’ (2003) 58(1) *University of Miami Law Review* 51. See also Hilary Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part I’ (2000) 11(1) *Australasian Dispute Resolution Journal* 73 and Hilary Astor, ‘Rethinking Neutrality: A Theory to Inform Practice Part II’ (2000) 11(2) *Australasian Dispute Resolution Journal* 145 in which Astor writes eloquently on the notion of maximising parties’ control in mediation as a principle of party equality and relational self-determination.

³² For discussion of the equitable maxim that equity looks to intent rather than form, see Heydon, Leeming and Turner (n 10) [3-145 – 3-184]. See also Carrie Menkel-Meadow, ‘From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context’ (2004) 54(1) *Journal of Legal Education* 7.

³³ Heydon, Leeming and Turner discuss the equitable maxim that equity assists the diligent, not the tardy: (n 10) [3-125].

mimicked in mediation where mediator conduct is increasingly dictated by statute, case law and other norms, and mediation outcomes are informed by the shadow of the law.³⁴

In terms of procedure, equity and mediation have affinities in that they both offer a reduced reliance on procedural formality and rigidity.³⁵ By nature of the formal application of law, it was inevitable that courts of competent jurisdiction would restrict their judgment to what was pleaded and conduct proceedings in accordance with rules of procedural fairness, standards of evidence, and levels of protocol and formality associated with the institution. In response, procedural reforms made in England in the mid-1800s ‘were designed to facilitate in equity the adjudication of legal titles and the award of legal remedies, and to permit at law the admission of some equitable defences and the award of equitable relief’.³⁶ Mediation’s promise of procedural informality is possible because apart from structural guidelines as to the potential steps of a mediation meeting, there are generally no fixed procedural requirements. The parties and the mediator have high levels of autonomy in negotiating how the process will unfold. Even in the context of court-referred mediation, early Australian case law established that parties are not restricted by the pleadings in what they consider and decide.³⁷ Mediation’s claim to procedural informality perhaps even overrides the claims of equity, in that the voices of the parties are potentially more prominent and immediate in mediation as opposed to the restricted roles of the parties in courts of equity. Mediation shares, however, an analogue with equity in that increased regulation, sometimes to a high degree, and the dominance of lawyers in some areas of practice, has led to degrees of procedural formality and compliance with regulatory norms that have jeopardized the potential of mediation for procedural flexibility.³⁸

There are also affinities between the two systems in terms of remedies and outcomes, with the potential for outcomes specific to each

³⁴ Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88(5) *Yale Law Journal* 950. See also Herbert Jacob, ‘The Elusive Shadow of the Law’ (1992) 26(3) *Law and Society Review* 565; John Wade, ‘Forever Bargaining in the Shadow of the Law — Who Sells Solid Shadows? (Who Advises What, How and When?)’ (1998) 12(3) *Australian Journal of Family Law* 256; Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Themis Press, 2011); Grant Strother, ‘Resolving Cultural Property Disputes in the Shadow of the Law’ (2014) 19 *Harvard Negotiation Law Review* 335; Erin York Cornwell, Emily S Taylor Poppe and Megan Doherty Bea, ‘Networking in the Shadow of the Law: Informal Access to Legal Expertise Through Personal Network Ties’ (2017) 51(3) *Law & Society Review* 635; Jonathan Crowe et al, ‘Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution’ (2018) 40(3) *Sydney Law Review* 319.

³⁵ Deborah L Rhode, ‘Access to Justice’ (2001) 69(5) *Fordham Law Review* 1785.

³⁶ Heydon, Leeming and Turner (n 10) [2-015].

³⁷ There could be qualifications to the principle where mediating parties seek a consent order and the respective tribunal or court has jurisdictional limits.

³⁸ See, eg, Boule and Field (n 1); Field (n 1).

case. Equity, for example, introduced the remedy of specific performance which was historically alien to the common law.³⁹ It allowed the courts to enjoin a defendant to perform what had been promised or what was equitably due to the other party.⁴⁰ Mediation mimics equitable remedies to some extent, for example in the potential for equivalent outcomes to specific performance or restitution. Mediation is recognised as a system that offers the benefit of flexible outcomes, even beyond those that courts of equity could provide.⁴¹ Therefore, for example, in a franchise dispute brought to mediation, a franchisor and franchisee could be assisted by the mediator to renegotiate and redraft terms of the franchise agreement to suit changing forms of service delivery, domestic competition or international trade treaties.

There are also interfaces between equity and mediation in relation to their structures and personnel. In all Australian jurisdictions, courts and tribunals can make referrals to mediation without party consent. Referrals can be, and are, made where equitable remedies are being sought under the original cause of action.⁴² While the shadow of the law hangs over these judicially-referred mediations, their resolution can be dictated by factors unrelated to law and equity in terms of the principle of self-determination availing mediating parties. Where there is no resolution, matters might revert to litigation and a judicial determination, although this is a rare event in contemporary legal systems.

Where matters of equity are resolved through the mediation process, the outcome is usually reflected in a mediated settlement agreement (MSA), deed of release, or like document. In this situation, mutual releases cause the original cause of action to lapse and future remedial action based on non-compliance with MSA terms must be sought under the contract, rather than in equity. A higher level of structural interface between equity and mediation is found in jurisdictions in which a Court of Chancery offers mediation-only programs.⁴³ Here, subject to various

³⁹ For discussion of the remedy of specific performance, see Heydon, Leeming and Turner (n 10) ch 20.

⁴⁰ See, eg, Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 10th ed, 2006) 663; Ian CF Spry, *Equitable Remedies* (Lawbook Co, 9th ed Sydney, 2014) ch 3; Gareth Jones and William Goodhart, *Specific Performance* (Butterworths, 2nd ed, 1996); Ong (n 10).

⁴¹ See, eg, Boule and Field (n 1); Field (n 1).

⁴² There are numerous examples, such as *Jingalong Pty Ltd v Todd* [2015] NSWCA 7. Proceedings were brought in the Equity Division of the NSW Supreme Court, and the matter returned to the court post-mediation for a consideration of certain features of the mediated settlement agreement.

⁴³ For example, the Court of Chancery of the State of Delaware offers such a process. See Rule 174 of the Rules of the Court of Chancery of the State of Delaware. See also eg, Leo E Strine Jr, 'Mediation-Only Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America's Business Courts' (2003) 53(2) *Duke Law Journal* 585. See also Michael Legg, 'Mediation of Complex Commercial Disputes Prior to Litigation' (2010) 21(1)

jurisdictional requirements and fee payments, parties can, on a consensual basis, lodge a petition with the court seeking mediation only, and can even request a specific judge of the court to act in the capacity of mediator.⁴⁴ The mediation is conducted on standard confidentiality terms and can result in court orders and the finalisation of the matter. This arrangement reflects a high point in structural integrity between equity and mediation.

An overlap of affinities does not necessarily indicate comity of origins or significance in all important respects. This can be shown in the duty of confidentiality, which can be traced to equity.⁴⁵ An equitable obligation of confidence has several elements: a plaintiff must identify specifically the information in question and be able to show that: the information has the necessary quality of confidentiality; the information was received by the defendant in circumstances importing an obligation of confidence; and there is actual or threatened misuse of that information, without the plaintiff's consent.⁴⁶

There are several potential levels of confidentiality in mediation.⁴⁷ The first is unwritten, but is sometimes reinforced by statute, and relates to the without prejudice nature of the whole process. The second relates to the separate meetings conducted between mediators and the respective parties, which by contract and convention cannot lead to disclosures to the other side unless expressly permitted. The third is found in mediated settlements containing non-disclosure agreements, subject to express carve outs. Equitable considerations of confidentiality might have influence when a court considers the principle, and its exceptions, in relation to mediation but there is no necessary equivalence in its significance in both situations.

In short, both equity and mediation have involved and exemplify attempts to move away from rigid legalistic notions of rights, liability and damage and take account of context and circumstances. Both have purported to focus on individualised justice for those within the respective system and also to focus on more tailored conceptions of parties' commercial and personal needs, interests and priorities. In relation to outcomes in the respective systems, there was likewise a shift from old common law conceptions of binary outcomes to more

Australasian Dispute Resolution Journal 44; Wayne Martin, 'Alternative Dispute Resolution – A Misnomer?' (Australian Disputes Centre, Perth, 2018).

⁴⁴ For an example of the operation of such a system, see the Rules of the Court of Chancery of the State of Delaware, r 174.

⁴⁵ See Gummow J in *Smith Kline and French Laboratories v Secretary* (1990) 22 FCR 73, 87. See also discussion of the obligation of confidentiality in the context of fiduciary duties in Heydon, Leeming and Turner (n 10) [5.020, 42.050, and 42.070].

⁴⁶ *Worth Recycling Pty Ltd v Waste Recycling & Processing Pty Ltd* [2009] NSWCA 354.

⁴⁷ See, eg, Boulle and Field (n 1); Field (n 1). See also Rachael Field and Neal Wood, 'Marketing Mediation Ethically: The Case of Confidentiality' (2005) 5(2) *QUT Law and Justice Journal* 143; Rachael Field and Neal Wood, 'Confidentiality: An Ethical Dilemma for Marketing Mediation?' (2006) 17(1) *Australasian Dispute Resolution Journal* 79.

equitable notions of open-ended settlements reflective of the above factors.

As with any substantive legal rules and principles, equity is subject to being overridden by valid enactments of an appropriate legislature. Likewise, general legislation, such as that relating to contracts review, can allow courts to set aside mediated settlement agreements (MSAs) that do not satisfy legislative standards. In both situations outcomes and procedures are potentially subordinated to overriding legislation.

IV Mediation-Equity Disjunctions

Notwithstanding the commonalities between the two systems under consideration, there are also profound historical, structural and doctrinal disjunctions.

The most prominent of the disjunctions is that equitable remedies were established, developed and refined by common law courts themselves. While conceived as a form of responsive justice, the need for disputants to avail themselves of relevant courts in various jurisdictions compromises any claim of equity to a strong access to justice element. Mediation, by contrast, was developed outside court systems, sometimes far removed from the law and the legal remedies the courts provide and enforce. Mediation was very much conceived of and promoted as providing greater access to justice in terms of availability, cost, time efficiency and user participation, and it has only been judicially-shaped and contoured in interstitial ways.

Secondly, equity developed prominent doctrinal principles in the evolutionary development of the system.⁴⁸ Among the many prominent examples are beneficiaries' obligations to compensate for a benefit deemed to constitute an unjust enrichment.⁴⁹ Mediation, by contrast, lacks doctrine in this sense, although it is not lacking in underlying value propositions, norms and aspirations.⁵⁰ Further, some legal doctrine has emerged around mediation, but this has been incidental to its operation. When matters come to the courts for adjudication on issues arising before, during or after mediation – so-called satellite litigation – the courts do develop doctrine of sorts, but this is not intrinsic to the mediation process itself.⁵¹ Nonetheless, as mentioned later, a legal framework has developed in which some forms of mediation operate.

⁴⁸ See the discussion of the systemisation of equity, particularly between 1660 to 1873, in Heydon, Leeming and Turner (n 10) [1-070 – 1-075]

⁴⁹ See, eg, Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005); Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78(3) *The Cambridge Law Journal* 521; Steve Hedley, 'Justice and Discretion in the Law of Unjust Enrichment' (2019) 48(3) *Common Law World Review* 94.

⁵⁰ See, eg, Boule and Field (n 1); Field (n 1); Heydon, Leeming and Turner (n 10).

⁵¹ Boule and Field (n 1); Field (n 1).

A third disjunction relates to precedent. In the origins of equity, there was wide discretion in relation to equitable rights and the system was conceived of as allowing relief from the rigidity of precedent.⁵² Over time, however, systems of precedent began to operate in equitable jurisdictions much as they did in the common law courts.⁵³ Not only did this provide actors with predictability in relation to applicable legal rules and principles, but it was also arguably more consistent with developing notions of the rule of law, in particular that law should not operate retrospectively. There is no analogous concept of precedent in mediation. Indeed, the very design of mediation as a system is predicated on a future focus and on the ability of parties to make their own decisions about their individual interests, needs and priorities—without any required reference to the latest High Court decision. However, in mediation contexts, overly formalistic understandings of the impact of law and precedent in mediation should be avoided and the influence and authority of the shadow of the law should not be underestimated.⁵⁴ Thus in well-worked areas of mediation, such as retail leasing or unfair dismissal, the ‘soft law’ well-known to repeat agents, lawyers and others can be, if not binding, at least highly influential in shaping respective outcomes.

Finally, and most significantly, equitable principles, properly pleaded and adjudicated, are enforceable. In exercising its equitable jurisdiction, a court can take account of the many moving parts, such as whether a claimant has clean hands, the equitability of their behaviour, an absence of delay, and the like, in making a binding judgment. Not only is an outcome guaranteed but it is buttressed by the full force of the law. There is, then, a significant difference between making decisions for parties, in this way, and assisting them to make their own decisions, as in mediation. In the latter process there may be argumentation over principles of law and equity, but they will not necessarily dictate outcomes, particularly where one side has significantly more power to leverage than the other.⁵⁵ And even the eventuality of an outcome is not guaranteed, as the consensuality principle allows each side to walk away from the mediation table or screen and pursue their desired remedies elsewhere. A mediated settlement is, subject to relevant defences, as enforceable as any legal agreement, but this generally requires the creation of legal instruments, such as a contract or deed, or judicial orders in the form of consent orders.

⁵² See, eg, *Thornborough v Baker* (1675) 3 Swans 628; 36 ER 1000.

⁵³ On the use of precedent in equity, see, eg, Clyde Croft, ‘Lord Hardwicke’s Use of Precedent in Equity’ (1989) 5(1) *Australian Bar Review* 29.

⁵⁴ See references on the shadow of the law (n 34).

⁵⁵ See, eg, Boule and Field (n 1); Field (n 1).

V Trends over Time

The US jurist Roscoe Pound referred to the ‘decadence of equity’ in relation to its merger with common law and its institutionalization within court systems.⁵⁶ He suggested that this merger meant that equity had thereby lost its ‘core values’.⁵⁷ That is, equity forfeited the discretion and flexibility that it had provided in its emergence, in contrast to the rigidity of the then common law. Some references have been made in the preceding section to this phenomenon in relation to the transfer of equitable principles from case law to the statute book. However, statutory interventions, whether in relation to equitable remedies or mediation, are not necessarily inimical to the essential principles of each system.

In relation to mediation, there are some who might regard it as having lost its ‘core values’ in becoming a mechanism serving the needs of case management in the courts and budgetary imperatives in the civil justice system.⁵⁸ The ubiquitous demands for efficiency and effectiveness have given it, at least in relation to its operation in some contexts, a mandatory and routine character which has impacted some of its normative claims – such as consensus and self-determination.⁵⁹ Some of its past claimed values included its voluntary nature, alternative character and guaranteed confidentiality, many of which have become adulterated as the mediation system has developed over the last three decades. In some respects, legislation has been required to restore defining aspects of mediation: the self-determination principle, good faith obligations and procedural fairness.⁶⁰

The emerging case law on mediation talks in part to the ‘legalisation’ or ‘institutionalisation’ of the system, or, in more pejorative terms, the ‘take-over’ of mediation by legal norms, systems and actors. Perhaps, more subtly, it talks to a quasi-merger of mediation and the law, not dissimilar to the merger of law and equity in many jurisdictions. There are decisions, for example, on the drafting and enforceability of dispute resolution clauses, on lawyer responsibilities in mediation, on the binding nature of mediated outcomes, and on good faith obligations in mediation, all of which provide legal strictures on the potentially boundary-free nature of the system.⁶¹ Law’s shadow is extended through statutes, regulations and rules of court on the subject of

⁵⁶ Jacqueline Nolan-Haley, ‘The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound’ (2004) 6(1) *Cardozo Journal of Conflict Resolution* 57, 57.

⁵⁷ *Ibid.*

⁵⁸ See, eg, Boule and Field (n 1); Field (n 1).

⁵⁹ See, eg, Laurence Boule and Rachael Field, ‘Re-Appraising Mediation’s Value of Self-Determination’ (2020) 30(2) *Australasian Dispute Resolution Journal* 96; Robert Angyal, ‘Is Party Self-Determination a Concept Without Content?’ (2020) 15 *Newcastle Law Review* 68.

⁶⁰ For example, mediators operating under the *Workers Compensation Act 1987* (NSW) can order the production of documents pre-mediation.

⁶¹ See, eg, Boule and Field (n 1); Field (n 1).

mediation; on the accepted practices of retired judges, barristers and lawyers as mediators; and on the conduct of legal representatives in mediation proceedings, much the same as occurred in domestic arbitration decades ago.

The ‘quasi-merger’ thesis can be taken in different directions. On one hand, it can be said to over-legalise a system that has at its core the informal, flexible and non-adjudicative resolution of disputes, countermanding the value aspirations of mediation and conciliation. On the other hand, the ‘quasi-merger’ thesis gives precision to the legal contours of DR processes, for example in delineating how lawyer responsibilities are similar or dissimilar to those in unassisted negotiation or litigation. Another important area is in defining the contours of good faith bargaining or using reasonable endeavours in DR settings so that all participants operate under the same conduct standards. As with all boundaries they might be said to free up those who operate within those bounds and proscribe those who don’t.

Where legal disputes are mediated, participants tend to be focused on the perceived legal or equitable rights, obligations and remedies of the respective parties. Where a party is seeking equitable relief and there is a court-referral to mediation, representatives are likely to argue and counter-argue during the process on the substantive principles of equity and appropriate relief. This is partly a function of the tendency for some legal mediations to constitute ‘mini-hearings’, notwithstanding that this is not consistent with the premises on which the system is based.⁶² The stronger the shadow of the law over such mediations, the more likely it is for both sides to have as their reference points the relief or damages likely to be awarded judicially. As in all cases, however, where equitable relief is at stake the uncertainties of litigated outcomes create a difficult risk assessment for both sides.

In relation to the interface of personnel, judges and lawyers with expertise in equity may act as the mediators in equitable matters, whether those matters are referred to mediation by the courts or arrive at mediation as a result of the parties’ own volition. In our view, the strong legal culture surrounding mediation in Australia takes away some of the original advantage of equity jurisdictions.

VI The Limits of Equity and Mediation: The Case of Unconscionability

Judicial decisions, statutes and other forms of law guide individuals, corporations and government entities in planning their behaviour, in terms of the doctrine of private ordering. Equitable principles, whether reflected in the jurisprudence of the courts or in statute, provide guidance to respective actors. As mediation and conciliation always

⁶² See McHugh (n 6) 106.

operate, albeit in differing degrees, under the shadow of the law, these norms can impact on DR dynamics and outcomes. While it is by no means restricted to equitable principles, pronouncements of the law in this area often provide considerable latitude in respect of the nature and import of a legal principle. This necessitates a ‘case by case’ approach by courts and it confers discretion on judges. In the context of the relative uncertainty that such discretion creates, questions arise as to whether parties seeking equitable outcomes might be better served by the mediation system, in which mutually beneficial, future-focussed outcomes can be reached. A recent case on the equitable doctrine of unconscionability provides an opportunity to consider the extent to which cases on equitable issues are amenable to resolution through mediation.

According to Meagher, Gummow and Lehane, unconscionability can be raised as an equitable defence to a bargain in circumstances where:

... one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.⁶³

Closely related to this doctrine is the common factor that the parties involved are on an unequal power footing, as often occurs in loan or guarantee agreements.

In the 2022 case of *Stubbings v Jams 2 Pty Ltd* (‘*Stubbings*’),⁶⁴ financial lenders made two short-term asset-based loans (with high interest and default rates) to a company, Victorian Boat Clinic Pty Ltd (VBC), owned by Mr Stubbings.⁶⁵ The loans were for the purpose of a house purchase in Fingal, Mornington Peninsula, where Stubbings planned to live. He provided security for the loans in the form of a guarantee supported by mortgages over two other properties he owned and the new house at Fingal. Stubbings was the sole director and shareholder of VBC, which was in fact a shell company having no assets and which never traded as a boat repair business. The facts of the case indicate that Stubbings was challenged in a number of ways. For example, he was unemployed, did not have a regular income, was not current with his tax returns, and had low financial literacy. The interest payments were formidable – on one of the loans the default rate was 25%. The facts were further complicated because a ‘consultant’ had

⁶³ Heydon, Leeming and Turner (n 10) [180].

⁶⁴ (2022) 399 ALR 409.

⁶⁵ This case summary draws from Edward Martin, *Unconscionable Conduct in Asset Based Lending: Stubbings v Jams 2 Pty Ltd [2022] HCA 6* (5 April 2022 Gadens Commentary) (Web page, 2022) <<https://www.gadens.com/legal-insights/unconscionable-conduct-in-asset-based-lending-stubbings-v-jams-2-pty-ltd-2022-hca-6/>>.

acted as an intermediary between the contracting parties, who had never met directly. There were also concerns over the ‘independent legal and financial advice’ that had been provided to Stubbings, who defaulted soon after settlement of the loans and against whom the lenders sought to enforce the guarantee.

The unconscionability defence was successful at the court of first instance where *Jams 2 Pty Ltd* was seeking to enforce the guarantee.⁶⁶ The trial judge found that Stubbings had a ‘special disadvantage’ in relation to the loan transaction. Indeed, in the primary judgment, Justice Robson described Mr Stubbings as ‘completely lost, totally unsophisticated, incompetent and vulnerable’.⁶⁷ The trial decision was set aside by the Victorian Court of Appeal,⁶⁸ *inter alia*, on the basis of its holding that the appellant had neither actual nor constructive knowledge of the respondent’s personal and financial circumstances. Special leave to appeal was granted by the High Court which subsequently upheld the appeal, finding that, in light of the loan circumstances, equitable intervention was justified.

It is notable that the High Court overturned the decision of the Victorian Court of Appeal. The High Court also held that the lender could not rely on the certificates of independent legal and financial advice which the borrower was required to provide in order to immunise the transaction against unconscionable conduct laws.

The majority judgment referred to the following passage from earlier High Court jurisprudence, approved in subsequent cases, in affirming the application of equitable principles relating to unconscionability, saying that an inquiry into whether equity’s conscience had been offended

... calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the vulnerable party. Such cases do not depend on legal categories susceptible for clear definition...⁶⁹

In the ‘combination of circumstances’ of the *Stubbings* case, the High Court found that the appellant was at a special disadvantage and that

⁶⁶ *James 2 Pty Ltd v Stubbings (No 3)* [2019] VSC 150. The court also considered the legality of the arrangement in terms of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth). This aspect is not considered further here.

⁶⁷ *Ibid* [265].

⁶⁸ *Jams 2 Pty Ltd v Stubbings* [2020] VSCA 200.

⁶⁹ *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118-119 (Dixon CJ, McTiernan and Kitto JJ). This judgment refers to Lord Stowell’s classic generalisation: ‘A court of law works its way to short issues and confines its views to them. A court of equity takes a more comprehensive view and looks to every connected circumstance that ought to influence its determination upon the real justice of the case’. See also Rick Bigwood, ‘*Kakavas v Crown Melbourne Ltd* - Still Curbing Unconscionability: *Kakavas* in the High Court of Australia’ (2013) 37(2) *Melbourne University Law Review* 463.

the respondent's agent had knowledge of their situation and exploited it.

The High Court's ruling in *Stubbings* is not implying that asset-based lending is unconscionable per se. However, it is saying that equity will intervene if an asset-based lending transaction is entered into unconscionably. For this reason, before lenders agree to lend, they must take care to understand the commercial circumstances of applicant borrowers and guarantors – probing and clarifying questions must be asked. Further, the High Court has made clear that the courts are willing to look beyond certificates of independent legal and financial advice that are designed to immunise a transaction against allegations of unconscionable conduct.

The High Court ruling in *Stubbings* was favourable for Mr Stubbings, but only after a roller coaster of success at trial level and defeat at state appellate level. For Jams 2 Pty Ltd, the defeat at trial seemed vindicated in the Victorian Court of Appeal but victory was short-lived. The legal fees of the entire matter would have been significant and the pressure, stress and emotional toll on all parties (and possibly their representatives) potentially significant. The parties were litigating for more than three years.

Could the use of mediation early, or at any point, in the proceedings have provided Mr Stubbings with an equally good or better outcome? Could mediation have possibly resulted in a mutually acceptable outcome rather than a win for Stubbings and a loss for Jams 2 Pty Ltd? What would their lawyers have advised about the efficacy of pursuing a mediated outcome in this situation? There is no mention in the High Court judgment, or in the trial or Court of Appeal judgments, of mediation prior to the instigation of litigation or of any application during the course of the trial and two appeals for a mediation referral. Nevertheless, consideration of whether a court may have made an order referring the matter to mediation, had such an application been made, may provide some clarity about whether, in an equity dispute such as this, mediation as a system has potential to assist parties reach a more timely, less costly and more mutually satisfactory outcome, in particular where a litigated outcome is highly unpredictable and there are good reasons to mitigate litigation risk.⁷⁰ Needless to say, however, not all matters will be suitable for this form of dispute resolution.

Guidance as to when a case may be suitable for mediation referral was provided in *Barrett v Queensland Newspapers Pty Ltd* ('*Barrett*'),⁷¹ where an application for a judicial order referring the parties to

⁷⁰ Stubbings was successful at first instance, lost in the Victorian Court of Appeal, and won in the High Court, with Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ producing three judgments with different rationales. This suggests the extent to which both parties faced risks of holdings against them.

⁷¹ *Barrett v Queensland Newspapers Pty Ltd* [1999] QDC 150.

mediation was opposed by the plaintiff.⁷² Samios DCJ noted the need to balance eight relevant factors in deciding whether to exercise his discretion to refer a matter to mediation in the face of opposition by one of the parties.⁷³ These factors are considered below with reference to *Stubbings*.

First, it should be considered whether mediation has the potential to result in a successful outcome. In most matters, we would contend, there is at least some potential for success. For example, a mutually agreeable possible outcome in the *Stubbings* matter may have been for a payment plan to be agreed upon that would support Mr Stubbings to honour and pay out the loan, potentially with some negotiated reduction in the formidable interest payments. The second consideration is whether resolution through mediation and removal of the matter from the court list will make court time available to other litigants. Many days of Supreme Court, Victorian Court of Appeal and High Court time would have been freed up had the *Stubbings* matter been referred to mediation. The judgment in *Barrett* opined that the third matter to be considered is whether any other relevant parties to the dispute are prepared to engage in a mediation. In *Stubbings*, there were no other relevant parties, so Mr Stubbings and Jams 2 Pty Ltd would not have had any potential restriction on opting for mediation imposed by any other relevant third parties. The fourth consideration identified in *Barrett* is whether the cost for the resisting party of going to mediation may be somewhat ameliorated by the applicant. Depending on whether Mr Stubbings or Jams 2 Pty Ltd were seeking an order for referral to mediation, this may have been possible. Fifth, consideration should be had to whether the nature of the matter is such that a third party may be able to assist the parties reach an agreement to resolve the dispute. This was arguably possible in *Stubbings*. Sixth is whether attending mediation may avoid the parties incurring substantial costs at trial. This would inevitably have been the case in *Stubbings*. Seventh is whether the risks of litigation outweigh the potential benefits of litigation. Again, this can be said to be true of the *Stubbings* matter. And finally, it should be considered whether a suitable mediator with the necessary skill could be appointed as the mediator. Competent and respected mediators abound in the commercial sphere in Melbourne, so this was most certainly possible.

We can therefore conclude that an opportunity to avoid three levels of court action and the costs, time and upheavals they represent was lost in *Stubbings*, given that, as far as we know, mediation was never

⁷² See also Laurence Boule, 'In and Out the Bramble Bush: ADR in Queensland Courts and Legislation' (2005) 22(1) *Law in Context* 93. See also Joshua Taylor, 'A Critical Analysis of Practitioners Issuing 'Not Appropriate for Family Dispute Resolution' Certificates under the *Family Law Act 1975* (Cth)' (2020) 41(1) *Adelaide Law Review* 149.

⁷³ *Barrett* (n 71) 159-160.

attempted.⁷⁴ It is our position that mediation may indeed provide parties to equity disputes with a forum in which needs and interests and perspectives and priorities can be exchanged in a way that may lead to mutually beneficial outcomes.

VII Conclusion

This article was written in homage to the work of Professor Denis SK Ong, one of the intellectual giants of the Australian field of equity and our highly esteemed and respected colleague at Bond University Faculty of Law. Coming as we do from the field of DR, our approach has been to offer some insights from comparing and contrasting the disciplines of equity and mediation. We have briefly explored the origin stories of each system and have considered how their values and operation have similarities, consistencies, and affinities, as well as differences, dissonances, and disjunctures. Our conclusion is that the affinities are persuasive, that the differences are not problematic, and that there is much potential for mediation systems to support appropriate outcomes for parties in equity disputes. This is so because mediation offers a confidential environment where the parties can be treated humanely and fairly as they explore mutually agreeable ways to meet their respective needs and interests.

⁷⁴ Unlike in relation to federal courts, there is no legislative obligation for prospective litigations to take 'genuine steps' to resolve matters before instituting proceedings. See the critical analysis of John Woodward, 'Legislating for Common Sense: The Case for (Re) enacting Pt 2A of the *Civil Procedure Act 2005* (NSW)' (2021) 9(3) *Journal of Civil Litigation and Practice* 111.