THE PRINCIPLES OF EQUITY

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THE PRINCIPLES OF EQUITY

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Second Edition

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FOREWORD TO THE FIRST EDITION

Sir Anthony Mason AC KBE

Chancellor, The University of New South Wales
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This exposition of the principles of equity by an array of authors, all specialists in equity, each of whom writes particular chapters, is an impressive publication. It takes its place alongside other well known Australian textbooks on equity and trusts. They demonstrate not only that equity is flourishing in Australia but also that it has captured the minds as well as the hearts of a number of Australia's finest lawyers, professional and academic.

To measure the Australian achievement in equity, one can compare the modern Australian textbooks with the old English textbooks, Snell and Hanbury, which were in use in my early days in the law. No doubt that achievement has been made possible by the sophisticated judicial development of equitable doctrine by Australian judges and lawyers. But Australian equity does not exist in isolation. Equity, like its old rival, the common law, is continuing to evolve by means of refinement and elaboration, at the hands of judges and lawyers in many jurisdictions. Indeed, the modern evolution of equity is very much a comparative exercise in which judges and lawyers must keep abreast of key decisions in jurisdictions outside Australia.

The consequence is that the compilation of a major textbook of equity is a more onerous undertaking than it was even two decades ago. It is an undertaking which calls for up-to-date knowledge of how equitable principle stands in other jurisdictions and what effect that may have for us in Australia. In meeting this challenge, the authors of this work refer where appropriate to overseas authority.

They have also succeeded in giving due emphasis to the origins and history of equity. An understanding of those origins and that history is of vital importance in understanding the nature and operation of equitable principle. The broad concepts and discretionary remedies of equity have enabled it to adjust readily to the different demands and conditions of modern society. Broad concepts can be moulded to apply

to a range of different circumstances and in such a way as to conform to the particular objects and purposes which equitable principle seeks to serve. Indeed, much of the work of the High Court of Australia in recent years exhibits the historic characteristics of equity.

As the authors point out, equity judges were not subscribers to the quaint common law fiction that the rules of law had survived from time immemorial and that the judges merely find and declare the pre-existing law. We are reminded of Sir George Jessel's salutary reminder in *Re Hallett's Estate* (1879) 13 Ch D 696 that equitable doctrines and principles were "established from time to time, altered, improved and refined from time to time". Why the paramountcy of equity over the common law, established by the *Judicature Act*, did not prevail also in this matter of how principles of law come to be shaped, continues to astonish me.

Not that I seek to downplay the virtues of the common law. But I cannot refrain from observing that the initiatives of Lord Mansfield, England's greatest common lawyer, were not always followed by his common law brethren. Curiously enough, his approach to good faith and to restitution has always seemed to me to reflect the spirit of equity rather than what its admirers refer to as the genius of the common law.

The authors display a refreshing willingness to mention and cite the views of the other writers on equity. That element is a noticeable feature of the work. It frequently puts the reader in touch with academic discussion elsewhere which examines problems at greater length or from a different perspective. That is one of the strengths of *The Principles of Equity* and it derives from the fact that the book is the product of individual contributors. Another feature is that there is an overlap between the contributions so that the reader has the advantage of having some questions examined from different viewpoints.

In the Foreword it is invidious to single out parts of this work for mention. Nonetheless, to convey an impression of the breadth and flavour of what the authors offer, I should refer to the chapters on unconscientious dealing, estoppel, undue influence and fiduciary obligations. They provide an indication of the scholarship which we have come to expect of dedicated equity lawyers. And there is an interesting treatment of restitution designed to show that it serves an important purpose in informing equitable principle.

Above all else, this is a work which captures the spirit of equity and enables us to appreciate the shining virtues of a system of law, not based on custom and usage, but devised with vision and ingenuity by the judges themselves.

Sydney

9 April 1996

PREFACE

The last few years have seen a renaissance of equity not only in Australia but also in many other common law countries. Many of the most important decisions of the High Court in the 1980s and 1990s on matters of private law have involved equitable principles, and similar developments were seen in Canada, England, New Zealand and elsewhere. While the pace of change has slowed in Australia in the years since the first edition was published in 1996, the House of Lords has been very active since then in developing the principles of equity and restitution in bold ways.

With the developments in these jurisdictions, equitable doctrines founded upon the demands of good conscience have been applied with new vigour to protect the vulnerable and to mitigate the harshness which can arise from too rigid an application of common law and statutory rules. Equitable remedies, in particular, the injunction and equitable compensation, have been given renewed scope. The resurgence of equity reflects changes in community values, and goes hand in hand with statutory developments in such areas as consumer protection law and corporations law which address the issue of unfair dealing and require people in positions of trust to act in accordance with appropriately high standards of honesty and integrity.

The developments in equitable doctrine reflect in many cases a rediscovery of equity's conscience, after years in which equity seemed to have hardened into little more than a series of rules which were as capable as the common law could be of a rigid and inequitable application. The renaissance of equity does not consist only in a revitalisation of various of its doctrines, but the rediscovery of equity as based in principle and founded upon the requirements of conscientious conduct.

This book seeks to expound afresh those principles of equity in a way which is clear, comprehensive and contemporary, for the use of both practitioners and students. Where it has been appropriate to do so, the equitable principles have been considered together with statutory rules which cover much the same field of application. The first edition of this book was published in 1996 and resulted from the efforts of twenty authors, both academics and practitioners. More authors have now been added in this edition to revise and update the work of those authors who were not able to undertake the task themselves for various reasons. Where there are two authors given, the second author was responsible for revising and updating the chapter. The exception to this is Chapter 3, which was co-authored in the first edition and was

updated in this edition by David Wright. Many of the chapters are based on material which first appeared, in a different form, in the Equity and Unfair Dealing titles of *The Laws of Australia* (Lawbook Co.) first published in 1993.

I am grateful to many people who have made this volume possible — Sir Anthony Mason, for kindly agreeing to write the Foreword to the first edition; the authors, who managed to fit this project into very busy schedules and alongside numerous other commitments; and the staff of Lawbook Co., in particular, the inhouse editor, Corina Brooks.

We have endeavoured to state the law as at 1 January 2002, but where possible, more recent developments have been incorporated. Regrettably, it was not possible to update references to Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*, since the new edition of that fine work is appearing at about the same time as this one.

PATRICK PARKINSON

Sydney

July 2002

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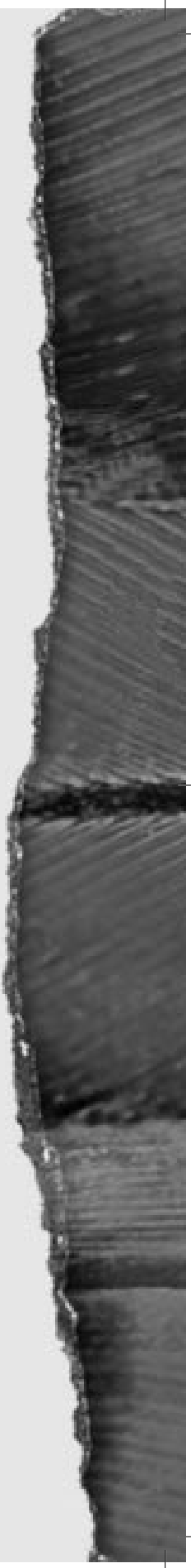
BRIEF CONTENTS

TABLE OF CONTENTS

PART I

The History and Nature of Equity



CHAPTER ONE

THE HISTORICAL ROLE OF THE EQUITABLE JURISDICTION

Patricia Loughlan

"[W]herefore in some cases it is good and even necessary to leue the wordis of the lawe and to folowe that reason and Justyce requyreth and to that intent equytie is ordeyned that is to say to tempre and myttygate the rygoure of the lawe"

St German, *Doctor and Student: First Dialogue*[1]

INTRODUCTION

[101] Equity may be defined as that body of rules, principles and remedies which was initially developed and administered in the English High Court of Chancery before 1873,[2] but which remain

1 Plucknett T F T and Barton J L (eds), "St German's Doctor and Student" 91 *Selden Society* (London, 1974), at 97.

2 No more than a glance at those aspects of the history of equity which are most relevant to an understanding of the character of modern equity is possible here. For works devoted exclusively to the history of equity, see Kerly D M, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, Cambridge, 1890); and Potter H, *An Introduction to the History of Equity and Its Courts* (Sweet & Maxwell, London, 1931). For an account of the origin and growth of equity in the Australian states, see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), pp 10-22. For a more detailed analytical history of specific periods in the development of the equitable jurisdiction, see Holmes O W Jnr, "Early English Equity" (1885) 1 *Law Quarterly Review* 162; Adams G B, "The Origin of English Equity" (1916) 16 *Colorado Law Review* 87; Barbour W, "Some Aspects of Fifteenth Century Chancery" (1917-1918) 31 *Harvard Law Review* 834; Holdsworth W S, "The Early History of Equity" (1914-1915) 13 *Michigan Law Review* 294; Pollock F, "The Transformation of Equity" in Vinogradoff P (ed), *Essays in Legal History* (Clarendon Press, Oxford, 1913), p 286; Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction; Baildon W (ed), "Select Cases in Chancery" 10 *Selden Society* (London, 1896), Introduction.

a distinct and vital source of legal authority in Australian courts today. The scope and limitations of this equitable jurisdiction, as well as its nature and function within the contemporary Australian legal order, can only be fully understood by reference to the jurisdiction's long and remarkable history. That history reveals equity's gradual and as yet incomplete transformation from a jurisdiction of fluid, pragmatic,[3] conscience-based decision-making to one founded primarily upon the application of authoritative rules, maxims,[4] principles and precedents. The history of equity is fundamentally the history of that transformation.

Equity engendered and sustained, within the legal system and yet separate from it, a vision of judge-made justice which was profoundly anti-formal; which was, in its insistence on the relevance and result-determining power of particular circumstances, concrete, contextual and supple. That vision of justice has never entirely vanished, despite its submersion within a legal order characterised by the common law and the common law's aversion to any exercise of legal power that is not rule-governed. The continued existence of the equitable jurisdiction has ensured that the common law's primary judicial focus on formal equality and the uniform application of general laws has not been entirely dominant. Equity's particular and unique relevance to contemporary legal issues and social concerns was recently commented on by Sir Anthony Mason:[5]

> "[T]he ecclesiastical natural law foundations of equity, its concerns with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century."

That continuing relevance signals a need to re-examine the history and nature of the equitable jurisdiction and review the specific contribution that that jurisdiction has made and will continue to make to our legal system and our legal culture.

3 The word "pragmatic" is used here in the same sense as it is used in Atiyah P S, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Clarendon Press, Oxford, 1978), p 5: "[A] pragmatic decision is a decision designed to achieve justice in the particular circumstances of the case, irrespective of the possible impact of the decision in the future."

4 For an analysis of the juridical nature of maxims in equity, see below, para [112].

5 Mason, The Honourable Sir Anthony "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Waters D (ed), *Equity, Fiduciaries and Trusts 1993* (Carswell, Ontario, 1993), p 1 at p 5.

In so far as the treatment of equity as a distinct branch of Australian jurisprudence needs further justification beyond the historical and conceptual analysis contained in this chapter, that justification may be found in looking to some of the jurisdiction's specific doctrines and remedies; for example, its distinctive methodology in relation to property rights, its emphasis upon unconscionable conduct, the importance it places upon fiduciary and other relationships of confidence, and the discretionary nature of its unique remedies. These doctrines and remedies will be fully discussed in the remaining chapters of this book.

THE EARLY HISTORY OF EQUITY

[102] In the 12th and 13th centuries, any distinction between the common law and equitable jurisdictions in England was nascent and unclear, and it was only during the course of the 14th and 15th centuries that Chancery slowly emerged as a distinct and autonomous curial body.[6] The Court of Chancery developed as such largely as a result of the need to consider and deal with the rapidly increasing numbers of petitions made to the Crown, pressing for discretionary relief from the rigour or deficiency of the common law and the common law courts.[7] These petitions, which were initially addressed to the King or the King and Council, were then referred to the Chancellor and later came to be addressed directly to the Chancellor himself.[8] The petitions were various, but the source of grievance was common — justice was not to be had for the petitioner at common law which had become, by the beginning of the 14th century, inflexible, rule-bound, rigid, and resistant to arguments based on considerations of moral right and good conscience.[9] It may come as a surprise to those in the modern period, who are accustomed to thinking loosely of equity as an established set of complex legal rules, to know that it was in its origins and at its philosophical heart a

6 Kerly D M, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, Cambridge, 1890), pp 26-36.

7 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 3.

8 Although exact dates are generally not available for events and changes in the early history of equity, there is a record of a petition in the year 1377 addressed directly to the Chancellor and heard and dealt with by him without reference to the King's Council: Potter H, *An Introduction to the History of Equity and Its Courts* (Sweet & Maxwell, London, 1931), p 8.

9 Barbour W, "Some Aspects of Fifteenth Century Chancery" (1917-1918) 31 *Harvard Law Review* 834; Adams G B, "The Origin of English Equity" (1916) 16 *Colorado Law Review* 87 at 96-97; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 6.

reforming, daring foe of rigid medieval structures and a still feudalistic common law, but that is indeed what it was.[10]

The petitions to the Chancellor as a delegate of the King reflected the popular political belief of the time that the constitution reserved to the King (or to the King's delegate) a residual, prerogative power to dispense justice, in extraordinary cases, outside the established system of the common law courts. The establishment of those courts had not, on this view, exhausted the King's judicial power, and that remaining power could be and indeed was, through the Lord Chancellor, used to thwart and undermine the jurisdiction and authority of the common law courts. Indeed, the King's constitutional role as a dispenser of justice was of such potency that, if the King's feudal duties as lord of vassals came into conflict with his duty to see that justice was done even to the poorest of his subjects, the latter duty was to prevail.[11]

[103] Certain of the formative and fundamental ideas of equitable justice, which even now help to constitute and sustain the equitable jurisdiction, were developed during this early period. One such idea was the notion upon which the petitions were based, that equity is a dispensation from, or supplement to, a general or "common" law which is inadequate to deal justly with the petitioner's case. The harsh or unjust, and therefore unconscionable, results which would flow from an application of common law rules alone in certain cases provided the theoretical and moral justification for the existence of Chancery and for its powerful interventions into the legal order.

The Aristotelian conception of equity as "a rectification of law where the law falls short by reason of its universality"[12] was of great significance in early equity jurisprudence because one of the perceived sources of inadequacy and injustice in the common law was the generality of the law's rules, and the law's inability to mould its rules to fit the circumstances of the particular case.[13] Rules by their nature require a restriction on the factors that may be taken into account in decision-making,[14] but

10 Vinogradoff P, "Reason and Conscience in Sixteenth-Century Jurisprudence"(1908) 96 *Law Quarterly Review* 373 at 373.

11 Adams G B, "The Origin Of English Equity" (1916) 16 *Colorado Law Review* 87 at 91.

12 Aristotle, *Nicomachean Ethics*, Book V, Ch 10.

13 In his influential treatise, *Doctor and Student, First Dialogue*, St German noted: "It is not possyble to make any generall rewle of the lawe but that it shall fayle in some case": Plucknett T F T and Barton J L (eds), "St German's Doctor and Student" 91 *Selden Society* (London, 1974), at 97.

14 Galligan D J, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986), p 69.

the greater that restriction is, the greater is the risk that substantive justice will not be done in the particular case. The equitable jurisdiction functioned to prevent, correct and reverse the individual failures of justice of a rule-governed decision-making forum. "Equyte" said St German, "is a ryghtwysenes that consideryth all the pertyculer cyrcumstaunces of the deed",[15] and the idea that general rules should yield to the power of particular circumstances so that justice inter partes may be done is a fundamental idea in equity.

Lord Ellesmere drew upon this notion of equity in his celebrated defence of Chancery in the *Earl of Oxford's Case* (1615) 1 Ch Rep 1 (at 6); 21 ER 485, *the* pivotal case in the history of equity:

> "The cause why there is a Chancery is for that men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular act and not fail in some circumstance."

In that case, Lord Ellesmere asserted an equitable jurisdiction to enjoin a plaintiff who had had a common law judgment granted in his favour from executing that judgment. The decision so enraged the Lord Chief Justice, Sir Edward Coke, that he provoked the confrontation which led to the Royal Decree of James I asserting the supremacy of equity over the common law.

Since in early Chancery all the circumstances of the individual case were considered and cases were decided according to the "rules of equity and good conscience",[16] there was no selection in advance of those considerations which would be taken into account in the case and those which would not be. Adjudication in Chancery was therefore contextual and pragmatic. "And thus, in Chancery, every particular case stands upon its own particular circumstances".[17] There was no abstracting methodology, no doctrine of strict binding precedent,[18] and, accordingly, no commitment to the values of continuity, consistency, uniformity and predictability which support and justify that doctrine at

15 Plucknett T F T and Barton J L (eds), "St German's Doctor and Student" 91 *Selden Society* (London, 1974), at 95.

16 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 8. See also Plucknett T F T and Barton J L (eds), "St German's Doctor and Student" 91 *Selden Society* (London, 1974), at 95.

17 Ballow H, *A Treatise of Equity* (revd by Fonblanque J, Garland Publications, New York, 1979), pp 10-11.

18 For a detailed account of the eventual development of a doctrine of precedent in the equitable jurisdiction, see Winder W H D, "Precedent in Equity" (1941) 57 *Law Quarterly Review* 245.

common law. Rules were not abstracted from previous cases in Chancery, and justice between the parties could therefore be done in consonance with the Chancellor's conscience without fear of distorting any rule or introducing a new and dangerous precedent.

It is important to note, however, the fundamental pre-condition to the exercise of the jurisdiction. Where the particular circumstances of the case were *not* such as to make the application of common law rules alone harsh or unjust, the Lord Chancellor had no jurisdiction to interfere with the application of those rules.[19]

[104] Without a doctrine of precedent, there was little or no need for the reporting of judgments and there is only a very scant written record of cases decided in Chancery before the middle of the 17th century.[20] Not only was adherence to precedent not required in equity, the results of prior decisions were by and large not even recorded, and this absence of an authoritative written "text" of reported judgments meant that the Chancellor's dynamic equitable jurisdiction lacked even the stabilising effect of a written legal language.

Not only were judges in equity unfettered by precedent, they were free of the burdensome fiction that the rules of the common law had existed from time immemorial or, in Blackstone's phrase, "time whereof the memory of man runneth not to the contrary",[21] and that the judicial role was merely to "find" and "declare" this pre-existing law. This vesting of judgments with the impersonal authority of the ages was alien to equity which, as Jessell MR pointed out in *Re Hallett* (1879) 13 Ch D 696 (at 710), always acknowledged that its doctrines and rules were "established from time to time, altered, improved and refined from time to time". Equity was a jurisdiction of dispensation and grace, not of custom, and its judges knew it.

19 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 7.

20 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), point out at p 8 that: "reports of cases in the Court of Chancery go back no further than 1557; and the mass of reports which come to use from between that date and the Restoration in 1660 is a light matter". Barbour W, "Some Aspects of Fifteenth-century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 840-842, notes that, in the collection of some 300,000 petitions to the Chancellor from the 14th to the early part of the 16th century, known as Early Chancery Proceedings, the decree in the case was only rarely noted upon the bill itself and no other record was kept.

21 Jones G (ed), *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Law of England* (Macmillan, London, 1973), p 49.

While all questions of fact in trials at common law went to the jury for determination, the Lord Chancellor was the trier of both fact and law. There was therefore no need to develop in equity a sharp distinction between questions of law and questions of fact, and this also contributed to the contextual and fluid character of equitable adjudication.

[105] The common law, with its adherence to the rigour of the law and its mechanical, deductive reasoning processes, was, and was perceived by contemporary observers to be, harsh and relentless in its application. Equity's role in a legal order dominated by that common law was said to be a "softening" one, its role being to "temper and mitigate the rigour of the law".[22] The image was a common one in the jurisprudence of the time, used, for example, both by Lord Ellesmere in his defence of Chancery in the *Earl of Oxford's Case* (1615) 1 Ch Rep 1 (at 7); 21 ER 485 "to soften and mollify the extremity of the law", and by James I in the Royal Decree which he issued in response to and in support of that case and of Chancery itself. The decree established the supremacy of Chancery over the common law courts on the basis that the King's subjects should not be left "to perish under the rigor and extremity of our law".[23]

The juristic principle upon which Chancery did rely in its exercise of the equitable jurisdiction to release parties from the common law was that of "conscience", and, by the 15th century, the Chancellor's intervention was commonly sought expressly on that ground.[24] The concept of "conscience", with its correlative notions of conduct which was "contrary to conscience or unconscionable", was influenced in early equity jurisprudence by the meaning given to it through the canon law in which all the early Lord Chancellors were trained.[25] However, the extent of that influence is controversial, and the secular concept as it existed in Chancery itself remained somewhat uncertain in meaning and content. It was used in Chancery in two different

22 Plucknett T F T and Barton J L (eds), "St German's Doctor and Student" 91 *Selden Society* (London, 1974), at 97: "and to that intent equytie is ordeyned that is to say to tempre and myttygate the rigoure of the lawe".

23 Quoted in Kerly D M, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, Cambridge, 1890), p 115. For an account of events leading up to the Royal Decree of James I, see Dawson J P, "Coke, and Ellesmere Disinterred: The Attack in the Chancery in 1616" (1941) 36 *Illinois Law Review* 127.

24 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xxxviii.

25 Vinogradoff P, "Reason and Conscience in Sixteenth-Century Jurisprudence"(1908) 96 *Law Quarterly Review* 373.

ways.[26] One was to describe the aim of the equitable jurisdiction with respect to the individual defendant, namely, to purify and correct that defendant's conscience by forcing her or him to act in accordance with those dictates of reason and good conscience found by the Lord Chancellor to be applicable to that case. This usage can be seen in Lord Ellesmere's judgment in the *Earl of Oxford's Case* (1615) 1 Ch Rep 1 (at 7); 21 ER 485:

> "The office of the Chancellor is to correct men's consciences for frauds, breach of trust, wrongs and oppressions of what nature soever they be"

The second usage expressed the idea that the conscience of the King and even the conscience of the realm itself were articulated and enforced through Chancery.[27] The jurisdiction therefore, at least in theory, was suffused with a form of moral, conscience-based reasoning.

Common law rules in their substance and application were not, however, the only perceived source of injustice and hardship which Chancery functioned to rectify. Chancery was also a court to which plaintiffs could resort when they would be, according to the rules of the common law itself, entitled to the remedies they were seeking, but they could not, for reasons such as lack of money, engage those rules to work on their behalf. Consider, for example, the 15th-century case[28] of a woman who had given all her property into the possession of a suitor who had promised to marry her. He was, in fact, already married and there was evidence that he had made a practice of preying on women in this way. She could not recover her property at common law, not because the common law had no remedy for her, but because she had no money to prosecute her cause.[29]

Chancery was a court "always open to the poor"[30] and as late as the beginning of the 17th century, a plaintiff's poverty was as

26 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xxix.

27 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xxxix.

28 Holdsworth W S, *A History of English Law* (7th ed, Methuen, London, 1956), Vol V, pp 279-280.

29 As her petition to the Lord Chancellor put the case: "[She was not] of power to sue her recovere by way of action after the cours of the comen laws of this lond for grete poverty, her said goods thus being out of her possession."

30 Barbour W, "Some Aspects of Fifteenth-Century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 856.

important a factor in getting a case heard in Chancery as were the merits of the dispute.[31] A disparity in wealth and power between the parties was one of the most common reasons given at this time for seeking the aid of the Lord Chancellor[32] and the equitable jurisdiction could successfully be invoked in circumstances where a dominant defendant would be able to intimidate the juries, sheriffs, or judges entrusted with the administration of the common law:[33]

> "Two things do principally and properly entitle the Chancery to all causes. Equity in the cause and inequality between the persons as where the plaintiff is a mean man and the defendant a great man in his county so as there is no hope of indifferency in trial."

The freeing of the parties from the scrutiny and decision-making power of a jury, especially one drawn in a local court, described for example, as "parcyall and not indifferent"[34] appears to have been one of the leading motivations for attempting to have the cause heard in Chancery.

It is worth noting that equity's historic role as a court open to the poor and the powerless and as a countervailing force to the sporadically oppressive reign of the common law extended across the gender divide. Equity historically, though erratically and narrowly, often exercised its protective jurisdiction to shield women from the harshness of common law principles which denied them a legal existence and a right to control property during marriage. Equitable doctrines such as the separate estate of married women, the wife's equity to a settlement and even the equitable enforcement of financial provision clauses in separation deeds at a time when such deeds were illegal at common law, substantively improved the lives and increased the independence of married women.

31 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xlii.

32 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 6.

33 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xlii, n 2, quoting from a manuscript of Lord Ellesmere's time (1596-1617). See also Barbour W, "Some Aspects of Fifteenth-Century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 856, n 40.

34 Barbour W, "Some Aspects of Fifteenth-Century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 856.

THE TRANSFORMATION OF EQUITY

[106] Pressure to reform and systematise the equitable jurisdiction was exerted on Chancery from various sources, both internal and external. Despite Chancery's success in establishing its supremacy over the common law by Royal Decree, its close association with the monarch and with royal prerogative justice placed it under constant threat from the democratic revolutionary forces of the Commonwealth in the political upheavals of 17th-century England. In 1653, Parliament, under Cromwell, considered a number of law reform measures, including the proposed abolition of Chancery, which was called the "greatest grievance in the nation".[35] This Parliament actually passed a resolution that "The High Court of Chancery of England shall be forthwith taken away", but the Bill incorporating the resolution was never enacted,[36] and, after the Restoration in 1660, the immediate threat to Chancery passed away. In 1690, a Bill to reverse the *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485 and thereby to achieve the statutory reversal of the supremacy of equity over the common law was introduced into Parliament but never enacted.[37]

It was at least in part in response to these outside threats to Chancery's existence that the equitable jurisdiction began its transformation and its emulation of the more politically acceptable common law. However, there were internal pressures as well, and it would be incorrect to assume that Chancery changed purely in response to a threat of extinction. Indeed, the equitable jurisdiction had begun the process of change as early as the latter half of the 16th century.[38] For one thing, the pressures of continuous litigation in Chancery had led gradually and perhaps inevitably to the development in the jurisprudence of that court of some settled principles and traditions of consistency in decision-making in certain areas.[39] Of particular significance in the history of English law was the establishment in Chancery of two substantive doctrines of law — the equitable enforcement of simple parole contracts at a time when contract

35 Holdsworth W S, *A History of English Law* (3rd ed, Methuen, London, 1945), Vol 1, p 432. And see Munger R L, "A Glance at Equity" (1915-1916) 25 *Yale Law Journal* 42 at 56.

36 Kerly D M, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, Cambridge, 1890), p 159.

37 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 7.

38 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 9.

39 Plucknett T F T and Barton J L (eds), "St German's Doctor and Student" 91 *Seldon Society* (London, 1974), Introduction at xlviii, xlix; Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xxxvii.

remedies were available at common law only in actions on deeds; and the equitable enforcement of uses, or trusts, as they were later known.[40] By the 15th century, uses were common, as were petitions to the Chancellor for their enforcement,[41] and enforcement rapidly became consistent enough to allow the development of equitable ownership of property. By 1450, the use was regarded as a "vendible interest".[42] The equitable enforcement of uses continued despite the statutory assault of the *Statute of Uses* 1535 (27 Hen VIII c 16) in 1535 and developed, within the exclusive jurisdiction of Chancery, into a detailed, ruled, and complex body of law, virtually indistinguishable in form from areas of English law outside of Chancery's range.

[107] After the Restoration in 1660, Chancery became much more concerned with issues involving property and proprietary rights than it had been hitherto,[43] and the need for settled and certain principles of law to govern those issues became more apparent. Precedent increased in importance and by the end of the century "was rapidly superseding conscience as the foundation of practical equity".[44] The demand for written case reports of cases in Chancery outstripped the supply as Chancellors increasingly sought precedents for their decisions.[45] The concept of conscience was itself being transformed during this period, as was signalled by the judgment of Lord Nottingham in the case of *Cook v Fountain* (1676) 3 Swanst 585 (at 600); 36 ER 984:

> "With such a conscience as is only *naturalis et interna* this court has nothing to do: the conscience by which I am to proceed is merely *civilis et politica* and it is infinitely better for the public that a trust, security or agreement should miscarry than that men should lose their estates by the mere fancy and imagination of a Chancellor."

It is apparent from this celebrated and influential passage that considerations of certainty, security of property interests and the

40 Barbour W, "Some Aspects of Fifteenth-Century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 848-849; Vinogradoff P, "Reason and Conscience in Sixteenth Century Jurisprudence" (1908) 24 *Law Quarterly Review* 373 at 381-384.

41 Barbour W, "Some Aspects of Fifteenth-Century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 848-849; Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), pp 6-7.

42 Barbour W, "Some Aspects of Fifteenth-Century Chancery" (1917-1918) 31 *Harvard Law Review* 834 at 849-850.

43 Kerly D M, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge University Press, Cambridge, 1890), p 167.

44 Winder W H D, "Precedent in Equity" (1941) 57 *Law Quarterly Review* 245 at 247.

45 Winder W H D, "Precedent in Equity" (1941) 57 *Law Quarterly Review* 245 at 249.

public good have supplanted early equity's concern with justice on the facts of the particular case. Lord Nottingham's repudiation of a notion of conscience "*naturalis et interna*" in favour of one "*civilis et politica*" began the counter-discourse of conscience by which the concept was objectified, made public and tamed. There were other changes in the jurisdictional ambit of Chancery. By Nottingham's time, the plaintiff's poverty was still an important consideration to be taken into account by Chancery in determining relief, but it had ceased to be viewed as "an equity of itself"[46] and by the following century, this aspect of Chancery's jurisdiction had faded into insignificance.

The transformation of the equitable jurisdiction accelerated during the latter half of the 17th century under the Chancellorship of Lord Nottingham (1673-1682) who has accordingly been described as "the first modern Lord Chancellor"[47] and "the father of systematic equity"[48] and generally acclaimed as a masterful and progressive judge. Nottingham's systematising work was then carried on by subsequent Lord Chancellors, most notably Lord Hardwicke (1736-1756), who is credited with achieving "the full development of the principles of equity".[49]

Throughout the 18th and 19th centuries, the development of authoritative, positive and coherent rules, fixed in their application and founded in precedent, became the successful aim of one Lord Chancellor after another. The final demise of equitable decision-making based on the Chancellor's sense of moral right and good conscience, and on Chancery's commitment to informal, pragmatic, contextual adjudication was seen by Atiyah as the "first and most striking legal development of the nineteenth century".[50] Consider some statements made by Lord Eldon in 1818:[51]

46 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xci-cxii.

47 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 7, n 30.

48 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at xlv.

49 Potter H, *An Introduction to the History of Equity and its Courts* (Sweet & Maxwell, London, 1931), p 65.

50 Atiyah P S, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Clarendon Press, Oxford, 1978), p 5.

51 *Davis v Duke of Marlborough* (1818) 2 Swanst 108 (at 163); 36 ER 555. See also *Gee v Pritchard* (1818) 2 Swanst 402 (at 414); 36 ER 670.

> "[I]t is not the duty of a judge in equity to vary rules, or to say that rules are not be considered as fully settled here as in a Court of Law. The doctrines of this Court ought to be as well settled and made as uniform almost as those of the Common Law."

However, as the traditional equitable jurisdiction declined, and probably because of that decline, there were significant developments in substantive doctrine, and reported judgments from the 19th century still form "the greater part of modern equity".[52] Certain bodies of legal rules were governed by the common law courts and other bodies of legal rules were governed by Chancery, but even that distinction was abandoned later in the century. In the *Judicature Acts* of 1873-1875, the administration of the equitable and common law systems was fused and the old Court of Chancery abolished. By the time of its abolition, the old Court had become a procedural and administrative disgrace, a notorious, time-wasting mess vividly described by Charles Dickens in *Bleak House*:[53]

> "This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of everyman's acquaintance; which gives to moneyed might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give — who does not often give — the warning 'Suffer any wrong that can be done you, rather than come here'."

THE MODERN EQUITABLE JURISDICTION

[108] The dominant modern understanding of the equitable jurisdiction is of a body of rules, principles and doctrines which had their origins in the Court of Chancery but which have continued to change and develop since the abolition of that Court. The rules of equity, according to this view of the modern jurisdiction, cannot otherwise be contradistinguished from rules which had

52 Spry I C F, *Equitable Remedies* (6th ed, Law Book Co, Sydney, 2001), pp 2-3.

53 Dickens C, *Bleak House* (Thomas Nelson & Sons, London, 1977), p 3.

their genesis in the courts of the common law. Maitland's famous formulation of this view of equity has been very influential:[54]

> "[E]quity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be known as Courts of Equity … for if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity."

This view was, at the time of Maitland's writing, and is still, an accurate and sensible description of the equitable jurisdiction. There are equitable doctrines, such as trusts, fiduciary relationships, subrogation and confidential information, to name only a few, which are equitable only because they always were, not because the doctrines are now substantively different from doctrines of the common law. And there is little or no pattern in the areas in which substantive equitable doctrines have arisen. As Maitland has pointed out, some areas of law "have been copiously glossed by equity while others are quite free from equitable glosses".[55] The "copious glosses" on the law of property and contract, for example, have yielded many substantive equitable doctrines such as trusts, undue influence and relief against penalties and forfeitures, while other areas of the law such as crime, tort and public law have remained relatively free from equitable rules.

[109] The doctrines and remedies of equity may be classified into those which are in the exclusive jurisdiction of equity, and those which are in aid of legal rights.[56] An example of an area of law which resides in the exclusive jurisdiction of equity is the trust. The trust is exclusively a creature of equity and the principles for the enforcement of trusts and for the assignment of beneficial interests under a trust rely entirely on equitable principles. Remedies granted in equity against defaulting trustees are distinctive; they have no precise parallel at common law. The same is true in other areas where equity exercises an exclusive

54 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 1. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 3: "Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873."

55 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 19.

56 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), pp 9-10.

jurisdiction, such as in the enforcement of fiduciary obligations. Courts exercising equitable jurisdiction may, in some circumstances, award compensation, but the principles on which the award of equitable compensation rests are not the same as for the award of damages either in contract or tort, at common law.[57]

Those doctrines and remedies which are not in the exclusive jurisdiction of equity are those which function to aid and effectuate the enforcement of legal rights.[58] The equitable remedy of specific performance, which is available when damages are inadequate, provides an example of this, as does the remedy of injunction. These equitable remedies supplement those available at common law in order to provide more effective relief. Rectification and rescission are also ways in which equity supplements the relief available at common law.

The equitable remedies are distinguished from common law remedies in that their grant is always a matter for the discretion of the court, while remedies at common law are available as of right to a plaintiff who has successfully brought her or his action to a conclusion.[59] The discretion available to judges in determining whether or not in all the circumstances of the case to grant an injunction, for example, harks back to the early days of contextual decision-making in equity and marks a strong conceptual continuity in decision-making in the jurisdiction.

[110] The dominant view of the concept of conscience in the modern equitable jurisdiction is one which is not qualitatively different from Lord Nottingham's "*civilis et politica*" understanding of conscience referred to above[60] as the beginning of a new judicial view of the concept. For a modern version of this concept of conscience, one can hardly do better than this account in the American case of *National City Bank v Gelfert* 29 NE (2d) 449 (at 452); 130 ALR 1472 (at 1475) (1940):

57 *Re Dawson* [1966] 2 NSWLR 211; Davidson I E, "The Equitable Remedy of Compensation" (1982) 13 *Melbourne University Law Review* 349. But see *Day v Mead* [1987] 2 NZLR 443; *Canson Enterprises v Broughton & Co* (1991) 85 DLR (4th) 129.

58 Nineteenth century commentators drew a distinction between the "concurrent" and "auxiliary" jurisdictions of equity. In the modern law, this differentiation is difficult to sustain in theory, and is unimportant in practice. Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 10. However, it does have applications where it is sought to apply a statute of limitations to an equitable claim by analogy to the common law: see below, para [2911].

59 Loughlan, P, "No Right To The Remedy? An Analysis Of Judicial Discretion In The Imposition Of Equitable Remedies" (1989) 17 *Melbourne University Law Review* 132.

60 See above, para [107].

> "The 'conscience' which is an element of the equitable jurisdiction is not the private opinion of an individual court, but is rather to be regarded as a metaphorical term, designating the common standard of civil right and expedience combined, based upon general principles and limited by established doctrines, to which the court appeals and by which it tests the conduct and rights of suitors — a judicial and not a personal conscience."

The personal is here sharply distinguished from the judicial. That which is "private" and "individual" is scorned in favour of the "general" the "common", the "civil" and the "established". "Conscience" is not moral but metaphorical, and a metaphor for expediency at that. Conscience is public and objective and impersonal. Its meaning has been transformed so that the common law values of consistency and uniformity replace those values of moral right and correct individual judgment which constituted and informed the equitable jurisdiction in its pre-modern period.

In contrast, however, to the dominant view of the equitable jurisdiction as a diverse group of heterogeneous rules linked only by their common origins in a court which has now long since been abandoned, is a growing understanding of the Australian equitable jurisdiction at least, as a "seamless web" of fundamental principles,[61] a "unity rather than merely a scattered collection of glosses on the common law".[62] Despite the warnings of Maitland and others that the field of equity cannot be described in general terms,[63] judges and commentators are increasingly noting an emerging doctrinal unity and coherence of principle in the equitable jurisdiction. That perception is founded upon the principle that the role of a court of equity is the prevention and sanctioning of unconscionable conduct, a notion that harks back to ideas of equitable justice which were developed in the earliest days of the jurisdiction. Finn has written:[64]

61 Heydon J D and Loughlan P L, *Cases and Materials on Equity and Trusts* (5th ed, Butterworths, Sydney, 2002), Preface, p xi.

62 Heydon J D and Loughlan P L, *Cases and Materials on Equity and Trusts* (5th ed, Butterworths, Sydney, 2002), Preface, p xi.

63 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), pp 13-14. And see Gummow W M C, "Forfeiture and Certainty: The High Court and The House of Lords", in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 30: "To generalise about equity may be pleasurable but must be dangerous."

64 Finn P D, "Equitable Estoppel" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 60.

> "While it is, as yet, premature to assert that a new order is with us, intimations of such an order are clearly discernible. It is one which would seem to give a unity of principle to a number of heads of equity. And it marks a reversion to equity's age old concern with sanctioning unconscionable conduct."

Recent cases and commentaries in Australia demonstrate the significance of the principle. Hardingham has stated that the prevention of unconscionable behaviour is "the overriding aim of all equitable principle";[65] Spry has noted that the principles of equity have a "distinctive ethical quality"[66] because they reflect the prevention of unconscionable conduct. Statements such as these are strongly supported by recent cases of the highest authority. In *Legione v Hateley* (1983) 152 CLR 406, for example, the High Court of Australia expressly based the equitable jurisdiction to relieve against penalties and forfeiture in a contract on the fact of a defendant's unconscionable conduct. The court (at 444) referred to:

> "[T]he fundamental principle according to which equity acts, namely that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct."

In *Baumgartner v Baumgartner* (1987) 164 CLR 137, the High Court founded a constructive trust on the basis of preventing unconscionable conduct on the part of the person with legal title to the property in dispute. The Court described (at 148) that prevention as "a concept which underlies fundamental concepts and doctrines" in equity. In *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, the same court founded the doctrine of equitable estoppel on the defendant's unconscionable conduct and once again reverted to the classical discourse of early equity in its judgment. Brennan J said (at 419):

> "The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity and the remedy required to satisfy an equity varies according to the circumstances of the case."

These cases demonstrate a continuing commitment to the conscience-based jurisdiction of equity and, in particular, to the

65 Hardingham I J, "Unconscionable Dealing" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 1.

66 Spry I C F, *Equitable Remedies* (6th ed, Law Book Co, Sydney, 2001), p 1.

correction in equity of an errant defendant's conscience by the application of moral reasoning. The cases assert the relevance and result-determining power of the particular circumstances of the particular case and allow no primacy in equity to the common law values of consistency, uniformity and certainty. Equity remains a jurisdiction without binding rules.[67]

There is another and more direct link to early equitable notions of conscience and that is in express statement. Despite occasional judicial assertions of equity's complete severance from its conscience-ridden past, such as "this Court is not a court of conscience",[68] it is not in fact uncommon for modern courts of equitable jurisdiction expressly to affirm their status as courts of conscience. In *National Westminster Bank v Morgan* [1985] AC 686, for example, the House of Lords expressly held (at 709) that a court of equitable jurisdiction is to act as a court of conscience when it exercises its jurisdiction to relieve against undue influence. Young J has explained the function of conscience in modern equity as, in effect, a principle of decision-making which comes into play in the absence of other binding rules, principles or precedents:[69]

> "It is sometimes said … that equity's power to act as a court of conscience is now spent. That statement is correct insofar as it is clearly recognized that many situations which previously were dealt with according to the rule of the Chancellor's foot are now dealt with by settled principles as a result of the work of Lord Eldon and others. However, it does not mean that when unconscionable situations exist in modern society, that this Court just shrugs its shoulders and says that as no historical example can be pointed to as a precedent the court does not interfere. This Court still continues both in private and commercial disputes to function as a court of conscience."

Traditional notions of conscience in modern equity can also have a formative effect on the development of substantive principles. In the case of *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, for example, Stephen J refused to hold that a third person who had become involved in a breach of fiduciary duty could rightly be made liable in constructive trust in the

67 I have argued elsewhere that since there is never a rule to dictate the result in equity, every case in equity is a "hard case". See Loughlan P, "No Right To The Remedy: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies" (1989) 17 *Melbourne University Law Review* 132 at 136.

68 *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at 195.

69 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 463 © Council of Law Reporting for New South Wales 1986.

absence of actual knowledge or some variant of actual knowledge of wrongdoing. To hold such a person liable on the basis of constructive knowledge alone would be, in his view, "to disregard equity's concern for the state of conscience of the defendant" (at 412).[70]

Conscience and the prevention of unconscionable conduct provide a conceptual link with the jurisprudence of early equity and are a potential source of unifying distinctiveness in modern equity. There is, however, no generalised jurisdiction in modern courts of equity to do what is "fair". The "objective" conscience of courts of equity is given effect to in a range of specific doctrines which are united by certain common themes. These are discussed in Chapter 2: "The Conscience of Equity".

There are other instances of equitable principles which have progressed into substantial bodies of sometimes complex doctrine but which nonetheless retain their conceptual links with early equity. One can see this in fiduciary law, for example, a doctrine created and sustained within the exclusive jurisdiction of equity, which represents a standard of altruism and solidarity contrasting sharply with the free and self-seeking norms of contract and contract law.[71]

Although it is clear that the classic discursive practices of Chancery are now subservient, that the lithe functioning of equity as what Lord Diplock has called a "dynamic force" and a "creative principle" in history has slowed and the jurisdiction become decadent, some of the classic, traditional equitable notions of justice and appropriate judicial decision-making retain their potency and influence. The contextual legal and moral reasoning power of the great equity judges has not been spent.

RELATIONSHIP BETWEEN LAW AND EQUITY

[111] The English *Judicature Act* of 1873 and its statutory counterpart in each of the Australian States[72] brought about a merger of the

70 See also *Target Holdings v Redferns* [1995] 3 WLR 352.

71 Unger R M, *The Critical Legal Studies Movement* (Harvard University Press, Cambridge Mass, 1983), pp 83-84. See also Frankel T, "Fiduciary Law" (1983) 71 *California Law Review* 795 at 830.

72 The Australian statutory equivalents to the *Judicature Act* are these: *Supreme Court Act* 1970 (NSW), ss 57-63 and the *Law Reform (Law and Equity) Act* 1972 (NSW); *Judicature Act* 1876 (Qld), ss 4-5; *Supreme Court Act* 1935 (SA), ss 17-28; *Supreme Court Civil Procedure Act* 1932 (Tas), ss 10-11; *Supreme Court Act* 1958 (Vic), s 62; *Supreme Court Act* 1935 (WA), ss 24-25.

administration of the common law and equitable jurisdictions, abolished the common injunction, and enshrined in statutory form the principle that where there is a conflict between the rules of the common law and the rules of equity, the latter prevails over the former. But the massive change in the legal order brought about by the *Judicature Act* was of a purely administrative and procedural character. There was no merger of equitable and common law rules and principles, no joining of substantive legal and equitable doctrines and no alteration of legal or equitable principle.[73]

This is not, of course, to suggest that the principles of either the common law or of equity ceased to change and develop after the passing of the *Judicature Act*. The Act had no effect on that development: its effect was described in Ashburner's famous metaphor:[74]

> "[T]he two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters."

Failure to appreciate the exclusively procedural and administrative effect of the *Judicature Act* has occasionally and unfortunately resulted in judgments which mix together rules and principles from the separate jurisdictions. In principle, any result in a case should be explicable either by reference to rules of law exclusively or by reference to principles of equity exclusively. But where the result can only be explained by reference to some mixture of both, then it is arguable that an error has been made. Such errors in legal reasoning have been characterised as "fusion fallacies",[75] particular types of errors in legal reasoning which allegedly lead to an unsound result:[76]

> "The fusion fallacy involves the administration of a remedy, for example, common law damages for breach of fiduciary duty, not previously available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign, for example, by holding that the existence of a duty of care in tort may be tested by asking whether the parties concerned are in fiduciary relations."

73 *Salt v Cooper* (1880) 16 Ch D 544, Sir George Jessel MR at 549; *Bank of Boston Connecticut v European Grain & Shipping Ltd* [1989] 1 All ER 545, Lord Brandon at 557.

74 Ashburner W, *Principles of Equity* (2nd ed, Butterworths, London, 1933), p 18.

75 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), pp 46-47.

76 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 47.

While some such fusion fallacies falsely attribute authority for substantive fusion to the effect of the *Judicature Act*,[77] and other cases show confusion resulting from a failure to analyse the relevant relationship between common law and equitable principles correctly,[78] some judges have taken the view that the orderly development of the law is promoted by substantive fusion.[79] Lord Diplock in particular is quite celebrated for his statement in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (at 925) that the two jurisdictional streams "have surely mingled now" although that insight has more recently been described by Meagher JA in *G R Mailman & Assoc v Wormald* (1991) 24 NSWLR 80 (at 99) as a "view so erroneous as to be risible". Sir Anthony Mason has explained Lord Diplock's statement in the following way:[80]

> "It is possible that Lord Diplock intended to convey no more than that the Judicature Acts did not prohibit the continuing development by judicial decision of the substantive principles of law and equity."

There are many instances of alleged "fusion fallacies" in the cases. For example, the principles of contributory negligence have been invoked in relation to compensation for breach of fiduciary duty,[81] and common law notions of mitigation and remoteness of damage have been invoked in a similar context (where the case might have been resolved equally well by reference to principles of causation).[82] Indeed, it has been held in New Zealand that the principles of compensation for breach of equitable obligation are to be equated fully with the principles for the award of common law damages.[83] It is in relation to the principles of equitable compensation that most attention has

77 For example, the statement by Eve J in *Re Pryce* [1917] 1 Ch 234 at 241 that the effect of the *Judicature Act* 1873 (UK) was to prevent a volunteer suing for damages resulting from breach of a covenant under seal.

78 Compare *Tottenham Hotspur Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17 with *McMahon v Ambrose* [1987] VR 817.

79 *Attorney-General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (NZCA), Cooke P at 172; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 (SCC), La Forest J.

80 Mason, Sir Anthony, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Waters D (ed), *Equity, Fiduciaries and Trusts 1993* (Carswell, Ontario, 1993), p 1 at p 6.

81 *Day v Mead* [1987] 2 NZLR 443 (NZCA).

82 *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 (SCC). Contrast the approach of La Forest J, who advocated the mingling of law and equity, with that of McLachlin J and Stevenson J.

83 *Aquaculture Corp v New Zealand Green Mussell Co Ltd* [1990] 3 NZLR 299. See further, Michalik P W, "The Availability of Compensatory and Exemplary Damages in Equity: A Note on the Aquaculture Decision" (1991) 21 *Victoria University Wellington Law Review* 391.

been paid to the fusion debate in recent years (see below, Chapter 22: "Equitable Compensation"). The mingling of law and equity in the manner suggested by Lord Diplock and others begs the question of which principles are to be cross-fertilised and why. Since equitable principles such as those applicable to fiduciaries fulfil a different social purpose from the law of contract and of tort, imposing, as they do, a strong duty to act only in the interests of the other,[84] it is by no means clear that principles developed in respect to common law obligations should be utilised in the equitable jurisdiction.[85]

A different reason for fusion entirely is where there is no longer any need for a distinctive equity jurisprudence because the limitations of the common law, which led to the supplementation by equity, have been overcome. Thus the fusion of common law and equitable estoppel may be justified by the similarity of principle between them and by the recognition that the line of precedent established by *Jorden v Money* (1854) 5 HLC 185; 10 ER 868[86] should no longer be treated as a limitation upon the capacity of the courts to give relief where one party has placed detrimental reliance upon the representation of another (see *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ, Deane J).

MAXIMS OF EQUITY

[112] The maxims of equity are fixed and formulaic statements of certain broad equitable principles which have emerged during the course of the jurisdiction's long and varied development.[87] They seem to have been cast into their present form of expression in the late 17th and early 18th centuries and have been described as a "symptom, or perhaps a cause, in the hardening of equity".[88] It has been suggested that the pattern of jurisprudential development with the use of the maxims is the occurrence of a series of cases from which the maxim is deduced,

84 See further Finn P D, "The Fiduciary Principle" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 1. Contrast Gautreau J R M, "Demystifying the Fiduciary Mystique" (1989) 68 *Canadian Bar Review* 1.

85 *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, McLachlin J (with whom Lamer CJ and L'Heureux-Dube J agreed) at 154-157.

86 See below, paras [710]-[714].

87 The exact age and origin of the maxims of equity are uncertain and a matter of some academic controversy: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 71.

88 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at lviii.

followed by an express statement of the maxim, which then itself provides a fresh impulse for the development of doctrine in the case law.[89]

A book of the maxims, *Maxims Of Equity* by Francis, was published in 1728, at a time when Chancery had already begun to move away from its contextual, case-by-case decision-making towards a regime of precedent and substantive doctrine. The maxims were in effect observations of what Chancery had already been doing in its cases, distillations of some of the principles which had been gradually developing over the past two or three centuries. This confirms the thesis of Roscoe Pound that maxims emerge in law when the law becomes conscious of itself, at a time in a legal system when the participants in that system are becoming reflective about what they have been doing and interested in making generalisations about the decisions they have been making.[90]

Although the maxims are not rules or "positive laws"[91] and cannot supply specific answers to specific legal problems,[92] they are not without function or value in the modern jurisprudence of equity. The maxims do sometimes merely justify and confirm decisions which have in fact been made on the basis of more precise equitable principles,[93] and they here perform a simple rhetorical function for a judge of demonstrating pithily how the decision is, after all, imbued with the ancient values of an ancient jurisdiction. However, the maxims also represent, reflect and disseminate certain of the fundamental moral ideas and themes which lie at the heart of the equitable jurisdiction.[94] In *Corin v Patton* (1990) 169 CLR 540, the maxim "equity will not assist a volunteer" was described in the High Court of Australia (at 557) in the following terms:

> "Like other maxims of equity, it is not a specific rule or principle of law. It is a summary statement of a broad theme which underlies equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain."

89 Yale D E C (ed), "Lord Nottingham's Chancery Cases" 73 *Selden Society* (London, 1957), Introduction at lxiii.

90 Pound R, "The Maxims of Equity" (1920-21) 34 *Harvard Law Review* 809 at 819

91 McGhee J (ed), *Snell's Equity* (30th ed, Sweet & Maxwell, London, 1990), p 27.

92 *Corin v Patton* (1990) 169 CLR 540 at 557; Oleck H L, "Maxims of Equity Reappraised" (1952) 6 *Rutgers Law Review* 528 at 528.

93 Spry I C F, *Equitable Remedies* (4th ed, Law Book Co, Sydney, 1990), p 6.

94 Oleck H L, "Maxims of Equity Reappraised" (1952) 6 *Rutgers Law Review* 528 at 528; Spry I C F, *Equitable Remedies* (4th ed, Law Book Co, Sydney, 1990), p 6; *Corin v Patton* (1990) 169 CLR 540 at 557.

The maxims function as axioms, general guides to equitable decision-making, and as "coadjutors to the study of equity jurisprudence".[95] Maxims are not legally authoritative; they are descriptive, explanatory, directive and, as Sir Edward Coke said: "A maxime is a proposition to be of all men confessed and granted without proofe, argument or discourse".[96] A maxim is, in Coke's view, a kind of rule of reason.

[113] Maxims are not intended for direct literal application but they have some explanatory power to illustrate and explain some of the central ideas and themes and values of the equitable jurisdiction. The following is an illustrative list of the maxims of equity. Certainly no list of the maxims is definitive, but these are indisputably significant and central:

- Equity looks on as done that which ought to be done.
- Equity follows the law.
- He or she who comes into equity must come with clean hands.
- He or she who seeks equity must do equity.
- Equity does not allow a statute to be made an instrument of fraud.
- Equality is equity.
- Equity acts in personam.
- Equity will not assist a volunteer.
- Equity looks to intent not form.
- Equity will not suffer a wrong to be without a remedy.
- Where the equities are equal, the law prevails.
- Where the equities are equal, the first in time prevails.
- Equity aids the diligent not the tardy.

Consider, for example, the maxim in question in *Corin v Patton* (1990) 169 CLR 540: equity will not assist a volunteer. Why not? What is wrong with volunteers? The answer goes deep into the history of Chancery as a court of "conscience", a court which acted to correct and purify a defendant's conscience by forcing her or him to act in accordance with the dictates of good conscience. Since the equitable jurisdiction was not a morally neutral jurisdiction, it was only activated by acts which were

95 Hanbury H G, *Essays in Equity* (Clarendon Press, Oxford, 1934), p 54.

96 Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), Vol 1, p 57a.

against conscience. If someone had paid money to a defendant for some property and the defendant retained the money but used some legalistic argument in order not to convey the property, that was a wrongful and unconscientious act which equity would intervene to rectify, and the same was true if the defendant had entered into a specifically enforceable contract. But if the person had simply expected to get some free property which the defendant had promised and that person had not paid for it, then the defendant had not in the eyes of equity done anything seriously wrong. Since the defendant's conscience was not harmed by wrongdoing, equity would not intervene. The wrongful act which brought the jurisdiction to life did not exist.

One of the most celebrated of the maxims of equity is "he or she who seeks equity must do equity". It appears in Francis' *Maxims of Equity* and was again strongly stated at the beginning of the 19th century in *Davis v Duke of Marlborough* (1819) 2 Swan 108 (at 157): "the principle of this court is not to give relief to those who will not do equity". The intuitive appeal of the moral concept which it embodies is obvious and immediate and can be traced into substantive equitable doctrines such as the wife's equity to a settlement. Before the statutory reform of the late Victorian period, married women were not legally capable of having separate control over their own property. If a married woman owned property and kept it from her husband, he could seek to recover it. If he needed the assistance of a court of equity to do that, that court, acting on the maxim, or at least on the moral idea which informs the maxim, would force the husband as a condition of relief to make an appropriate settlement out of that property in favour of the wife and children. The court could also stay proceedings in another court until the husband "did equity". The following is an illustration of the workings of the maxim taken from Francis' *Maxims of Equity*:[97]

> "If the husband sues in the ecclesiastical court for a portion due his wife, the court of Chancery will order an injunction to stay proceedings there, 'til he makes a competent jointure'."

The specific substantive doctrine of a wife's equity to a settlement has of course fallen into legal history as the need for it passed away, but it stands as a splendid historical example of a moral concept cast into the form of a maxim and developed into a full equitable doctrine. The meaning of many more of these equitable maxims will be seen in the substantive discussions of specific principles and doctrines of equity which follow this chapter.

97 Francis R, *Maxims of Equity* (1728), Maxim 1, para 5.

CHAPTER TWO

THE CONSCIENCE OF EQUITY

Patrick Parkinson

INTRODUCTION

[201] As was seen in Chapter 1,[1] a central theme of equity is that equitable modification of common law rights is based upon the requirements of conscientious conduct which the courts uphold in dealings between people. Equitable intervention on behalf of a plaintiff is frequently based upon the fact that there is something in the conduct of the defendant which makes it unconscionable for her or him to insist on the preservation or enforcement of the strict legal rights arising under the law of contract or the law of property. Unconscionability is thus the basis of a range of doctrines. It is also a theme of equity jurisprudence which has seen a considerable revitalisation in recent years. It has been said that unconscionability is an emerging preoccupation of the judiciary in the common law world, not only in Australia, but also in Canada, New Zealand and especially the United States.[2] It has been described as a "universal talisman in many fields of equity".[3]

[202] The historic basis of equity's concern with unconscionability is the prevention of "fraud". In this context, however, "fraud" does not have its ordinary meaning, in the English language, of an act of wilful deceit to gain an advantage, nor, at common law, of an intentional or reckless disregard for truth (*Derry v Peek* (1889) 14 App Cas 337). This common meaning of "fraud" is narrower than fraud in equity; indeed, a distinction is made between

1 "The Historical Role of the Equitable Jurisdiction": see above, para [110].

2 Finn P D, "The Fiduciary Principle" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 6.

3 Mason A, "Themes and Prospects" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 244.

"actual fraud", and "constructive fraud" or "equitable fraud". Viscount Haldane LC explained the meaning of "constructive fraud" in *Nocton v Lord Ashburton* [1914] AC 932 at 954 in terms of a violation of the standards enforced by equity:[4]

> "[W]hen fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

Relief from fraud, in the equitable sense, may be said to be the leitmotif of equitable intervention to modify strict legal rights generally. The express trust has its origins historically in the prevention of fraud (*Muschinski v Dodds* (1985) 160 CLR 583, Deane J at 610). Holders of the legal title to property who received that property "to the use of another" were not allowed to set up the legal title against the other's moral claim. In equity, they were compelled to carry out the obligations which they had undertaken. With the institutionalisation of the express trust, continuing development of the law in fulfilment of this principle has been largely through invocation of the constructive trust.[5] The law of constructive trusts may still be explained, primarily, on the basis that the trust is imposed to prevent the retention of benefits which have resulted from unconscionable conduct.[6]

4 See also *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82 (CA); *Bulkley v Wilford* (1834) 2 Cl & Fin 102; 6 ER 1094 (Ch), Lord Eldon at 177; *Torrance v Bolton* (1872) LR 8 Ch 118, James LJ at 124; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371. See generally, Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Ch 12.

5 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

6 See below Chapter 21: "Constructive Trusts". It has also been argued that the related principle against unjust enrichment provides a unifying theme: see Waters D, *The Constructive Trust* (Carswell, Toronto, 1964). See also Elias G, *Explaining Constructive Trusts* (Clarendon, Oxford, 1990).

A further form of relief against unconscionable conduct is expressed in the maxim that "equity will not allow the *Statute of Frauds*[7] to be a cloak for fraud".[8] This maxim underlies the equitable doctrine of part performance,[9] certain grounds for the imposition of a constructive trust, and aspects of the law of equitable assignments.[10]

Equitable fraud is a deliberately fluid concept.[11] The great 18th-century judge, Lord Hardwicke, wrote that:

> "As to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive."[12]

However, a clear understanding of the way in which the conscience of equity is expressed through its doctrines and remedies is necessary, for, without such an understanding of "unconscionability", the notion can decline all too readily into a generalised justification for the courts doing whatever they deem to be fair.[13] In Australian law, such an approach has clearly been rejected.[14]

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7 1677 (29 Car 11 c 3).

8 *Davies v Otty (No 2)* (1865) 35 Beav 208; 55 ER 875; *McCormick v Grogan* (1869) LR 4 HL 82; *Rochefoucald v Boustead* [1897] 1 Ch 196 (CA).

9 See below, para [1714].

10 The *Conveyancing Act* 1919 (NSW), s 23C and its equivalent in other States and Territories, provides that the writing requirements in that section do not affect the creation or operation of constructive trusts.

11 Equity operates in this respect, as in others, through the imposition of standards. It has been argued that rules are more appropriate to sanction homogeneous kinds of misconduct, whereas standards are more appropriate to deal with heterogeneous kinds of wrongs. See Duggan A, "Is Equity Efficient?" (1997) 113 *Law Quarterly Review* 601 at 630 citing Kaplow L, "Rules versus Standards: An Economic Analysis" (1992) 42 *Duke Law Journal* 557 at 595.

12 Letter to Lord Kames, cited in Sheridan L, *Fraud in Equity: A Study in English and Irish Law* (Pitman, London, 1957), p 2.

13 In *Bridge v Campbell Discount Co Ltd* [1962] AC 600, Lord Radcliffe said at 626: "'Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plenitude of jurisdiction, and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues".

14 The approach is most often associated with the "new model constructive trust" founded upon "justice and good conscience": see *Hussey v Palmer* [1972] 3 All ER 744 (CA), Lord Denning at 747. This approach was firmly rejected by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 615, who criticised the use of the constructive trust as a means of indulging in "idiosyncratic notions of fairness and justice". See also Brennan J (dissenting) in *Stern v McArthur* (1988) 165 CLR 489 at 514.

THE CHANGING EMPHASIS ON UNCONSCIONABILITY

[203] The current emphasis on unconscionability in Australian law is important, because beneath the detail of individual cases lies an ideological shift. Increasingly, courts are curtailing the pursuance of self-interest, where, in times past, it would have been encouraged as a virtue. For example, no longer is it likely that judges will say, as did Wills J in *Allen v Flood* [1898] AC 1 at 46, that "any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right". One may now observe the growth of obligations to have concern for others' interests in areas of the law where hitherto such obligations would not have been countenanced.[15] In the commercial world, in Australia at least,[16] this translates into more stringent obligations of good faith and fair dealing in pre-contractual negotiations[17] and in the performance of contracts,[18] careful scrutiny of the steps taken to ensure that the consent of guarantors is not procured by unfair pressure, influence or exploitation,[19] and a refusal by the courts to allow the harsh or oppressive use of forfeiture provisions.[20]

Some of the most significant developments have occurred through the enactment of broad statutory notions of unconscionability, such as in the *Trade Practices Act* 1974 (Cth),

15 For a critique of the view that equity at times promotes altruistic conduct, see Duggan A, "Is Equity Efficient?" (1997) 113 *Law Quarterly Review* 601. Duggan argues, by reference to a range of doctrines, that the outcomes of decisions applying equitable doctrine tend towards economic efficiency in much the same way as the common law. Equity does not therefore impose "other-regarding" norms as much as it promotes efficiency in bargaining processes. Economic efficiency is, however, not inconsistent with an altruistic standard. Duggan argues, for example, that the rules of unconscionable dealing preventing exploitation are efficient because they prevent the "misallocation of resources" which occurs when one party agrees to an unwanted contractual outcome, and the lowest cost avoider is required to bear the burden of refraining from exploitative conduct (at 614). Nonetheless, a law which prevents such exploitation may be both altruistic and economically efficient, altruistic because it places constraints upon exploitation, efficient because it promotes optimising transactions at the lowest possible cost.

16 For comparisons between Britain and Australia, see Mason A, "The Impact of Equitable Doctrine on the Law of Contract" (1998) 27 *Anglo-American Law Review* 1.

17 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Contrast *Walford v Miles* [1992] 2 AC 128.

18 See below, para [215].

19 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Garcia v National Australia Bank* (1998) 194 CLR 395. See also, in Britain, *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021.

20 *Stern v* McArthur (1988) 165 CLR 489. Contrast *Union Eagle Ltd v Golden Achievement* [1997] AC 514. See below, Chapter 9: "Relief against Forfeiture".

the parallel Fair Trading Acts, and the *Contracts Review Act* 1980 (NSW).[21] In the New South Wales Court of Appeal, in *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 611,[22] Kirby P said that the *Contracts Review Act* 1980 (NSW), "although it operates in the domain of contract law, signals the end of much classical contract theory". Whatever careful limitations may have been placed on the scope of equitable intervention are largely swept away by the statutory regimes. The incremental approach of precedent upon precedent is replaced by a broad judicial discretion to prevent injustice, within the guidelines given in each Act.

Outside statute, the ideological shift has not translated itself into new doctrines as such. The old labels are being used, but with new meanings and extended scope. Thus, fiduciary obligations may be invoked as the rationale for the imposition of a duty of disclosure upon the proprietor of a business to a prospective purchaser who wants to buy into the enterprise;[23] estoppel or waiver is used to say that one party to litigation may owe some obligation to the other which prevents the first party from changing its mind about pleadings;[24] a solicitor, intellectually able but emotionally vulnerable, may successfully rely on the doctrine of unconscionable dealing to set aside substantial gifts of property made to a person whom the solicitor loved; [25] a nephew is said to have taken unconscientious advantage of his elderly uncle's trust and affection in purchasing property from him at an undervalue even when the uncle clearly wanted to benefit the nephew rather than his daughters.[26] The use of familiar doctrinal language disguises the extent of the change which has been occurring. These developments have not been without protest, however. High Court and other appellate decisions have often been made by bare majorities.[27] Differences between judges have reflected ideological differences about the limits of equitable intervention to modify strict legal rights.[28]

21 See below, paras [515]-[521].

22 See also McHugh JA (with whom Hope JA agreed) at 621.

23 *Hill v Rose* [1990] VR 129.

24 *Commonwealth v Verwayen* (1990) 170 CLR 394.

25 *Louth v Diprose* (1992) 175 CLR 621 (HC).

26 *Bridgewater v Leahy* (1998) 194 CLR 457.

27 See, for example, *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA); *Commonwealth v Verwayen* (1990) 170 CLR 394; *Stern v McArthur* (1988) 165 CLR 489; *Bridgewater v Leahy* (1998) 194 CLR 457.

28 See, for example, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Dawson J (dissenting) at 481; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA), Kirby P at 583; *Foran v Wight* (1989) 168 CLR 385, Mason CJ (dissenting) at 389; *Bridgewater v Leahy* (1998) 194 CLR 457, Gleeson CJ and Callinan J, dissenting.

PROCESSES AND OUTCOMES

[204] A distinction is sometimes drawn between procedural and substantive unconscionability (*West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 (CA), McHugh JA at 620).[29] The terms refer, respectively, to situations where the unconscionability lies in the process by which one party gained the benefit which is under challenge, and cases in which the rationale for judicial intervention is founded upon the unconscionability of the outcome which would otherwise prevail. Clearly, of course, the two are interrelated. Much of the concern with unfairness in the process of gaining a contract is because of the unconscionable outcomes which arise from one-sided bargains. Furthermore, grossly unfair outcomes inevitably lead to an inquiry about the negotiating process. In *Hart v O'Connor* [1985] AC 1000, Lord Brightman (speaking for the Privy Council at 1017-8) said:

> "If a contract is stigmatised as 'unfair', it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this 'procedural unfairness'. It may also, in some contexts, be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other. In order to distinguish this 'unfairness' from procedural unfairness, it will be convenient to call it 'contractual imbalance'. The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing."

Thus ideas about what is, or is not, an unfair outcome may have a strong influence upon decisions about whether aspects of the process should be deemed "unconscionable". Nonetheless, procedural unconscionability has been the traditional focus of legal doctrine, both at common law and in equity. The doctrines of undue influence, unconscionable dealing, unilateral mistake, relief from fraud, misrepresentation and duress, may all be explained on this basis (*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J at 461). What attracts the exceptional intervention of the court to set aside transactions

29 See also below, paras [502]-[503], [522].

which would otherwise stand, or to interfere with legal rights which would otherwise be enforced, is that those against whom claims are raised have so acted that it would be inequitable and against conscience[30] for them to set up those legal rights. It is the words or conduct of the party with the claimed right which justify the court in refusing to enforce that right, or enforcing it subject to a trust, or other qualification upon legal title.

Increasingly, however, there are signs that courts are justifying intervention on the basis of unconscionable outcomes, without requiring proof that the defendant has engaged in some form of unfair dealing.[31] Here, the unconscionability lies in the insistence on one's strict legal rights, in circumstances where to do so is considered to be contrary to equity and good conscience, because of the hardship which would thereby be caused to the other party. Courts have usually proceeded cautiously in this area, however, since without a focus upon specific acts of wrongful conduct, the notion of unconscionability can become all too subjective. A principle which was meant to be used to restrain people like the Sheriff of Nottingham should not be used to empower a judge to act like Robin Hood.

TYPES OF UNCONSCIONABILITY

[205] The conscience of equity is expressed in a range of different doctrines. It is possible to discern five categories into which these doctrines might be placed. These are not entirely distinct categories. A particular doctrine might readily be placed in more than one category. The five categories are:

- the exploitation of vulnerability or weakness;
- the abuse of positions of trust or confidence;
- the insistence upon rights in circumstances which make such insistence harsh or oppressive;
- the inequitable denial of obligations;
- the unjust retention of property.

30 The word "unconscientious" has been suggested as a more accurate term than "unconscionable": see *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444.

31 See below, paras [209] and [212]. See especially *Bridgewater v Leahy* (1998) 194 CLR 457, in which the High Court indicated that the passive acceptance of a benefit may be unconscionable. In this case, the benefit to the nephew through the purchase of property from his uncle at an undervalue was at the expense of the daughters' entitlements under the uncle's will. The majority of the High Court evidently saw this as an unconscionable outcome, even though it was consistent with the uncle's generous treatment of his nephew and his less than generous treatment of his wife and daughters, over many years.

Exploitation of vulnerability

[206] The exploitation of a person's special vulnerability or weakness is treated as unconscionable conduct. In *Stern v McArthur* (1988) 165 CLR 489 at 527,[32] Deane and Dawson JJ expressed the principle that "a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself". This principle underlies the doctrines of unconscionable dealing[33] and undue influence,[34] and, arguably, the law of unilateral mistake (*Taylor v Johnson* (1983) 151 CLR 422).[35]

As has been noted, the various equitable doctrines have been supplemented in recent years by a plethora of statutory provisions, such as the *Trade Practices Act* 1974 (Cth) and the Fair Trading Acts, which are broader in scope. These provisions, which are mainly concerned with the protection of consumers, give to courts considerable discretionary powers to provide relief from exploitation and unfair dealing. The scope of the discretion provided by these statutory powers to protect consumers has had an effect upon the interpretation of equitable doctrine in areas where the statutory principles are inapplicable.[36] Another influence upon the courts has arguably been the rise of the welfare state. There are parallels in the extent to which the courts seek to provide a safety net for those who would otherwise be losers in the world of free market forces, and the extent to which a welfare philosophy is held by society generally. Ultimately, whether particular conduct is exploitative will be a matter of opinion, and the law is shaped by changing circumstances and moral standards.[37] In applying equitable doctrines concerned with protecting the vulnerable, it is apparent that courts have

32 An older statement in similar terms was made in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82 (CA) by Lord Chancellor Hardwicke at 155, who described a third kind of fraud "which may be presumed from the circumstances and condition of the parties contracting … but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another".

33 See below, Chapter 5: "Unconscientious Dealing".

34 See below, para [1132].

35 In this case, a purchaser of land knew that the vendor was under a serious misapprehension about the agreed price and sought to conceal the error from her.

36 Priestley L J, "Unconscionability as a Restriction on the Exercise of Contractual Rights" in Carter J W (ed), *Rights and Remedies for Breach of Contract* (University of Sydney Faculty of Law, 1988).

37 In *Harry v Kreutziger* (1978) 95 DLR (3d) 231 (CA BC), Lambert JA at 241 made this point when he said: "The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases … In that examination, Canadian cases are more relevant than those from other lands where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were, in some respects, rougher, and in other respects, more fastidious."

been more inclined to extend their hand of protection than they might have done in the first three quarters of the 20th century.[38]

These heads of relief have been broadened considerably in recent years but are, nonetheless, limited. Although Lord Denning MR purported to identify a general principle of equity which justified the setting aside of a contract whenever an inequality of bargaining power attended its formation,[39] such a broad statement of principle has not been accepted in Australia.[40] Rather, the approach in this country has been to rely on specific, and more precisely defined, doctrines to "police" unfairness.

The abuse of a position of trust or confidence

[207] Equity protects relationships of trust and confidence in a number of ways. First, persons in positions of trust and confidence who are characterised in equity as fiduciaries are not permitted to place themselves in a situation where their interests conflict with their duty; nor are they allowed to profit from opportunities gained in the course of their fiduciary work.[41] Secondly, equity protects information which is divulged in confidence through an action for breach of confidence.[42]

This category of unconscionability is not wholly distinct from the first one, restraining exploitative conduct. The doctrine of presumed undue influence could readily be categorised under either heading, for it is applied in a range of different contexts in which transactions are seen to have been procured improperly.[43] At one end of the spectrum is actual undue influence, which supplemented the common law of duress, to make voidable transactions which were procured through undue pressure falling short of common law duress.[44] At the other end

38 Compare the clash of values represented in the majority and dissenting opinions in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. See also *Louth v Diprose* (1992) 175 CLR 621 (HC); *Bridgewater v Leahy* (1998) 194 CLR 457.

39 *Lloyds Bank v Bundy* [1975] 1 QB 326 (CA) at 339 (guarantee and charge given by father to secure debts of son's company unenforceable).

40 In England, it was finally rejected by the House of Lords in *National Westminster Bank v Morgan* [1985] AC 686. For further discussion, see below, para [512].

41 In *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 198, 199 stated that these are related, but distinct themes. These are not the only duties of fiduciaries however. See further below, Chapter 10: "Fiduciary Obligations", and Finn P D, *Fiduciary Obligations* (Law Book Co, Sydney, 1977).

42 See below, Chapter 12: "Breach of Confidence".

43 For a full discussion, see below, paras [1130]-[1132].

44 For explanation of the various kinds of undue influence, see *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021, Lord Nicholls at 1029-31.See further, Chapter 11: "Undue Influence".

of the spectrum are cases of presumed undue influence in which the central concern of equity is that a person has used the influence which he or she has over others to gain a personal benefit.[45] In this regard, equity insists upon a standard of altruism which is quite unknown to the common law. As Dixon J stated in *Johnson v Buttress* (1936) 56 CLR 113 at 135, when one person has a position of influence over another:

> "it is his duty to use his position of influence in the interest of no-one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare."

[208] The law of fiduciary obligations could also be categorised as involving a concern to protect the vulnerable. It is one of the identifying features of a fiduciary relationship that the one to whom fiduciary obligations are owed is vulnerable to the exercise of a power or discretion by the fiduciary (*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Mason J at 96-97). However, fiduciary law differs from unconscionable dealing, undue influence and the law of unilateral mistake in that its concerns go far beyond setting aside transactions which were improperly procured. Its broader concern is to ensure the highest standards of propriety, and to curb self-interested behaviour, among those who are called to positions of trust and confidence in the community.

The vulnerability of those to whom fiduciary obligations are owed may also be quite different in kind from the vulnerability which justifies equitable intervention in other respects. Fiduciary law protects the financial interests of employers against self-interested behaviour by employees. It protects companies from defalcations by company directors. Many of the institutions which benefit from fiduciary law may ordinarily have little need for the tender conscience of equity to come to their aid.

45 There are cases in which courts have set aside transactions in which the disponor of the property was sufficiently influenced by the advice of one on whom he or she depended that the transaction ought not to be allowed to stand, even though there was no benefit to the ascendant party. Although this is expressed doctrinally as a concern about the voluntariness of the transaction (*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J at 461; Deane J at 474), there is an element of paternalism in the decision-making of the courts. See, for example, *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30 (improvident deed of settlement set aside after 20 years which had been made by a 21-year-old woman on the advice of her uncle and others); *Everitt v Everitt* (1870) LR 10 Eq 405 (deed of settlement by 21-year-old set aside; no improper motive attributed to trustees); *Allcard v Skinner* (1887) 36 Ch D 145 (CA), Cotton LJ at 172; Lindley LJ at 185, 186; Bowen LJ at 190, 191 (substantial donations to religious order; no improper action or personal benefit by lady superior or priest; gift not set aside because of delay); *Bullock v Lloyds Bank Ltd* [1955] Ch 317 (deed of settlement by 21-year-old which was influenced by father set aside; no improper motives).There is a long history of such paternalism in equity which must be distinguished from the restraint of unconscionable conduct.

However, their vulnerability arises from the fact that, in many spheres of commercial life, people are in positions where the loyalty which they owe by virtue of their contract of employment or their position as a director cannot easily be monitored and scrutinised. Trust and confidence in these people is essential to the operation of commerce, and yet the very difficulty in supervising their work provides opportunities for them to abuse their position of trust. To the age-old question, "who guards the guardians?", equity offers fiduciary law as an answer. Fiduciary law plays a prophylactic role to prevent unconscionable dealing. It imposes very strict standards on all fiduciaries in order to preserve the integrity of the fiduciary office.[46] The strictness of the law is properly commensurate with the risk there is of an abuse of trust in the position of responsibility that many fiduciaries enjoy. The strictness of the rules concerning fiduciaries ought to mean that a relationship should not lightly be characterised as fiduciary. The fiduciary obligation is the highest standard of obligation known to the law.

Harsh or oppressive exercise of rights

[209] The insistence upon rights in circumstances which make this harsh or oppressive is a further form of unconscionability. In *Legione v Hateley* (1983) 152 CLR 406 at 444,[47] Mason and Deane JJ stated the general principle that "a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct". Unconscionability in this context is more particularly defined through a number of doctrines. For example, the law of estoppel may operate to preclude an unconscionable insistence upon legal rights.[48] The doctrine of promissory estoppel, as it was accepted as part of the law of Australia in *Legione v Hateley*,[49] is an illustration of this. A party to a contract, who has induced another party to place detrimental reliance upon an assumption that legal rights will not be enforced, will not be allowed to enforce those rights, temporarily or permanently, where it would be inequitable

46 This rationale explains the strict rules concerning the purchase of property by trustees from beneficiaries, and especially the rule in *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223, which prevents a trustee from renewing a lease personally even if the option to do so is unavailable to the trust itself. See further below, Chapter 10: "Fiduciary Obligations" and Chapter 21: "Constructive Trusts".

47 Citing Story J, *Commentaries on Equity Jurisprudence as Administered in England and America* (12th ed, 1877), Vol 2, para [1316].

48 See below, Chapter 7: "Estoppel".

49 See further below, paras [711]-[712].

having regard to the dealings between the parties.[50] The doctrine, which owes its modern revival to Denning J, as he then was, in *Central London Property Trust v High Trees House Ltd* [1947] KB 130, was greeted cautiously at first, but gradually gained acceptance.

Relief from penalties and forfeiture provides another example of the same principle. In certain circumstances, it may be unconscionable to insist upon one's strict contractual rights concerning the consequences of breach. Equity will relieve against a clause which is in the nature of a penalty,[51] and will also relieve against forfeiture.[52] The debate, which came to the fore in *Stern v McArthur* (1988) 165 CLR 489,[53] is whether relief against forfeiture is dependent upon conduct by the party seeking to assert the right which has, in some way, contributed to the adverse position of the other, or whether substantive notions of unfair outcomes are to be invoked. This case involved an instalment contract for the purchase of land. The majority of the High Court held that the purchasers could be relieved from forfeiture despite continual failures to pay the requisite instalments. In the majority, Deane and Dawson JJ likened the instalment contract to a purchase with an aid of a mortgage (at 529). If there had been a mortgage, the purchasers would have been entitled to an equity of redemption without regard to any stipulation as to time. They argued that equity was therefore entitled to extend a similar remedy to a transaction of a similar character. The third member of the majority, Gaudron J, stated her view in broader terms (at 540-541). She said that relief against forfeiture should be allowed in that case because, on a number of grounds, it was substantively unfair for the vendors to insist upon the strict terms of the contract.[54] A principle may be emerging that equity will relieve against forfeiture where the vendor's legitimate interests may be secured by other means.[55]

Equity's concern to relieve against a harsh or oppressive exercise of rights has many other applications. It provides the historic

50 *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439; *Ajayi (t/a The Colony Carrier Co) v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 (PC); *Legione v Hateley* (1983) 152 CLR 406.

51 See below, Chapter 8: "Relief against Penalties".

52 See below, Chapter 9: "Relief against Forfeiture".

53 Contrast the decision of the Privy Council in *Union Eagle Ltd v Golden Achievement* [1997] AC 514.

54 Mason CJ and Brennan J at 503-505 and 513-521 respectively, dissented because, in their view, relief from non-penal forfeiture could be established only where the vendors contributed to the breach, or unreasonably refused to allow the purchasers to cure the breach, or sought to deny them the benefit of improvements.

55 For a full discussion of the different meanings attributed to unconscionability in relation to relief against forfeiture, see below, para [907].

justification for the development of the equity of redemption, by which equity protected the position of those who mortgaged their property through the transfer of legal title as security for a debt. More recently, it has been said to be the basis on which courts will refuse to allow vendors to rescind contracts for the sale of land under a contractual provision which entitles them to do so if they are "unable or unwilling" to comply with a requisition (*Pierce Bell Sales Pty Ltd v Frazer* (1973) 130 CLR 575, Barwick CJ at 587). The same concern may also be the basis of equity's jurisdiction to relieve for common mistake.[56]

The law of equitable set-off may also be explained by the same concern of equity to prevent the harsh exercise of rights.[57] An unliquidated counterclaim may be set off in equity against a claim where the counterclaim "impeaches the title" of the plaintiff.[58] Thus, set-off will be permitted where it would be unconscionable to allow the plaintiff to proceed to judgment where the countervailing claim seriously diminishes the merits of the plaintiff's claim while not being a substantive defence to that claim. Another application of the principle that equity will not allow the unconscionable insistence upon rights is in relation to time stipulations in contracts. Equity would intervene to restrain the termination of a contract for breach of a time stipulation if time has not been said to be of the essence. As Deane and Dawson JJ explained in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 654:

> "The whole point of equity's intervention in relation to stipulations as to time was that, in the absence of express or implied contractual provision to the contrary, it regarded it as inequitable or unconscionable for a party to a contract to rescind for breach of a time stipulation without having given reasonable warning to the party in default."

More broadly, the courts' concern to restrain the harsh exercise of rights may be seen in equity's attitude to remedies. Specific performance may be denied on the grounds of hardship to the defendant,[59] and injunctions are discretionary.[60] Indeed, the courts have traditionally insisted that equitable remedies are not

56 See Carter J and Harland D, *Contract Law in Australia* (4th ed, Butterworths, Sydney, 2002), para [1228].

57 On the law of set-off generally, see below, Chapter 30: "Set-off".

58 *Rawson v Samuel* (1841) Cr & Ph 161 at 178; 41 ER 451; *Re Just Juice Corp Pty Ltd* (1992) 109 ALR 334, Gummow J at 347-352. See below, paras [3014]-[3016].

59 See below, para [1728].

60 See below, Chapter 18: "Injunctions".

"of right" at all,[61] and this discretionary element can be used to ensure that harsh and oppressive outcomes do not occur. However, the restraint of oppression is only one factor in the exercise of discretion; the courts, exercising equitable jurisdiction, still demonstrate that self-effacing modesty which gives primacy to common law relief (*Attorney-General v Blake* [2001] 1 AC 268, Lord Nicholls at 282, 285).[62] Such shyness lingers even in an age of statutes.

Inequitable denial of obligations

[210] An unconscionable insistence upon the absence of legal obligations may also give rise to relief. One context where this occurs is where a person seeks to rely on the absence of writing in transactions for which writing is required by law.[63] Where the denial of obligations is unconscionable, oral agreements and trusts which are unenforceable at law due to the absence of writing may nonetheless be enforceable in equity. The doctrines which may be included in this category are all instances of the maxim that equity will not allow the *Statute of Frauds* to be a cloak for fraud.[64] In *Last v Rosenfeld* [1972] 2 NSWLR 923, Hope J (at 927-928) listed a number of the applications of the maxim:

> "No sooner had the *Statute of Frauds*[65] been enacted in 1677 than the courts set about relieving persons of its effect in cases where it was thought that the legislation could not have been intended to apply ... The fields in which this general approach was adopted include, as well as the doctrine of part performance, the rule that parol evidence is admissible to show that an absolute conveyance was in truth by way of security only, the principle

61 For a discussion of this, in the light of Ronald Dworkin's theories, see Loughlan P, "No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies" (1989) 17 *Melbourne University Law Review* 132.

62 Such deference is diminishing however. An important step in liberalising the law of specific performance was the judgment of Windeyer J in *Coulls v Bagot's Executor & Trustee Co* (1967) 119 CLR 460 at 499-504. See also *Posner v Scott-Lewis* [1987] 1 Ch 25; *Patrick Stevedores v The Maritime Union of Australia* (1998) 195 CLR 1, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ at 46-47 commenting on *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1. In other respects too, traditional restraints on the granting of equitable relief are being removed. See below, Chapter 17: "Specific Performance".

63 *Davies v Otty (No 2)* (1865) 35 Beav 208; 55 ER 875 (Rolls Ct); *McCormick v Grogan* (1869) LR 4 HL 82; *Rochefoucald v Boustead* [1897] 1 Ch 196 (CA).

64 Variations on this maxim include reference to "an engine of fraud" or an "instrument of fraud": *McCormick v Grogan* (1869) LR 4 HL 82, Lord Westbury at 97; that the Statute does not prevent "proof of fraud": *Rochefoucald v Boustead* [1897] 1 Ch 196 (CA), Lindley LJ (for the Court) at 206; and that the Statute "was not made to cover fraud": *Lincoln v Wright* (1859) 4 De G & J 16; 45 ER 6 (Ch), Turner LJ at 22.

65 29 Car 11 c 3.

> that oral evidence can establish that a person has taken a transfer of property as trustee or agent for another, the doctrine whereby equity gave relief upon a breach by the survivor of two persons of a contract they had made to make mutual wills, and the principle whereby equity will compel beneficiaries who have agreed to accept their interests under the will upon communicated trusts to perform those trusts."

The doctrine of part performance illustrates the principle.[66] The reason why contracts for the sale of land are enforced despite the absence of writing is not because part performance offers a reliable alternative form of evidence concerning the alleged contract, but because the fact of part performance makes it inequitable for the other party to rely upon the absence of writing to deny the contract (*Maddison v Alderson* (1883) 8 App Cas 467). The detriment which is constituted by part performance is such that it would be unconscionable to allow the other party to deny contractual obligations. The doctrine is thus closely related to the law of estoppel. While this is the accepted rationale, the doctrine of part performance has taken on a life of its own, and judges have not always spoken in terms of detriment in assessing whether an act of part performance is sufficient. Thus, the mere taking possession of a property will be a sufficient act of part performance,[67] although it may sometimes scarcely constitute a detriment; while in other cases, serious detriment incurred in reliance upon an oral agreement has been deemed insufficient because of a failure to meet the doctrine's strict evidentiary standards (*Maddison v Alderson* (1883) 8 App Cas 467).

The law of fully-secret trusts provides another instance, although the relevant statute here is the *Statute of Wills*,[68] and its modern equivalents. Courts will impose a constructive trust upon those who, though expressed to take absolutely on the face of a will, have nonetheless agreed during the lifetime of a testator to hold that property on behalf of a secret beneficiary.[69] The unconscionability which the courts seek to avoid extends to all those

66 See further below, para [1714].

67 *Regent v Millett* (1976) 133 CLR 679, Gibbs J at 682; *Smallwood v Sheppards* [1895] 2 QB 627.

68 1540 (32 Hen VIII c 1).

69 In *McCormick v Grogan* (1869) LR 4 HL 82 at 97, Lord Westbury said: "My Lords, the jurisdiction which is invoked here by the Appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." When half-secret trusts came to be enforced, the courts could not rely on the prevention of fraud as a rationale for relief, since the person against whom the suit was brought was named as a trustee on the face of the will. Consequently, the courts adopted the rationale that the trust arose (as an express trust) outside the will: *Blackwell v Blackwell* [1929] AC 318; *Re Young* [1951] Ch 344.

who would benefit from the unconscionable conduct of which complaint is made, and can be enforced against executors, or those who would otherwise be entitled to receive the property on the death of the trustee. The obligation attaches to the property concerned. Thus, a secret trust can, in theory, be enforced even after the death of the alleged trustee,[70] and an agreement by a woman to leave a house by will to one couple was enforced against another couple who received a devise of the house in violation of the woman's agreement (*Ottaway v Norman* [1972] Ch 698). In the analogous doctrine of mutual wills, the beneficiaries under a revoked will, which was the subject of a mutual wills agreement, may assert a claim against those who were named as beneficiaries under the new will (*Birmingham v Renfrew* (1937) 57 CLR 666).

A further example of the same principle is that a person who receives a conveyance of property, subject to an oral trust during the lifetime of the person transferring it, will be bound by that trust despite an absence of the necessary statutory formalities. As with the law of fully-secret trusts, a person who has gained a benefit by agreeing to act as a trustee cannot use the absence of writing to deny that trust (*Rochefoucald v Boustead* [1987] 1 Ch 196 (CA)). The line of cases which prevented those who received land under an express oral trust from denying the trust has been a fruitful source of further innovation. Early cases of this kind were simple oral trusts in which land was taken absolutely for a beneficiary.[71] Later, cases were decided in reliance upon the same principle where property was conveyed to a person subject to some lesser obligation to hold it for another. For example, in *Bannister v Bannister* [1948] 2 All ER 133, the defendant sold land to the plaintiff at below the market value on the faith of an undertaking that she should be able to remain in a cottage on the land for as long as she wished. Scott LJ (at 136) said that: "It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another." In *Last v Rosenfeld* [1972] 2 NSWLR 923, the same principle was applied to give effect to an oral agreement which did not form part of a contract for the sale of land, where two joint tenants sold their half of an investment property to the other joint tenants on condition that it should be reconveyed if the purchasers did not live in the house within 12 months.[72] The line of cases has been further extended to

70 *Re Snowden* [1979] Ch 528.

71 *Hutchins v Lee* (1737) 1 Atk 447; 26 ER 284 (Ch); *Childers v Childers* (1857) 1 De G & J 482; 44 ER 810 (Ch); *Re Duke of Marlborough; Davis v Whitehead* [1894] 2 Ch 133.

72 Since the land had been sold to a third party, and a reconveyance was therefore not possible, a monetary order was made.

provide a rationale for relief where one party purchases a house subject to a common intention that it should be owned jointly with a de facto partner.[73]

[211] Another circumstance in which an unconscionable denial of obligations may be precluded arises from the application of the doctrine of estoppel.[74] The law of estoppel is not confined to an unconscionable insistence upon rights. Cases of proprietary estoppel have long been instances of the courts' willingness to restrain an unconscionable insistence upon absolute legal title where one party has led another to believe that a certain proprietary right either had been granted, or would be as a matter of formality.[75] Such situations may arise where one party encourages another to build upon its land, and the other reasonably relies upon this encouragement (*Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC)).

An unconscionable denial of obligations may also arise where one party relies upon the absence of a binding contract to deny that it has obligations to another. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, the High Court decided that the operation of equitable estoppel is not confined to cases where a person insists unconscionably upon contractual or proprietary rights, but, in the words of Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 at 547, has a broad application to "prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment". This opened the way for the possibility that an estoppel might arise as a result of pre-contractual negotiations and in the absence of a binding contract, as was the situation in *Waltons'* case. In disputes between well-advised commercial enterprises, an estoppel is unlikely to arise from pre-contractual negotiations.[76] The law of estoppel does, however, provide a further weapon in the armoury of the court which wishes to take action against unconscientious conduct.

73 *Allen v Snyder* [1977] 2 NSWLR 685, Glass JA at 692-693; *Thwaites v Ryan* [1984] VR 65.

74 See below, Chapter 7: "Estoppel".

75 *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 (Ch); *Crabb v Arun District Council* [1976] Ch 179 (CA). See further below, paras [711]-[712].

76 See, for example, the rejection of the claim of estoppel in *Austotel v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA) (property developer not estopped from denying a binding agreement since essential terms not agreed, despite plaintiff's detriment), and the earlier Privy Council decision in *Attorney-General (Hong Kong) v Humphrey's Estate (Queen's Gardens) Ltd* [1987] AC 114 (agreement "in principle" not binding since defendants did not create or encourage a belief they would not withdraw, despite plaintiff's expenditure and detriment). See further below, para [727].

The unjust retention of property

[212] A final form of unconscionability arises where a person seeks to retain property in circumstances in which it was not intended that he or she should have the benefit of it. The constructive trust imposed to prevent an unjust retention of benefits on the breakdown of a joint endeavour is an example of this principle. This form of constructive trust was developed by the High Court in *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137. Here, the intervention of the court is motivated, not by the restraint of unconscionable conduct, but by a concern to avoid unjust outcomes.[77] In this context, it is seen to be unjust for one party to a relationship to retain a greater share of the property than is merited by the parties' respective contributions where a de facto relationship or other joint endeavour breaks down. The unconscionable conduct of the defendant lies in seeking to retain a benefit which ought, in conscience, to be shared with the other. There is a close relationship between this form of constructive trust and the principle of unjust enrichment, which has guided the courts in Canada since the landmark decision of *Pettkus v Becker* (1980) 117 DLR (3d) 257. The parallel was drawn in *Baumgartner v Baumgartner* by Toohey J, (1987) 164 CLR 137 at 153 who suggested that "the notion of unjust enrichment … is as much at ease with the authorities and is as capable of ready and certain application as is the notion of unconscionable conduct." The requirements given in *Pettkus'* case, of an enrichment and a corresponding deprivation, without juristic reason, more precisely identify the basis for relief in these cases than does the more generalised notion of unconscionability. Confusion only arises, however, if either of them are elevated into self-standing legal principles which may be applied without more precise doctrinal analysis. As explanations for the rationale which underlies a variety of specific doctrines, both are useful. However, they are stated at too great a level of abstraction to be helpful as doctrinal formulae in their own right.[78]

Another example of the principle that equity will preclude the unconscionable retention of a benefit arises where one person

77 See further Parkinson P, "Doing Equity Between de Facto Spouses: From Calverley v Green to Baumgartner" (1988) 11 *Adelaide University Law Review* 370; Dodds J, "The New Constructive Trust: An Analysis of its Nature and Scope" (1988) 16 *Melbourne University Law Review* 482.

78 An analysis of the problems inherent in a broad "unjust enrichment" approach is made in Parkinson P, "Beyond Pettkus v Becker: Quantifying Relief for Unjust Enrichment" (1993) 43 *University of Toronto Law Journal* 217. See also Hayton D, "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 205.

detrimentally relies upon a mistaken belief of ownership, and the mistake is not corrected by the true owner. For example, in *Hamilton v Geraghty* (1901) 1 SR (NSW) (Eq) 81, an estoppel arose to prevent a landowner retaining the benefit of a house which was built upon her property. A firm of builders had built the house on the wrong piece of land, and, although the owner was not responsible for the initial mistake being made, she stood by and allowed them to continue building after discovering the mistake. The builders gained a charge over the land for its value.

A final example of the same principle comes from the law of subrogation by which an insurance company is able to gain the benefit of a damages award received by the insured from a wrongdoer. In *Lord Napier and Ettrick v Hunter* [1993] AC 713 at 738, Lord Templeman explained the rationale for the doctrine as follows:

> "[A]n insurer has an enforceable equitable interest in the damages payable by the wrongdoer. The insured person is guilty of unconscionable conduct if he does not provide for the insurer to be recouped out of the damages awarded against the wrongdoer. Equity will not allow the insured person to insist on his legal rights to all the damages awarded against the wrongdoer and will restrain the insured person from receiving or dealing with those damages so far as they are required to recoup the insurer."

Thus it is unconscionable for an insured person to retain the benefit of a damages award having been reimbursed by the insurance company on the basis of the contract of insurance.[79]

THE CENTRAL THEMES OF UNCONSCIONABILITY

[213] At the heart of all the different applications of the conscience of equity, there are two central concerns. The first is the protection of the vulnerable. The second is the protection of people's reasonable expectations. Paul Finn[80] has drawn attention to the fact that, in these two central themes, there are parallels to be drawn with the operation of tort and contract. Equity curtails the pursuit of self-interest by imposing a duty in some situations to have regard to the interests of the vulnerable which may be

79 See also *Cochrane v Cochrane* (1985) 3 NSWLR 403 at 405.

80 Finn P, "Unconscionable Conduct" (1994) 8 *Journal of Contract Law* 37.

likened in some respects to a duty of care owed towards them. Equity also protects people's expectations in circumstances where there is no contract which can be enforced. He writes that "the place where the lawyer looks to find unconscionable conduct, not surprisingly, is in that region just beyond the boundaries of contract and tort".[81]

[214] Courts of equity have long exercised a role in protecting those who, for one reason or another, are incapable of conserving their own interests. This is especially so in relieving people from transactions which were not to their advantage. It is an ancient principle that "the Chancery mends no man's bargain" (*Maynard v Mosely* (1676) 3 Swans 651; 36 ER 1009 (Ch), Lord Nottingham at 655).[82] Nor have courts exercising equitable jurisdiction generally seen fit to set aside gifts, conveyances or settlements merely because they were improvident at the time of their making, or have proved to be so in the light of subsequent events.[83] Rather, the concern of equity has been that contracts and other transactions should have been freely entered into by a person of independent will and proper capacity, and that they should not be procured through unfair means such as fraud or duress. Equitable doctrines and statutory provisions which relieve against exploitation are a necessary corollary to the principle of freedom of contract, for the judicial enforcement of contractual obligations can only be justified morally if the law provides safeguards to ensure one party to the contract does not take an unfair advantage of the weakness of another.

[215] The second major theme of unconscionability is the concern of equity to protect the reasonable expectations of the parties. The language of "reasonable expectations" has not surfaced much in Australian judgments in this area, in contrast, particularly, with New Zealand[84] and Canada.[85] The concept should, however, be

81 Finn P, "Unconscionable Conduct" (1994) 8 *Journal of Contract Law* 37 at 39.

82 For similar statements, see *Brusewitz v Brown* [1923] NZLR 1106 (SC), Salmond J at 1109; *Bridge v Campbell Discount Co Ltd* [1962] AC 600, Lord Radcliffe at 626.

83 But see the High Court's surprising decision, by a bare majority, in *Bridgewater v Leahy* (1998) 194 CLR 457.

84 *Gillies v Keogh* (1989) 2 NZLR 327 (CA), Cooke P at 330-331.

85 The notion of reasonable expectations has been the touchstone of judicial intervention in the law of unjust enrichment in Canada. In formulating the principles of unjust enrichment in *Pettkus v Becker* (1980) 117 DLR (3d) 257 (SC), Dickson J at 274 used "reasonable expectations" as the test of whether there was an absence of juristic reason for an enrichment. The notion of reasonable expectations that one party should not act contrary to the interests of another was also invoked by La Forest J in *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SC) as a means of deciding whether fiduciary obligations should be imposed in a given case. He did not carry a majority of the court with him on this interpretation of fiduciary obligation.

familiar to Australian courts. The basis of promissory estoppel is the reasonable expectation on which reliance has been placed, that a promise will be kept. The protection of reasonable expectations, which have been relied upon, may indeed be identified as an underlying rationale of estoppel generally, now that the specific categorisation of estoppels is being abandoned.[86] In particular, the fulfilment of "reasonable expectations" has been identified as the basis upon which a duty to speak arises to prevent an estoppel arising from acquiescence of silence.[87] The concept of reasonable expectations was also used in *Stern v McArthur* (1988) 165 CLR 489 by Deane and Dawson JJ as an additional justification for relieving against forfeiture in a case where purchasers defaulted in payments for land under an instalment contract. They commented that the purchasers had "a reasonable expectation of benefiting from any increase in the value of the land with the passage of time" (at 529). Thus relief was justified even in the absence of unconscionable conduct on the part of the vendors.

The protection of people from the violation of their "reasonable expectations" provides a standard which may explain the application of a number of doctrines. It is not itself a doctrine of any kind. What those reasonable expectations are will depend upon the relationship which exists between the parties.

Reasonable expectations generally are held to arise in the context of contractual relationships. As Steyn LJ, as he then was, said in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 196:

> "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or principle of law. It is the objective which has been and still is the principal moulding force of our law of contract — if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness."

86 See below, Chapter 7: "Estoppel". For an important historical perspective on these developments, see Baker J, "From Sanctity of Contract to Reasonable Expectation?" (1979) 32 *Current Legal Problems* 17 at 29 ("[p]romissory estoppel is a means of bringing about reasonable expectations; and, far from being a post-war aberration, it enjoyed its finest hours in the Victorian House of Lords"). Baker also identifies the reasonable expectation that a contract will not operate unfairly as an underlying theme in consumer protection legislation.

87 *Trenorden v Martin* [1934] SASR 340 (FC), Angas Parsons J (for the Court) at 344, citing Cababe M, *The Principles of Estoppel* (Maxwell, London, 1886). See below, para [760]. More broadly, the failure to speak when duty-bound to do so has been regarded as a species of fraud. See *Brownlie v Campbell* (1880) 5 App Cas 925, Lord Blackburn at 950.

Outside of fiduciary positions, there is no obligation to act selflessly. However, certain expectations arise from contracts which go beyond the actual contractual terms, and may, in fact, be in contradiction to them. The courts have long upheld the expectation that contractual terms will only be enforced in such a way as to ensure the performance of what was bargained for, or that adequate compensation will be given in lieu. Courts strike down provisions for breach which are harsh or oppressive in nature. This is expressed in the doctrines of relief against penalties and forfeiture, and the discretion to refuse specific performance on grounds of hardship. It is also a reasonable expectation that promises made without fresh consideration, concerning the non-enforcement of strict contractual rights, will be kept, at least until sufficient notice is given of the retraction of the promise. This is expressed in the law of promissory estoppel.

Another expectation which arises between contracting parties is that they will not insist upon the written word (or the absence of written evidence) where this contradicts the agreement which was reached and which was inadequately recorded in writing. Equity allows the rectification of such contracts.[88] A further expectation is that one party to a contract will not insist upon the absence of written evidence to deny a contract where an oral agreement has already been partly performed.

All of these reasonable expectations of the parties exist independently of a contract which is enforceable at law. They rest, not in the agreement of the parties, but in their silent thoughts, in the assumptions that reasonable people have of the way others will behave towards them. In this sense, they represent the assumptions which people consider should not need to be spelt out in writing.

The protection of reasonable expectations is not only a matter of equitable doctrine. In North America especially, these assumptions about reasonable expectations have been expressed in terms that parties to contracts owe an obligation of good faith and fair dealing.[89] This concept is gaining momentum also in Australia, particularly in its application to the exercise of contractual powers

88 See below, Chapter 27: "Rectification".

89 *Uniform Commercial Code* (US), s 1-203 ("[e]very contract or duty within the Act imposes [an] obligation of 'good faith' in its performance or enforcement"; American Law Institute, *The Second Restatement of the Law of Contracts*, s 205 ("[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

to terminate a contract.[90] The New South Wales Court of Appeal indicated in *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [163] that "obligations of good faith and reasonableness will be more readily implied in standard form contracts, particularly if such contracts contain a general power of termination", although the cases where such terms are implied are not limited to standard form agreements. Sir Anthony Mason has argued that the concept of good faith "embraces no less than three related notions: (1) an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself); (2) compliance with honest standards of conduct; and (3) compliance with standards of conduct which are reasonable having regard to the interests of the parties."[91]

Good faith does not require altruism, just reasonableness. As Barrett J said in *Overlook v Foxtel* [2002] NSWSC 17 at [67]:

> "the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary … The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms."

Reasonable expectations of fair dealing may arise even in the absence of a contractual relationship. In certain situations, there may be a reasonable expectation that certain information should be disclosed by a party to a transaction which would otherwise be entitled to protect its own interests.[92] Such a situation arises,

90 The origins of this development lie in the judgment of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. See also *Hughes Bros Pty Ltd v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, Finn J at 192: "Fair Dealing is a major (if not openly articulated) organising idea in Australian law — [it] expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts."; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR 41-703; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187. See generally Peden E, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 *Sydney Law Review* 222 (Peden argues that the requirement of good faith is better seen as a rule of construction of contractual terms); Baron A, "'Good Faith' and Construction Contracts — From Small Acorns Large Oaks Grow" (2002) 22 *Australian Bar Review* 55.

91 Mason A, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 *Law Quarterly Review* 66 at 69.

92 In the United States, a duty to disclose in negotiations for a business transaction has been seen as an aspect of the law of tort, where the other party "would reasonably expect" such disclosure: see American Law Institute, *The Second Restatement of the Law of Torts*, s 551(2)(e).

not uncommonly, in cases of guarantees taken by banks.[93] It can arise also in other situations where one party has a strong informational advantage over another. The reasonable expectation that certain information will be disclosed is translated only with difficulty into specific legal doctrine. At times, resort has been made to fiduciary law.[94] At other times, refuge is taken in the doctrine of unconscionable dealing,[95] or in a general duty between creditors and guarantors.[96]

CONCLUSION

[216] The notion of unconscionability cannot be reduced to a single principle or doctrine, which, without more, explains or justifies the result in a given case. Its meanings are revealed by reference to the different types of unconscionable conduct discussed. It is as meaningful to refer to a principle of "unconscionability" in the courts' decisions as it is to refer to a principle of "fairness" or "justice". Naturally, the courts wish to restrain unconscionable conduct and unjust outcomes. The ongoing task of the courts is to define with particularity those actions and claims which will be regarded as "unconscionable".

The observation that the courts still need to particularise the meaning of unconscionability, and to explain it through specific doctrines, runs counter to a modern trend towards ever greater abstraction. Judges[97] and commentators,[98] impatient with the plethora of specific doctrines which define particular forms of unfair dealing, are inclined to look for "underlying principles", of which specific doctrines are mere illustrations. Such analysis is

93 See , for example, the disclosure requirements imposed upon banks in *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021.

94 *Hill v Rose* [1990] VR 129 (compensation equal to amount invested awarded to plaintiff due to proprietor's non-disclosure of parlous financial position and trustee nature of company); *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1985) 22 DLR (4th) 410 (CA Ont). For a discussion of the latter case, see Austin R, "The Corporate Fiduciary: Standard Investments Ltd v Canadian Imperial Bank of Commerce" (1986-87) 12 *Canadian Business Law Journal* 96.

95 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

96 See generally, O'Donovan J and Phillips J, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996).

97 See, for example, Lord Denning MR in *Lloyds Bank v Bundy* [1975] QB 326 (CA); Cooke P in *Gillies v Keogh* (1989) 2 NZLR 327 (CA); La Forest J in *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SC).

98 Gautreau J R M, "Demystifying the Fiduciary Mystique" (1989) 68 *Canadian Bar Review* 1; Stevens D, "Restitution, Property and the Cause of Action in Unjust Enrichment: Getting by With Fewer Things" (1989) 39 *University of Toronto Law Journal (Pt I)* 258, and *(Pt II)* 325; Reiter B and Swan J, *Studies in Contract Law* (Butterworths, Toronto, 1980), p 1.

important in tying in the application of doctrine to its wider purpose, and in revealing links between various disparate legal concepts. At a certain point, however, the process of synthesis and abstraction reaches the place where what is expressed as the principle is, in truth, no principle at all: it is an objective name for subjectivity, a reification of that which is indefinable. Unless more specific definition is made, an unjust enrichment is merely an enrichment which the court considers unjust, a reasonable expectation is an expectation which the court considers reasonable, and unconscionable conduct is conduct which the court considers unconscionable. Professor Julius Stone called these "categories of meaningless reference".[99]

The conscience of equity must not be given a life of its own, independent of the specific doctrines through which it finds expression. Ultimately, of course, judgments about unconscionability will be subjective. In contentious cases, resort cannot be had merely to precedent or to established rules. The questions for appellate courts are not really about resolving conflicting lines of authority, or areas of doubt, within legal doctrines. Contentious cases will turn upon the location of boundaries, on debates about the extent to which courts should intervene in a protective role. There is extensive room for discussion about who should be considered vulnerable for the purposes of the law of unconscionable dealing,[100] about what expectations of good faith and fidelity might be expected in a commercial setting,[101] about when certain obligations to another party might arise from pre-contractual negotiations.[102]

What is clear, however, is that the principles of equity and a variety of statutory provisions combine to ensure that a much greater standard of altruism is required in business and other relations than was the case a hundred years ago. Equity is resurgent. The courts are more vigilant than they once were to

99 Stone J, *The Province and Function of Law* (Associated General Publications, Sydney, 1946), pp 171-174.

100 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621 (HC); *Bridgewater v Leahy* (1998) 194 CLR 457.

101 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (no fiduciary obligations owed by distributor, but liability in contract); *Hunter Engineering Co (Inc) v Syncrude Canada Ltd* (1989) 57 DLR (4th) 321 (SC) (no unjust enrichment where company took interest from trust fund which it set up pending result of a legal dispute); *Atlas Cabinets & Furniture Ltd v National Trust Co* (1990) 68 DLR (4th) 161 (CA BC) ("unjust enrichment" where trust company, which lent money for construction project, foreclosed on mortgage after assuring continuing finance).

102 *Attorney-General (Hong Kong) v Humphrey's Estate (Queen's Gardens) Ltd* [1987] AC 114 (PC); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SC); *Austotel v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA).

restrain unfair dealing, and, if rules are less definable than once they were, predictability in the law may still be assured by a sensitive awareness of the standards which the courts are determined to uphold.

CHAPTER THREE

EQUITY AND PROPERTY

Patrick Parkinson and David Wright

INTRODUCTION

[301] From the earliest days of the development of the Court of Chancery, equitable doctrines and remedies have had a major impact upon the law of property. The law of trusts developed out of the willingness of the Court of Chancery to recognise the "use" as a form of property holding. Equitable doctrines had other applications to the law of property as well. Once it was recognised that there could be proprietary rights in equity, and that this was a form of ownership of property which co-existed with common law title, rules needed to be developed concerning the circumstances in which equitable proprietary rights would be deemed to arise, the relationship between common law and equitable rights in property, and the methods of assigning equitable property. The nature of property in equity, and its relationship to property rights at common law, is the subject of this chapter.

NATURE OF EQUITABLE ESTATES AND INTERESTS

[302] Historically, equity has operated in relation to persons, rather than property. When the Chancellor made orders which had the effect of modifying common law property rights, he did so by making orders against persons with respect to their ownership of property, rather than making orders in respect of the property itself. In *Muschinski v Dodds* (1985) 160 CLR 583, Deane J explained (at 613) this personal effect of equitable obligations in relation to the trust:

> "The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights."

Equity thus recognised the validity of the common law title, but imposed obligations upon the legal owner with respect to that property. The "in personam" nature of equitable rights[1] has given rise to a debate about whether equitable rights should be regarded as proprietary at all. Maitland was of the view that they are purely personal.[2] In relation to trusts, he observed that:

> "Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the cestui que trust."[3]

Certainly, equitable rights are personal in nature. The beneficiaries' rights are against the trustee, and theoretically are not rights in rem, that is, in the property itself. However, it would be incorrect to place too much emphasis in the modern law on the "in personam" nature of equitable rights in relation to property. Equitable title to property is not as secure a title as title which arises from statute or the common law. Equitable rights in relation to property are nonetheless proprietary in nature.

While the maxim that equity acts in personam is less significant than it once was, it still has some current importance. In particular, it is a significant concept for the purpose of deciding jurisdiction in relation to foreign subject matter. Since equity fastens upon the conscience of the person, it is sufficient that the defendant is within the jurisdiction, even though the property, which is the subject matter of the dispute, is not.[4] Thus Mareva

1 For different meanings of the notion that equity acts in personam in relation to property, see Spry I C F, *Principles of Equitable Remedies* (5th ed, Law Book Co, Sydney, 1990), pp 36ff.

2 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), Lectures IX-XI.

3 Brunyate J (ed), *Maitland's Equity* (2nd revd ed, Cambridge University Press, Cambridge, 1936), p 17.

4 In *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132, specific performance of an English agreement concerning the boundaries between Pennsylvania and Maryland was enforced in the English Court of Chancery despite the location of the land concerned. Lord Hardwicke LC said (at 447): "The conscience of the party was bound by this agreement; and being within the jurisdiction of this court ... which acts in personam, the court may properly decree it as an agreement." See also *Richard West & Partners (Inverness) Ltd v Dick* [1969] 1 All ER 943. For a full discussion of the application of the "in personam" maxim regarding foreign land, see generally Nygh P, *Conflicts of Laws in Australia* (6th ed, Butterworths, Sydney, 1995), pp 116-118.

orders, which prohibit an owner from dealing with property pending trial,[5] may have an extra-territorial operation.[6] Similarly, a court of equity may exercise jurisdiction over a trust which was established under the law of another country and the assets of which include property outside the jurisdiction, as long as the trustees themselves are subject to the jurisdiction of the court.[7]

[303] Certain equitable rights may give to their holder a proprietary interest in the property concerned. The personal nature of equitable rights does not mean that for all purposes rights against trustees or executors in relation to property need to be classified as merely personal. They may be so classified for some purposes but not for others. Where a beneficiary has a present entitlement to specific property (or to part or all of the income from a trust fund which may consist of a constantly changing portfolio of assets), the beneficial right may be classified for tax purposes as an interest in the property itself. In *Baker v Archer-Shee* [1927] AC 844, the House of Lords had to decide whether a British resident, who was entitled to the income of a residuary estate during her lifetime, was in receipt of income "arising from foreign securities stocks and shares". The residuary estate consisted of personal property situated outside the United Kingdom, and the trustee was a company based in New York. By a three to two majority, the House of Lords rejected the taxpayer's argument that her income derived from her personal rights against the trustee, rather than from the shares themselves, assuming for the purposes of this holding that New York law was the same as English law in relation to the nature of rights under a trust. Subsequently, the taxpayer was successful in challenging a later assessment, since evidence was given then that New York law did, in fact, differ from English law on this point (*Archer-Shee v Garland* [1931] AC 212).

The decision in *Baker v Archer-Shee* was subjected to some criticism as being contrary to fundamental equitable principles.[8] However the decision recognised, for the purposes of English (and Australian) law, the reality that interests under a fixed trust

5 See below, Chapter 20: "Mareva Injunctions".

6 *National Australia Bank Ltd v Dessau* [1988] VR 521, Brooking J at 527; *Babanaft International Co SA v Bassatne* [1990] 1 Ch 13. See further below, para [2008].

7 *Ewing v Orr Ewing* (1883) 9 App Cas 34; *Chellaram v Chellaram* [1985] Ch 409. However, as *Ewing's* case demonstrates, jurisdiction may be declined if the court of another country is a more appropriate forum.

8 Hanbury H, "A Menace to Equitable Principles" (1928) 44 *Law Quarterly Review* 468; *Livingston v Commissioner of Stamp Duties (Qld)* (1960) 107 CLR 411, Fullagar J at 436, 441-442. The question of whether equitable rights should be regarded as proprietary or merely personal was a factor in the division between the majority and the minority of the High Court in the latter case.

are proprietary in nature and should be treated as interests in the property itself for some purposes. Similarly, in *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90,[9] it was held that a beneficiary of a unit trust had a sufficient interest in the trust property, which was Torrens title land vested in the trustees, to support the entry of a caveat upon the register. To reach this conclusion, Brooking J explicitly found that the beneficiaries of the unit trust had a proprietary interest in all the trust property.

Whether or not an equitable interest is regarded as an interest in property may depend upon whether or not the equitable rights may be said sufficiently to attach to specific property. In *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694, the Privy Council held, on an appeal from the High Court of Australia, that the right of a residuary legatee under an unadministered estate was not a beneficial interest in the real and personal property situated in Queensland which formed part of the assets of that residuary estate. While a majority of the High Court had reached the same result in holding that no tax was owed to the Queensland authorities, the Privy Council differed from the High Court in the reasoning which led to this conclusion. In the High Court, a majority held that the location of the assets which formed part of the residuary estate should be treated as being in the place where the rights against the executors could be enforced, which in that case was New South Wales. The Privy Council held that the residuary legatee had no interest in property in either State, since her rights, as long as the estate was unadministered, were purely personal. The right of a legatee is to compel the due administration of the estate. The Privy Council considered that the right could not be treated as giving rise to an interest in specific property, since, until administration is complete, no one is in a position to say what items of property would need to be realised for the purposes of administration, or what the residue might be.[10]

[304] Equitable rights may be classified as property for some purposes but not for others. This proposition is fundamental to an understanding of equitable interests. The right to compel the proper administration of an estate provides an example of such a right.

9 Applied in *Connell v Bond Corp Pty Ltd* (1992) 8 WAR 352 and *Merifield Cooksey Holdings Pty Ltd v Commissioner of State Taxation (WA)* (1993) 93 ATC 4,153.

10 The decision of the High Court in *Horton v Jones* (1935) 53 CLR 475 must be regarded as inconsistent with *Livingston's* case to the extent that it decided that a contract for the disposition of rights in an unadministered estate, which included real property, had to be in writing as respecting an interest in land. The case concerned the enforceability of an alleged oral contract to leave a will in favour of the plaintiff. Three judges held the contract unenforceable by reason of uncertainty, while three judges held that the contract was unenforceable because it did not comply with the *Statute of Frauds* 1677 (29 Car 11 c 3), even if it were sufficiently certain.

While it was held by the Privy Council in *Livingston's* case[11] that this right did not give a specific interest in property, it was nonetheless a chose in action which was transmissible in the will of the residuary legatee. As *Official Receiver v Schultz* (1990) 170 CLR 306 demonstrates, this right may be treated as property for the purposes of bankruptcy law, so that the fruits of that right will vest in the Official Receiver even though they become certain only after the discharge from bankruptcy. In this case, a woman received a devise of a house (with its contents) in a will while she was still in bankruptcy. A successful family provision claim was made by the husband of the testator and the court ordered that the relevant clause of the will should be treated as if the husband's name were there instead of that of Schultz, the bankrupt. An appeal to the Full Court of the Supreme Court of Queensland resulted in a variation of this order to give the husband a life interest and Schultz a remainder interest in the property. The order of the Full Court was made after Schultz was discharged from bankruptcy. Although the High Court held that the Full Court's order giving Schultz a remainder interest took effect only from the date of judgment, nonetheless it vested in the Official Receiver in Bankruptcy. It was merely the fruit of the chose in action to compel the proper administration of the estate, which had first arisen while Schultz was still in bankruptcy.[12]

[305] The existence of a trust or other fiduciary obligation with respect to property does not necessarily give to the beneficiary an equitable interest in the property. As was noted above, those entitled under an unadministered estate do not have vested equitable interests in specific property before administration is complete because their equitable rights are limited to compelling the proper administration of the estate.[13] So too, the beneficiaries

11 *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694.

12 See also *Re Leigh's Will Trusts* [1970] Ch 277, in which Buckley J held that rights to shares and a debt in an unadministered estate could be left by will specifically, and did not form part of the residuary estate. The testator bequeathed all her shares and "any other interest" which she held in a certain company. At the time of her death, she was entitled to the whole of her late husband's estate, which was then unadministered. She was also the sole administrator of the estate. Her husband's estate included 51 shares in the relevant company and also a debt owed by it. It was held that the shares and debt passed in accordance with the specific bequest since the testator, as sole beneficiary (and administrator) could ensure that the shares were preserved intact.

13 *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694. Although the "beneficiary" of a discretionary trust has no equitable proprietary right until the discretion has been exercised in their favour, in *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 at 718 Robert Walker J suggested that where a trustee of a discretionary trust has, over an extended period of time, paid an amount to a particular "beneficiary" of a discretionary trust, the expectation so created in the "beneficiary" may cast upon the trustee an obligation to give that "beneficiary" the opportunity to persuade the trustee to continue the payment. Young J in *Maciejewski v Telstra Super Pty Ltd* (1998) 44 NSWLR 601 at 605 cited, with approval, this concept.

of a discretionary trust do not have equitable interests in the subject matter of the trust. Since the trustees of a discretionary trust have no duty to make a particular distribution, or indeed any distribution to a specific individual, the rights of the beneficiaries are limited to compelling the trustees to consider whether or not to make a distribution in their favour, and to ensuring the proper administration of the trust.[14] This is true even if the discretionary trust only has one beneficiary (*Re Weir's Settlement Trusts* [1971] Ch 145).

Similarly, charitable trusts, and valid non-charitable purpose trusts,[15] are legal arrangements whereby the property is held by trustees, with no specific beneficiaries having proprietary rights in the subject matter of the trust. The trust is for purposes, not persons. This does not mean that such trusts are practically unenforceable. In the case of charities, the Attorney-General of the jurisdiction in which the trust is situated has enforcement powers in relation to the trust on behalf of the Crown, apart from additional statutory controls on the administration of charities. In the case of non-charitable purpose trusts, those who indirectly benefit from it may be regarded as having standing to enforce the trust (*Re Denley's Trust Deed* [1969] 1 Ch 373).

These examples illustrate the proposition, advanced by Viscount Radcliffe in *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 (at 712), that equity does not always need to recognise a duality of estates with respect to property:

> "A … criticism has occasionally been expressed to the effect that it is incredible … to deny to a residuary legatee all beneficial interest in the assets of an unadministered estate. Where, it is asked, is the beneficial interest in those assets during the period of administration? It is not, ex hypothesi, in the executor: where else can it be but in the residuary legatee? This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a

14 In *Gartside v IRC* [1968] AC 653, the House of Lords held that a beneficiary under a discretionary trust who had died did not have an interest in the property for the relevant taxation legislation to apply. See also *Re Weir's Settlement Trusts* [1971] Ch 145; *Sainsbury v IRC* [1970] Ch 712.

15 There are a variety of exceptions to the rule stated by Sir William Grant MR in *Morice v Bishop of Durham* (1804) 9 Ves 399 (at 404); 32 ER 656, that for a trust to be valid there must be beneficiaries in whose favour the court may decree performance. These exceptions have been regarded as anomalous: *Re Endacott* [1960] Ch 232. However, they have gained increasing acceptance in recent years. See *Re Denley's Trust Deed* [1969] 1 Ch 373; *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* [1985] 1 All ER 155.

> person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines."

Thus it is possible for property to be held subject to a trust or other fiduciary obligations (such as those owed by executors) without creating proprietary rights in beneficiaries. Such obligations may only give rise to personal rights in those to whom the obligations are owed,[16] to compel the fiduciaries to carry out their responsibilities according to law. The classification of an equitable right as proprietary is therefore dependent upon the remedies available in equity to give effect to those rights, in a given category of case.

RECOGNITION OF EQUITABLE INTERESTS IN PROPERTY

[306] Courts exercising equitable jurisdiction recognise equitable interests in property which arise in a variety of different situations. Equitable interests may:[17]

- be expressly created, as when an express trust is created giving beneficial interests in the trust fund, or a partnership is entered into;
- arise from a contract for the sale of property;
- arise if equity gives recognition to the assignment of a legal interest when common law or statutory formalities have not been complied with;

16 See also *Gill v Gill* (1921) 21 SR (NSW) 400 (equitable personal obligation with respect to property). The English decision of *Ottaway v Norman* [1972] Ch 698, in which a testator devised a house to his housekeeper, coupled with an obligation accepted orally to leave it in her will to his son and daughter-in-law, may be explained best as a personal equitable obligation giving the testator's son and daughter-in-law no vested equitable interest prior to the housekeeper's death. However, Brightman J held a secret trust was created.

17 These categories should not be considered to be exhaustive and watertight as they show a great deal of overlap. This is particularly accurate when remedial property is being considered. Remedial property is most commonly found in subrogation, equitable liens and the remedial constructive trust.

- arise by implication of law, as in the case of a resulting trust or vendor's lien;
- arise by operation of law, for example, where the court declares the existence of a constructive trust arising irrespective of intention, or sets aside a disposition of property for fraud.

Thus equitable interests may arise in a great variety of ways. This list is not exhaustive. In particular, courts have been quite willing to find equitable interests to support a caveat in Torrens title land,[18] even though the claimed right would not be regarded, on an orthodox analysis, as an equitable proprietary right.[19]

A brief overview of the different ways in which equitable interests may arise follows.

[307] Equitable interests may be expressly created by the establishment of a trust, a partnership, the creation of security interests in property, or the imposition of a restrictive covenant.[20]

For an express trust to be created, there must be certainty of intention, subject matter and objects.[21] The intention to create a trust is not always to be found in express words. Indeed, the High Court has held that express words indicative of the intention to create a trust will not be effective unless

18 *Municipal District of Concord v Coles* (1905) 23 CLR 96, Griffith CJ at 107. See also *Bulter v Fairclough* (1917) 23 CLR 78 at 91; *Re Caveat of Gamboola Cabonne Phosphates Ltd* (1919) 19 SR (NSW) 227 at 229; *Tooth & Co Ltd v Barker* [1960] NSWR 51. Such equitable interests could be classified as an undefined equity: see Neave M and Weinberg M, "The Nature and Function of Equities" (1978) 6 *University of Tasmania Law Review* 24 and 115.

19 *Trancone v Aliperti* (1994) NSW Conv R 55-703 provides an example. In that case, a solicitor, Aliperti, borrowed money from several people. The loan agreement with each lender contained the following clause: "The Debtor authorises the Creditors to lodge a Caveat on any property owned by the Debtors [sic] to protect his interest." On the strength of this clause, some lenders lodged caveats over land in which Aliperti had an interest. The other owners of this land sought orders for the removal of the caveats on the basis of the lenders having no caveatable interest. The Court of Appeal unanimously rejected this proposition and found that the lenders did have caveatable interests. Section 74F(1) of the *Real Property Act* 1900 (NSW) states that a caveat cannot be entered against land unless the caveator has the relevant proprietary interest in the land. To determine whether the lenders did possess caveatable interests, Mahoney JA cited a principle of construction that: "Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect." On this basis, Mahoney JA found that Aliperti had created some undefined equitable interest in the land which was passed to his creditors. The fact that, if this clause did not create caveatable interests it would be meaningless, and that Aliperti had engaged in deceptive conduct, only strengthened Mahoney JA's decision. Priestley and Meagher JJA agreed with both the reasoning and the conclusion of Mahoney JA. See also *Murphy v Wright* (1992) NSW Conv R 55-652.

20 See Bradbrook A and Neave M, *Easements and Restrictive Covenants in Australia* (2nd ed, Butterworths, Sydney, 2000).

21 *Wright v Arkyns* (1823) Turn & R 143, Lord Eldon at 157; *Knight v Knight* (1840) 3 Beav 148; *Herdegen v FCT* (1988) 84 ALR 271 (Fed Ct); *Walker v Corboy* (1990) 19 NSWLR 382 (CA); *Winterton Constructions v Hambros* (1991) 101 ALR 363 (Fed Ct).

accompanied by the subjective intention to do so.[22] Often the intention to create a trust will be inferred from the conduct of the parties and all the circumstances of the case.[23] The subject matter of a trust can generally be any presently existing legal or equitable property. It is even possible for there to be a trust of a promise, whereby one party to a contract holds the chose in action on trust for a third party who has given no consideration, but who was intended to benefit from that contractual promise.[24] A final requirement for the creation of an express trust is that there must be certainty of objects. A trust must generally be for the benefit of a legal person. If this requirement is not satisfied, then there is a resulting trust in favour of the settlor (*Morice v Bishop of Durham* (1805) 10 Ves 522 (Lord Eldon LC at 543); 32 ER 947). Charitable trusts are exempted from this requirement. Such trusts may be for purposes rather than persons. A few non-charitable purpose trusts have also been upheld, as exceptions to the general rule.[25]

The creation of trusts of land must be "manifested and proved by some writing signed by some person who is able to declare such trust or by his will".[26] However, this writing requirement "does not affect the creation or operation of resulting implied or constructive trusts".[27] Thus equitable interests in property have

22 *Commissioner of Stamp Duties (Qld) v Joliffe* (1920) 28 CLR 178. In this case, a husband opened a bank account as trustee for his wife in order to get around a statutory provision that no person should have more than one savings account with a State bank. The High Court, by a majority, held that the money did not belong to the wife's estate after her death, since the husband intended to remain as beneficial owner.

23 *Cohen v Cohen* (1929) 42 CLR 91; *Vedejs v Public Trustee* [1985] VR 569; see also Parkinson P, "Chaos in the Law of Trusts" (1991) 13 *Sydney Law Review* 227. See also Mason CJ and Dawson J in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 for a novel approach to the test for certainty of intention.

24 *Fletcher v Fletcher* (1844) 4 Hare 67; 67 ER 564; *Trident General v McNiece Bros* (1988) 165 CLR 107. But see *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363 (Fed Ct). In the earlier part of the 20th century, courts were very reluctant to infer a trust of a promise: *Re Webb* [1941] 1 Ch 225, Farwell J at 234; *Re Schebsman* [1944] Ch 83, Lord Greene MR at 84, 89; Parcq LJ at 104.

25 See eg *Re Denley's Trust Deed* [1969] 2 Ch 373; Ford H and Lee W A, *Principles of the Law of Trusts* (2nd ed, Law Book Co, 1990), paras [523]-[531].

26 *Conveyancing Act* 1919 (NSW), s 23C(1)(b); *Property Law Act* 1974 (Qld), s 11(1); *Law of Property Act* 1936 (SA), s 29(1); *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Property Law Act* 1958 (Vic), s 53(1); *Property Law Act* 1969 (WA), s 34(1). This provision overlaps with other provisions regarding interests in land and dispositions of equitable interests, creating certain ambiguities in the interpretation of the existing requirements. See *Adamson v Hayes* (1973) 130 CLR 276; *Secretary, Department of Social Security v James* (1990) 95 ALR 615 (Fed Ct); *Abjornson v Urban Newspapers Pty Ltd* [1989] WAR 191; and the discussion in Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [706]-[708].

27 *Conveyancing Act* 1919 (NSW), s 23C(2); *Property Law Act* 1974 (Qld), s 60(2); *Law of Property Act* 1936 (SA), s 29(2); *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Property Law Act* 1958 (Vic), s 53(2); *Property Law Act* 1969 (WA), s 34(2).

been recognised in equity despite a failure to comply with the requisite formalities where such recognition is necessary to prevent fraud.[28]

[308] Partners have equitable interests in the property of the partnership while the partnership continues.[29] This gives each partner an interest in each asset of the partnership.[30] However, no partner may assert a right to control any particular asset.[31] There has been some debate about the nature of the equitable proprietary right which partners have. The right has frequently been described as an equitable chose in action.[32] However, in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327-328, the High Court described it as a proprietary equitable interest sui generis. The significance of this finding was that the court rejected the argument that a partner's interest is only a mere equity, and it was by way of contrast with a mere equity that the right was described as an equitable interest (at 328). This is also what the High Court concluded in *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446-447, and *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 687-688.[33]

[309] Equitable interests may be expressly created by the creation of security interests in property. While mortgages of land are generally governed by real property legislation and take effect, on registration, as a kind of charge,[34] a mortgage which is

28 *Rochfoucauld v Boustead* [1897] 1 Ch 196; *Bannister v Bannister* [1948] 2 All ER 133. See also *Last v Rosenfeld* [1972] 2 NSWLR 923 (oral contract to repurchase interest in land).

29 A partnership may exist where the parties do not refer to it as a partnership: see *Adam v Newbigging* (1888) 13 App Cas 308, Lord Halsbury at 315. The High Court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 indicated what factors needed to be present in order that a court would find there was a partnership. Frequently a partnership will be called a joint venture. In *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1, a single transaction joint venture was held to be a partnership.

30 *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales Pty Ltd* (1974) 131 CLR 321 at 327. Interestingly, White J in *Chettle v Brown* [1993] 2 Qd R 604 held that such an interest would not support a caveat.

31 *Watson v Ralph* (1982) 148 CLR 646. But see the qualification upon this provided by the Privy Council's decision in *Cameron v Murdoch* (1986) 60 ALJR 280 at 283.

32 *Re Bainbridge* (1878) 8 Ch D 218 at 223; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446-447 and *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 688.

33 See also *Connell v Bond Corp Pty Ltd* (1992) 8 WAR 352, Malcolm CJ at 370, but cf *Chettle v Brown* [1993] 2 Qd R 604.

34 *English, Scottish & Australia Bank v Phillips* (1937) 57 CLR 302 at 321. See also *Real Property Act* 1925 (ACT), s 93(1); *Real Property Act* 1900 (NSW), s 57(1); *Real Property Act* 1861 (Qld), s 60; *Real Property Act* 1886 (SA), s 132 (also NT); *Land Titles Act* 1980 (Tas), s 73; *Transfer of Land Act* 1958 (Vic), s 74(2); *Transfer of Land Act* 1893 (WA), s 106.

unregistered will be treated as an equitable mortgage.[35] The equitable charge, whether fixed or floating, is another kind of security interest which arises from a contractual agreement[36] that property be held by the chargor as security for the debt. The equitable charge may also arise by way of a voluntary transaction.[37] The equitable chargee only has a right to force a sale of the property. With an equitable charge there is no right to foreclosure. The right to foreclosure is a right in regard to a mortgage. Obviously there are important remedial differences between an equitable mortgage and an equitable charge,[38] but whether one or the other has been created is a question of construction of the language used to create the security. There is a debate concerning whether the equitable charge creates a proprietary equitable interest.[39] Everett contends[40] that a charge creates no property interest but only operates as a contractual promise. However, this fails to account for a charge created in a non-consensual way.[41] A similar view to Everett's is given by Tomasic and Bottomley who state[42] that the chargor retains both legal ownership and possession of the charged property, but subject to restrictions on the usual rights of ownership. However, Ford, Austin and Ramsay,[43] after reviewing the authorities supporting two competing theories concerning whether the holder of a floating charge possesses an equitable proprietary interest or not, conclude that the chargee of a floating charge does have an equitable proprietary interest.

35 *J H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546; *Heid v Reliance Finance Pty Ltd* (1983) 154 CLR 326. In addition, the deposit of the duplicate certificate of title with the mortgagee without any writing may constitute a sufficient act of part performance so that there is an enforceable contract to grant a mortgage. Legislation in two states expressly recognise this result: *Real Property Act* 1861 (Qld), s 30 and *Real Property Act* 1886 (SA), s 149.

36 *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, Gibbs CJ at 173ff.

37 For example, *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 419. *Re Roberts; Ex Parte Australian Telecom Employees Credit Union Co-op Ltd v Taylor* (1982) 84 FLR 88 details how an equitable charge may be brought into existence.

38 For discussions of the differences between these securities, see *Swiss Bank Corp Ltd v Lloyds Bank Ltd* [1982] AC 584 at 594-595 and *United Travel Agencies Pty Ltd v Cain* (1990) 20 NSWLR 566 at 569-570.

39 Everett D, *The Nature of Fixed and Floating Charges as Security Devices* (Lawpress, Melbourne, 1988); Gough W J, "The Floating Charge: Traditional Themes and New Directions" in Finn P (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 239.

40 Everett D, *The Nature of Fixed and Floating Charges as Security Devices* (Lawpress, Melbourne, 1988).

41 Such as a charge created by a will.

42 Tomasic R and Bottomley S, *Corporations Law in Australia* (Federation Press, Sydney, 1995), p 528.

43 Ford H, Austin R P and Ramsey, *Ford's Principles of Corporations Law* (10th ed, Butterworths, Sydney, 2001), para [19.320].

[310] Restrictive covenants are other equitable interests which may be expressly created. A restrictive covenant is a right recognised by equity since the middle of the 19th century,[44] created in order to overcome the rigid common law rule that the burden of a covenant cannot be enforced against any person other than the original contracting party.[45] Covenants represent a form of private land-use planning. However such planning has been in decline[46] as the State has taken over the function of planning and each jurisdiction now possesses detailed legislation regulating building, town planning and subdivision. Such legislation co-exists with the law relating to covenants. Covenants, positive or restrictive, may be enforced by the original contracting parties upon the basis of privity of contract. However difficulties are faced by successors-in-title to the original parties attempting to enforce the burden and benefit of the covenant.[47]

At common law in all States except South Australia[48] the benefit of a covenant will pass to a successor-in-title. The estate of the covenantee must be legal (*Rogers v Hosegood* [1900] 2 Ch 388). For the benefit of the covenant to pass in equity to the covenantee's successor-in-title, the covenant must "touch and concern"[49] the covenantee's land and satisfy one of the following methods: express annexation, express assignment or statutory annexation. If these conditions are satisfied then an equitable interest is created and so the benefit of the covenant can pass.

However, it is with the passing of the burden of a covenant that the major role for the creation of an equitable interest in the law of covenants is encountered. At common law, the burden of a covenant does not pass to the covenantor's successor-in-title (*Austerberry v Oldham Corp* (1885) 29 Ch D 750). The burden of a covenant can only pass in equity. For the burden of the covenant to be passed in equity, three prerequisites must be satisfied. The first is that the covenant must be, in substance, negative in nature.[50] The second prerequisite is that the covenant must

44 *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.

45 In New South Wales, positive covenants in favour of the Crown, statutory authorities and councils will bind the covenantee's successors-in-title: *Conveyancing (Covenants) Amendment Act* 1986 (NSW).

46 Butt P, "The Conveyancer" (1995) 69 *Australian Law Journal* 482.

47 This brief discussion will not deal with "schemes of development".

48 South Australia has additional requirements for the passing of the benefit at common law: see Bradbrook A J, MacCallum S V and Moore A P, *Australian Real Property Law* (2nd ed, Law Book Co, Sydney, 1997), para [18.04].

49 "Touch and concern" means that the restrictive covenant affects the nature, mode of user, or value of the relevant land.

50 *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403. It is for this reason that these covenants are known as "restrictive" covenants.

relate to the land of the covenantee,[51] while the third pre-requisite is that the original parties to the covenant must have intended that the burden should run with the land.[52] The Torrens legislation in New South Wales, Victoria, Tasmania and Western Australia permits the notification of restrictive covenants on the certificate of title of the burdened land.[53]

[311] Contracts for the purchase of an interest in property will give rise to an equitable interest in that property. Thus once a contract is made for the disposition of land, it gives to the purchaser an estate contract in the land, and, to the extent that the purchaser has a beneficial interest in the property prior to conveyance, the vendor is regarded as holding the property on constructive trust for the purchaser,[54] based upon the enforceability of that contract in equity. Thus an agreement for a lease, supported by consideration, gives rise to an equitable lease (*Chan v Cresdon Pty Ltd* (1989) 168 CLR 242). Similarly, a contract for the transfer of a remainder interest in shares makes the vendor a trustee for the purchaser of that interest.[55]

The creation of an equitable interest in property arising from the contract and prior to the transfer or conveyance of that property is founded upon the availability of specific performance. If specific performance of the contract will be granted,[56] then the property is treated in equity as if it already belonged to the party in whose favour specific performance would be ordered. On this

51 *London CC v Allen* [1914] 3 KB 642. But see s 88E of the *Conveyancing Act* 1919 (NSW) for an exception to this requirement.

52 Legislation in all jurisdictions, save the Australian Capital Territory, the Northern Territory and South Australia, now provides that a covenant relating to land shall, unless a contrary intention is expressed, be deemed to be made by the covenantor who enters the covenant for all parties deriving title from that original covenantor; *Conveyancing Act* 1919 (NSW), s 70A; *Property Law Act* 1974 (Qld), s 53; *Conveyancing and Law of Property Act* 1884 (Tas), s 71A; *Property Law Act* 1958 (Vic), s 79 and *Property Law Act* 1969 (WA), s 48.

53 *Conveyancing Act* 1919 (NSW), s 88(3)(a); *Land Titles Act* 1980 (Tas), ss 102-104; *Transfer of Land Act* 1958 (Vic), s 88; *Transfer of Land Act* 1893 (WA), s 129A.

54 *Brown v Heffer* (1967) 116 CLR 344; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600. *Central Trust & Safe Deposit Co v Snider* [1916] 1 AC 266, Lord Parker at 272: The beneficial interest of the purchaser "is in every case commensurate only with what would be decreed to him by a court of equity in specifically performing the contract, and could only be defined by reference to the relief which the court would give by way of specific performance". See also *Re CM Group Pty Ltd's Caveat* [1986] 1 Qd R 381 (contract for purchase of land was not equitable interest where Council approval required).

55 *Oughtred v Inland Revenue Commission* [1960] AC 206, Lords Radcliffe and Cohen (dissenting). The majority in this case decided it on an interpretation of the stamp duty legislation. See further below, paras [1331]-[1332].

56 As an equitable remedy, specific performance is discretionary: see below, Chapter 17 "Specific Performance". The court may decline specific performance because, for example, the tenant has entered into possession pursuant to the agreement but has breached one of its terms: *Swain v Ayres* (1888) 21 QBD 289. In such a situation, there will be no equitable interest.

basis, an estate contract may be treated as property which is assignable and transmissible by will.

It is not absolutely necessary that specific performance is available to the plaintiff at the time of hearing. In *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 712, it was held that although it was not possible for the court to order specific performance as the land had already been transferred to another party, it was sufficient to show that an order for specific performance would be available to the plaintiff at the time when the defendant entered into the contract with the third party. Therefore the defendant could be treated as a trustee of the property for the plaintiff and so the defendant was required to account for the dealing with the trust property in breach of trust.

The importance of specific performance as a precondition for the recognition of an equitable interest in property has not always been recognised in the case law. In particular, there are cases following *Walsh v Lonsdale* (1882) 21 Ch D 9 in which an agreement for a lease has been regarded as equivalent in effect to a legal lease in spite of the unavailability of specific performance.[57] Other authorities maintained that recognition of a lease in equity depended upon the availability of specific performance, so that relief would be denied where the court did not have jurisdiction to grant specific performance in the instant case,[58] or because specific performance could not be ordered because it would require the defendant to breach other covenants in her or his own head-lease (*Warmington v Miller* [1973] 2 All ER 372). In *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, the High Court reaffirmed the position that the recognition of an agreement for a lease as giving rise to an equitable lease is dependent upon the availability of specific performance. Their Honours stated (at 252) two propositions as arising from the case law:

57 *Tottenham Hotspur Football & Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17; *Morris v Montague* (1883) 2 NZLR 418. For a defence of the position that an equitable lease should be treated as having the same qualities as a legal lease, see Gardner S, "Equity, Estate Contracts and the Judicature Acts: *Walsh v Lonsdale* Revisited" (1987) 7 *Oxford Journal of Legal Studies* 60. See also Sparkes P, "*Walsh v Lonsdale*: The Non-Fusion Fallacy" (1988) 8 *Oxford J Legal Studies* 350; Sparkes P, "Backdating Specific Performance" (1989) 10 *Journal of Legal History* 29.

58 *Moore v Dimond* [1929] SASR 274 (reversed on other grounds in *Moore v Dimond* (1929) 43 CLR 105). In this case, the Full Court of the Supreme Court of South Australia commented (at 281): "Equity regards as done that which ought to be done but it does not jump to conclusions." Most States in Australia have conferred the jurisdiction to award specific performance upon intermediate courts: *District Court Act* 1973 (NSW), s 134; *District Courts Act* 1967 (Qld), ss 68 and 69; *District Court Act* 1991 (SA), s 8; *County Court Act* 1958 (Vic), s 37 and *District Court of Western Australia Act* 1969 (WA), s 50. Some lower courts have been invested with jurisdiction to grant awards of specific performance: *Magistrates Court Act* 1991 (SA), ss 8 and 30; *Magistrates Court (Civil Division) Act* 1992 (Tas), ss 9 and 10 and *Magistrates Court Act* 1989 (Vic), s 100.

> "First, the court's willingness to treat the agreement as a lease in equity, on the footing that equity regards as done what ought to be done and equity looks to the intent rather than the form, rests upon the specific enforceability of the agreement. Secondly, an agreement for a lease will be treated by a court administering equity as an equitable lease for the term agreed upon and, as between the parties, as the equivalent of a lease at law, though the lessee does not have a lease at law in the sense of having a legal interest in the term."

As this example demonstrates, the creation of an equitable interest may depend on the availability of an equitable remedy. There is thus an interrelationship between equitable remedies and equitable interests. This interrelationship was acknowledged by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 and by Browne-Wilkinson J in *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548 at 565. However, it is possible for equitable rights to surpass their generative remedy.[59]

Entitlements to future property may similarly be treated as property in equity where there is a contract to assign the property to another.[60] A purported assignment of future property will be treated as an agreement to assign it. In *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J explained (at 24) equity's approach to future property:

> "[I]n equity a would-be present assignment of something to be acquired in the future is, when made for value, construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. The purported assignee thus gets an equitable interest in the property immediately the legal ownership of it is acquired by the assignor, assuming it to have been sufficiently described to be then identifiable. The prospective interest of the assignee is in the meantime protected by equity."

Whereas the recognition in equity of leases has been held to be founded upon the availability of specific performance, such a requirement has been discounted in regard to assignments of

59 See *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216. In that case, the executor of a will sought a declaration as to whether the beneficiary of the will was disentitled from his rights under the will because, as a felon, he was denied the capacity to institute proceedings. The argument was that, as the beneficiary was incapable of pursuing equitable remedies, no equitable property existed. Kearney J rejected this argument on the basis that enforceability was only an incident of equitable interests and not a prerequisite to the existence of such interests.

60 See below, Chapter 13: "Equitable Assignments".

future property. In *Holroyd v Marshall* (1862) 10 HLC 191 (at 211); 11 ER 999, Lord Westbury LC had emphasised that equity's recognition of the assignment of future property was dependent on the contract being "one of that class of which a Court of Equity would decree the specific performance". However, in *Tailby v Official Receiver* (1888) 13 App Cas 523, the House of Lords took a different view. Lord Macnaghten said (at 547) that it would cause great confusion to transfer considerations applicable to suits for specific performance, "involving as they do, some of the nicest distinctions and most difficult questions that come before the court", to cases of equitable assignment, where nothing more is required of the court than to protect the rights which have been completely defined as between the parties to the contract.[61]

Thus while the requirement of the availability of specific performance is significant in relation to executory contracts for the disposition of an interest in property or for a lease, the same requirement does not apply where the consideration for an assignment has passed and the court needs only to declare interests in the property. In such a case, equity treats as done what ought to be done.[62]

[312] Equitable interests in property may also be created where equity gives effect to assignments which do not comply with the formalities for assignment at law.[63] This occurs with respect to purported assignments for value, which are treated as if they were agreements to assign and thus given effect in equity, since equity treats as done what ought to be done.

A purported voluntary assignment will also give rise to an equitable interest in the subject property if, though failing to meet the requirements at law for the transfer of a legal interest, the donor has done everything which, according to the nature of the property, is necessary to vest the legal title in the intended donee. This principle, derived from *Milroy v Lord* (1862) 4 De GF & J 264; 45 ER 1185, was given a number of different interpretations by the High Court in *Anning v Anning* (1907) 4 CLR 1049. The question was whether it was necessary for all the requirements of a legal assignment to be fulfilled, or for the

61 See further below, para [1369]. See also *Re Lind* [1915] 2 Ch 345 (effect of bankruptcy on assignment of an expectancy of an interest under mother's estate: immediate equitable charge created by agreement concerning future property); *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1, Latham CJ at 16; Dixon J at 26-27; *Booth v Federal Commissioner of Taxation* (1987) 164 CLR 159, Mason CJ at 165; *Re Puntoriero* (1991) 104 ALR 523.

62 See further Keeler J, "Some Reflections on Holroyd v Marshall" (1969) 3 *Adelaide Law Review* 360.

63 See further below, Chapter 13: "Equitable Assignments".

donor to do all that was within the donor's power to do, or whether the word "necessary" merely meant necessary to be done by the donor personally. This last was the view of Griffith CJ in *Anning v Anning* who said (at 1057) that "a gift would be complete on execution of the instrument of transfer and delivery of it to the donee". On this view, it is enough that the donor does all those acts which only the donor is able to do, leaving the registration of the transfer to the donee. This debate appears to have been settled by *Corin v Patton* (1990) 169 CLR 540[64] in which a majority of the High Court endorsed Griffith CJ's view, in the context of a case concerning Torrens title land (see further below, para [1315]).

[313] Equitable interests may also arise by implication of law. A resulting trust arises either as a matter of presumed intention[65] or otherwise where there is a gap in the beneficial ownership of the property.[66] The intention to retain a beneficial interest in property will be presumed where one person buys property in the name of another or contributes part of the purchase price,[67] unless evidence of the contrary intention is shown[68] or the presumption of advancement operates.[69] If a resulting trust is held to arise, then the legal titleholder is presumed to hold the property on trust for the purchasers in the proportions which

64 The reason that it *appears* to be settled is that the comments of the judges concerning assignments were strictly obiter dicta.

65 Sometimes resulting trusts are described as implied trusts, reflecting their operation as arising from the implied intentions of the settlor. See Meagher R P and Gummow W M C, *Jacob's Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), Ch 12.

66 In *Re Vandervell's Trusts* [1974] Ch 269, Megarry J at 289 classified these as "automatic" resulting trusts. However, in the very important decision of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961 Lord Browne-Wilkinson questioned this division and recommended (at 991) the adoption of a different division. Likewise, Rickett in "The Classification of Trusts" (1999) 18 *NZULR* 305 at 316 has suggested that the title "resulting trust" should be replaced by the phrase "presumed trusts". The other importance of *Westdeutsche* is that it maintained a very limited role for the resulting trust by explicitly rejecting the call made by Birks in "Restitution and Resulting Trusts" in Goldstein (ed), *Equity: Contemporary Legal Developments* (1992) for a greater role for the resulting trust.

67 In *Dyer v Dyer* (1788) 2 Cox 92 at 93; 30 ER 42, Eyre CB expressed the rule as being that "the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether joint or successive, results to the man who advances the purchase money".

68 As in *Russell v Scott* (1936) 55 CLR 440.

69 The presumption of advancement is where property is transferred from one person to another person and they are in a certain relationship. These relationships include parent to child (*Dullow v Dullow* (1985) 3 NSWLR 531) and husband to wife but, according to older authorities, not wife to husband (*March v March* (1945) 62 WN (NSW) 111). The list of relationships that attract the presumption is not closed: *Wirth v Wirth* (1956) 98 CLR 228, Dixon J at 238; McTiernan J at 241; and Taylor J at 248. For a discussion of the presumption of advancement in the modern law, see *Calverley v Green* (1984) 155 CLR 242.

reflect their contributions to the purchase price (*Calverley v Green* (1984) 155 CLR 242). Where part of the purchase money is borrowed on a mortgage, those liable under the mortgage are treated as contributing the borrowed money equally (*Calverley v Green*). Contributions to incidental costs or disbursements will not be considered when the court is decreeing a resulting trust (*Little v Little* (1988) 15 NSWLR 42).

A resulting trust will also arise where there is a failure to dispose of the entire beneficial interest. Thus where an express trust fails for uncertainty, or for any other reason, the beneficial interest will "result" to the settlor, and the trustees will hold the property on a resulting trust. This will also occur where money is given for a purpose and a surplus remains after fulfilment of that purpose. The donors will be entitled to the return of a rateable proportion of their gift,[70] unless they may be regarded as having given the money outright, in which case the property will pass as vacant property (bona vacantia) to the Crown.[71]

Equitable liens are other examples of where equity implies a proprietary interest.[72] There are several situations which give rise to an equitable lien. A vendor of land who has parted with the legal title has a lien over the land to the extent of the purchase money which remains unpaid. This lien arises by implication of law, and gives rise to the same equitable rights as an equitable charge.[73] There is also the purchaser's lien.[74] Purchasers have equitable liens for their deposits. For example, where a deposit has been paid, but before title to the property is transferred, the contract is lawfully terminated, the purchaser possesses an equitable lien on the vendor's interest in the property. The extent of the lien is determined by the size of the deposit and any interest payable upon it (*Lee-Parker v Izzet* [1971] 3 All ER 1099 at

70 *Re British Red Cross Balkan Fund* [1914] 2 Ch 419; *Re Gillingham Bus Disaster Fund* [1958] 1 Ch 300.

71 *Re West Sussex Constabulary's Widows, Children & Benevolent Fund Trusts* [1971] Ch 1; *Cunnack v Edwards* [1896] 2 Ch 679.

72 This area shows why the categories of the creation of equitable interests in property are not watertight. In *Giumelli v Giumelli* (1999) 196 CLR 101 the High Court had to examine a situation where a lower court had imposed a constructive trust. In refusing to award a constructive trust, rather selecting to order an equitable lien instead, the High Court recognised that the equitable lien constituted a limited and special form of constructive trust.

73 *Heid v Reliance Finance Corp* (1983) 154 CLR 326; *Hewett v Court* (1983) 149 CLR 639; Sykes E I, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), pp 199-206. Isaacs J has suggested that this vendor's lien arises on the exchange of contracts (*Davies v Littlejohn* (1923) 34 CLR 174 at 185), however Rich J has indicated that this arises from when the contract should have been completed (*Wossidlo v Catt* (1934) 52 CLR 301 at 307-308).

74 *Rose v Watson* (1864) 10 HCL 672; 11 ER 1187. A claim for a purchaser's lien has been found sufficient to support a caveat: *Ex parte Lord* [1985] 2 Qd R 198.

1106). An equitable lien has also been held to arise where a purchaser paid for a prefabricated property by instalments and the builder became insolvent (*Hewett v Court* (1983) 149 CLR 639). Where an insurer pays the insured as a result of a claim on an insurance policy, the doctrine of subrogation[75] confers on the insurer a proprietary equitable interest in the form of an equitable lien over any money that the insured may recover from the wrongdoer who caused the original loss (*Lord Napier and Ettrick v Hunter* [1993] AC 713). There are a variety of other liens which are also implied in equity, such as a trustee's lien on trust property for money properly expended in fulfilment of the trustee functions.[76] This lien arises even where the trust is a constructive trust (*Mansard Developments Pty Ltd v Tilley Consultants Pty Ltd* [1982] WAR 161). The trustee's lien is an equitable proprietary interest which has been successfully asserted where companies have gone into liquidation.[77] Another variety of equitable lien is known as the beneficiaries' lien. Where a trustee purchases property partly with her or his own money and partly with trust property, the beneficiary has a lien or charge on the property[78] unless such a charge would generate an inequitable result (*Re Diplock* [1948] Ch 465 at 548).

[314] Equitable interests also arise by operation of law, irrespective of the intentions of the parties concerned, to preclude an unjust enrichment, or where otherwise it is unconscionable for the defendant to assert beneficial ownership of the property. The usual means by which this is achieved is by the imposition of a constructive trust, particularly with the explicit recognition of the remedial constructive trust by the High Court.[79] The availability of the constructive trust as a remedy is not "at large" (*Muschinski v Dodds* (1985) 160 CLR 583, Deane J at 615). As Gummow J has written in *Re Stephenson Nominees* (1987) 76 ALR 485 (at 506):

75 The House of Lord's decision in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475 also indicated the use of subrogation as an equitable proprietary remedy. This decision is discussed in detail by Wright D, "The Rise Of Non-Consensual Subrogation" (1999) 63 *The Conveyancer and Property Lawyer* 113. Subrogation, the equitable lien and the remedial constructive trust constitute the main part of proprietary remedies, see Wright D, "Proprietary Remedies And The Role of Insolvency" (2000) 23 *University of New South Wales Law Journal* 143.

76 *Stott v Milne* (1884) 25 Ch D 710; *Benett v Wyndham* (1862) 4 De GF & J 259; 45 ER 1183.

77 *Octavo Investments Pty Ltd v Knight* (1979) 54 ALJR 87; *Re Enhill Pty Ltd* [1983] VR 561.

78 *Re Hallett's Estate* (1880) 13 Ch D 696; *Re Diplock* [1948] Ch 465.

79 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 and *Giumelli v Giumelli* (1999) 196 CLR 101. For the recognition and application of the remedial constructive trust in New Zealand, see *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171. See further below, Chapter 21: "Constructive Trusts".

> "[I]n Australia relief by way of constructive trust will only properly be available if the applicable principles of equity require that the person in whom the ownership of property is vested should hold it for the use or benefit of the person asserting the existence of the trust. General notions of fairness and justice may be relevant, but in the context of the traditional equitable notion of unconscionable conduct which influences many fundamental doctrines of modern equity."

Constructive trusts are imposed in such diverse circumstances as:

- where there has been a breach of fiduciary obligations;
- when property is obtained by fraudulent conduct;[80]
- when a fiduciary renews a lease for her or his own benefit;[81]
- from a contract to make mutual wills;[82]
- if there has been a failed joint venture;[83]
- from a breach of confidence;[84] and
- from the unconscionable retention of a benefit.[85]

This is not an exhaustive list of when a constructive trust may arise, particularly as the High Court has recognised that the constructive trust can be ordered as a remedy.[86] While the prevention of unjust enrichment is a major purpose for the imposition of a constructive trust,[87] it is not the only basis upon which it may be imposed. It is difficult to offer an all-embracing definition of a constructive trust, since the trust which arises from a contract for the sale of property between vendor and purchaser has been classified traditionally as a constructive trust, yet is not explicable either in terms of unjust enrichment or unconscionability. This trust arises from the operation of equitable principles concerning the enforcement of executory contracts. The constructive trust also operates beyond the scope

80 Such as property acquired by the use of undue influence.

81 *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223; *Chan v Zacharia* (1984) 154 CLR 178.

82 *Birmingham v Renfrew* (1937) 57 CLR 666.

83 *Muschinski v Dodds* (1985) 160 CLR 583.

84 *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

85 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

86 *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 and *Giumelli v Giumelli* (1999) 196 CLR 101.

87 See further Waters D, *The Constructive Trust* (Athone Press, London, 1964); Elias G, *Explaining Constructive Trusts* (Clarendon Press, Oxford, 1990).

of unjust enrichment as it may be decreed "as a cautionary or deterrent remedy where there has been no unjust enrichment at the expense of the plaintiff".[88]

CHARACTERISTICS OF EQUITABLE ESTATES AND INTERESTS

[315] Equitable estates and interests in property may be regarded as giving rise to the same rights as interests in property at law, subject to four differences.

First, the legal title is vested in another, who owes equitable obligations with respect to that property in favour of the holder of the equitable estate. Thus a sole beneficiary of a fixed trust will be treated by equity as the owner of that property, but legal title will be vested in the trustees, so that where ownership is recorded, as in the case of Torrens title land or shares, it is the trustees who will be registered as the owners. Where the beneficial ownership of property is vested in a beneficiary of full age and legal capacity, he or she is entitled to call for the legal title to the property, in which case the trust comes to an end.[89] The same applies where there are a number of beneficiaries, but all of them are of full age and agree to call for the legal estate (*Gosling v Gosling* (1859) Johns 265; 70 ER 423). For this to operate, all persons having present or contingent interests must agree.[90] The rule has also been applied to the beneficiaries of a discretionary trust in circumstances where all were of full age, the class of beneficiaries was closed, and there was no power to accumulate income from year to year.[91]

88 *Re Stephenson Nominees* (1987) 76 ALR 485, Gummow J at 503. But note should be taken of the limitation placed upon these cautionary or deterrence elements by the High Court's decision in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, which concerned a claim for an account of profits following a breach of fiduciary duty. The High Court indicated that where a non-specific asset, such as a business, is acquired in breach of fiduciary duty it may be both inappropriate and inequitable to compel the defaulting fiduciary to account for the whole of the profit and it may be appropriate to allow the fiduciary a percentage of the profits, especially where the profit is the result of the skill, efforts, property and resources of the fiduciary. This introduces other factors for consideration in such situations when the court may consider using the constructive trust as a cautionary or deterrent remedy. Although *Warman* did not involve a constructive trust, it did involve a breach of fiduciary duty and the principles are likely to be applicable to constructive trust cases.

89 This is known as the rule in *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.

90 *Berry v Green* [1938] AC 575, Lord Maugham at 582; *Estate of Lee* (1986) 84 FLR 268.

91 *Sir Moses Montefiore Jewish Home v Howell & Co (No 7) Pty Ltd* [1984] 2 NSWLR 406.

Secondly, although equitable estates may be assigned, given away or left by will, different formalities may be required for the disposition of such interests than for interests at law. Thus dispositions of subsisting equitable interests in property must be in writing and signed by the person disposing of the interest, or in that person's will, or signed by an agent lawfully authorised in writing to do so.[92]

Thirdly, equitable interests are treated differently where interests may be registered. The obvious example of this is Torrens title land. Equitable interests may continue to exist in such a scheme.[93] This is in spite of arguments that sections of the States' and Territories' Torrens legislation denied the existence of equitable interests.[94] Where a prior equitable interest exists, the later registration of another interest will defeat the earlier interest.[95] This general rule is subject to three broad exceptions. These are that:

- the general rule will not apply if the equitable interest holder has lodged a caveat;[96]
- the registered proprietor has engaged in fraud[97] relating to the earlier interest to gain registration; or
- the registered proprietor has created the earlier equitable right (*Bahr v Nicolay (No 2)* (1988) 164 CLR 604).

92 *Conveyancing Act* 1919 (NSW), s 23C(1)(c); *Property Law Act* 1974 (Qld), ss 5, 9 and 11; *Law of Property Act* 1936 (SA), ss 26, 29 and 31; *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2) and (5); *Property Law Act* 1958 (Vic), ss 53, 55. See further below, Chapter 13: "Equitable Assignments".

93 *Barry v Heider* (1914) 19 CLR 197; *Bulter v Fairclough* (1917) 23 CLR 78. The existence of equitable interests in the Torrens system has not been challenged after these cases; Stein R and Stone M, *Torrens Title* (Butterworths, Sydney, 1991), p 32.

94 *Real Property Act* 1925 (ACT), s 57; *Real Property Act* 1900 (NSW), s 41; *Real Property Act* 1886 (NT), s 67; *Real Property Act* 1861 (Qld), s 43; *Real Property Act* 1886 (SA), s 67; *Land Titles Act* 1980 (Tas), s 49(1); *Transfer of Land Act* 1958 (Vic), s 40(1); *Transfer of Land Act* 1893 (WA), s 58. See Robinson S, *Transfer of Land in Victoria* (Law Book Co, Melbourne, 1979), Chs 5 and 6 for the argument that these unregistered interests are merely contractual or personal rights.

95 This is true even where the later registered interest holder had notice of the existence of the earlier equitable interest. As the doctrine of notice has been abolished with regards to registered Torrens title land, more than mere notice is needed to subject the registered proprietor to the earlier equitable interest: *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491; *Stuart v Kingston* (1924) 34 CLR 394; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

96 Each State and Territory permits the lodging of a caveat: *Real Property Act* 1925 (ACT), s 104; *Real Property Act* 1900 (NSW), s 74F; *Land Title Act* 1994 (Qld), s 124; *Real Property Act* 1886 (SA), s 191 (also NT); *Land Titles Act* 1980 (Tas), s 133; *Transfer of Land Act* 1958 (Vic), s 89; *Transfer of Land Act* 1893 (WA), s 137.

97 See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, Mason CJ and Dawson J at 615 for the proposition that this fraudulent activity may occur before or after registration.

There will frequently be an extremely fine dividing line separating the second and third exceptions.[98]

Fourthly, equitable estates and interests may be lost if the legal estate passes to a bona fide purchaser of the legal estate for value without notice of the equitable interest. The bona fide purchaser doctrine consists of several elements:

- *The legal estate*. The bona fide purchaser doctrine is only applicable where the legal estate passes to the purchaser (*Phillips v Phillips* (1862) 4 De GF & J 208; 45 ER 1015). Where a bona fide purchaser takes only an equitable interest, as where there is an estate contract or an equitable mortgage, the matter is left to the rules concerning priorities (see below, paras [318]-[322]). If the purchaser takes the equitable estate for value and without notice, but before gaining the legal title, the purchaser gains notice and then takes the legal title for value by a separate transaction, that purchaser can defeat the earlier equitable interest.[99]
- *Purchaser for value*. The term "purchaser for value" is not tautological. The key words here are "for value". Equity will not scrutinise the adequacy of the consideration as long as it is not nominal.[100] Marriage has been held to be adequate consideration for these purposes.[101] The marriage referred to must be a future marriage.[102] Consideration stated to be for natural love and affection does not constitute valuable consideration.[103]
- *Bona fide*. The requirement of the purchaser being bona fide is "a separate test which may have to be passed even though absence of notice is proved" (*Midland Bank Trust Co Ltd v Green* [1983] AC 513, Lord Wilberforce at 528). This may become more important as a separate element of the doctrine with the greater emphasis on equity's concern with unconscionability. However, the requirement of the purchaser being bona fide has been generally subsumed by the notice element of this doctrine.
- *Notice*. Notice is the most controversial element of this doctrine. The question arises as to when notice of the earlier equitable interest will prevent the purchaser of the legal title taking free from that earlier interest. Generally legal title to goods passes on the transfer of the

98 Note the dispute in the High Court decision of *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, regarding which exception to apply. See also Tooher J G, "Muddying the Torrens Waters with the Chancellor's Foot? Bahr v Nicolay" (1993) 1 *Australian Property Law Journal* 1.

99 *Taylor v Russell* [1892] AC 244; *Bailey v Barnes* [1894] 1 Ch 25.

100 *Park v Dunn* [1916] NZLR 761.

101 *Jackson v Rowe* (1826) 2 Sim & St 472; 57 ER 427.

102 *Attorney-General v Jacobs Smith* [1895] QB 341.

103 *Goodright v Moses* (1774) 2 Wm Bl 1019; 96 ER 599.

consideration. Sometimes this does not occur and the legal title and consideration move at different times. So conceptually there are three time stages when notice may be received by the purchaser of the legal estate of the existence of an earlier equitable interest. The first stage is before either the consideration or the legal title have been transferred. Clearly the doctrine does not apply and so the purchaser does not take a title free from the earlier equitable title if notice is received during this stage. The third time stage is after both the consideration and the legal title has been transferred. If notice is obtained at this stage, then the doctrine will clearly apply.[104] The intermediate stage is the time between the payment of the consideration but before the transfer of the legal title. The question is, if notice is received in this second stage, whether the purchaser of the legal title acquires a title free of the earlier equitable title. Generally the purchaser who acquires notice during the second time stage will defeat the equitable interest. The exception to this general rule depends on the nature of the earlier equitable interest. If the legal title to be transferred is that which a trustee holds and the equitable interest belongs to the beneficiary of that trust, and notice is received in this second stage, the purchaser takes the legal title subject to the equitable title.[105] If the purchaser pays the consideration and, prior to obtaining the legal title, an equitable interest is created and then the purchaser obtains the legal title, the purchaser takes free of this equitable interest.[106]

A second question is of the three varieties of notice[107] that are relevant to the doctrine of bona fide purchaser for value without notice. The first of these is actual notice. Obviously this will constitute sufficient notice. However, the question remains: what is it the purchaser must have received notice of? Notice of the facts will suffice, even if this notice was obtained from a third party to the transaction.[108] However, a person does not necessarily have notice of facts which they became aware of in a transaction preceding the relevant transaction (*Brennan v Pitt Son & Badgery* (1899) 20 NSWR (Eq) 179, Simpson CJ in Eq at 184). Rumours have been held not to constitute notice of facts.[109] The second variety of notice is constructive notice, which is such

104 *Pilcher v Rawlins* (1872) LR 7 Ch App 259; *Newman v Newman* (1885) 28 Ch D 674.

105 *Mumford v Stohwasser* (1874) LR 18 Eq 556; *Taylor v Russell* [1892] AC 244; *Bailey v Barnes* [1894] 1 Ch 25.

106 As the purchaser has an earlier equitable interest, this would seem to be simply a straightforward application of the priority rules.

107 *Conveyancing Act* 1919 (NSW), s 164; *Property Law Act* 1974 (Qld), s 256; *Law of Property Act* 1936 (SA), s 117; *Conveyancing and Law of Property Act* 1884 (Tas), s 5; *Property Law Act* 1958 (Vic), s 199.

108 *Lloyd v Banks* (1868) 3 Ch App 488. But see *Williamson v Bors* (1900) 21 NSWLR (Eq) 302.

109 *Reeves v Pope* [1914] 2 KB 284; *Williamson v Bors* (1900) 21 NSWLR (Eq) 302.

notice as the purchaser would have received either had due inquiries been made or the normal inquiries conducted.[110] What are the normal inquiries that a purchaser should undertake? The answer to that depends on the type of property that constitutes the subject matter of the transaction. Generally there is a duty to inspect the property and a duty to inspect the title documents (for example, see *Barnhart v Greenshields* (1853) 9 Moo PC 18; 14 ER 204). Numerous statutes now provide a great deal of protection against constructive notice.[111] Notice may also be imputed to a purchaser if an agent had actual or constructive notice (*Wyllie v Pollen* (1863) 3 De GJ & S 596; 46 ER 767). Imputed notice is the third variety of notice. It is actual or constructive notice received by an agent of the purchaser of the legal estate. Notice, however, is more than vague reports or rumours, and it has been held that it cannot be attributed to the purchaser if the information was received from an overheard conversation some years before the transaction (*Williamson v Bors* (1900) 21 NSWLR (Eq) 302). The principal will not have imputed notice if the agent's notice arises from the agent's own direct or indirect fraud or any consequential equity (*Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 529). In four States, legislation means that the principal will only have imputed notice of knowledge that the agent acquired in the course of that transaction.[112]

EQUITABLE INTERESTS AND EQUITIES

[316] A distinction must be drawn between equitable interests in property, "mere equities" and "personal equities".[113] The terms "equitable estate" and "equitable interest" are commonly used

110 *Bailey v Barnes* [1894] 1 Ch 25, Lindley LJ at 35; *Abigail v Lapin* [1934] AC 491, Lord Wright (for the Privy Council) at 505-506.

111 For example, *Conveyancing Act* 1919 (NSW), s 53(1); *Property Law Act* 1974 (Qld), s 237(1); *Conveyancing and Law of Property Act* 1884 (Tas), s 35(1); *Property Law Act* 1958 (Vic), s 44(1); *Sale of Land Act* 1970 (WA), s 22.

112 *Conveyancing Act* 1919 (NSW), s 164(1)(b); *Law of Property Act* 1936 (SA), s 117(1)(b); *Conveyancing and Law of Property Act* 1884 (Tas), s 5(1)(b); *Property Law Act* 1958 (Vic), s 199(1)(b).

113 The above threefold classification has not been universally adopted. For example, Neave M and Weinberg M, "The Nature and Function of Equities" (1978) 6 *University of Tasmania Law Review* (Pt I) 24, (1979) (Pt II) 115, create a proprietary hierarchy in descending order of legal interests, equitable interests and equities. Also see Wright D, "The Continued Relevance of Divisions in Equitable Interests to Real Property" (1995) 3 *Australian Property Law Journal* 163 for detailed criticism of this threefold division.

to describe those equitable rights which are proprietary.[114] Beneficial interests under trusts, equitable mortgages, vendor's liens, partnership interests, restrictive covenants and estate contracts are all equitable interests in property (*National Provincial Bank v Ainsworth* [1965] AC 1175, Lord Upjohn at 1238). By contrast with such equitable proprietary rights, the term "personal equity" is often used to describe those rights of access to a court of equity which give to the plaintiff nothing more than a personal right to seek the remedies of equity. Such rights, being only personal, are incapable of assignment and do not attach to property (Lord Upjohn at 1238).

There is a third category of equitable right, which is a right ancillary to an equitable estate or interest, and this has been termed a "mere equity". These are rights which may have proprietary characteristics for some purposes, but not for others, and in particular, which will not prevail, even though they occur earlier, against a competing equitable interest. However, the classification of a given right as a mere equity is a description largely of a result, rather than providing in itself the reason for that result.[115] Thus it may be said that an equitable right ancillary to an equitable estate or interest in property is a mere equity because it will not prevail in competition with a later equitable interest. Such labelling of the prior right as a mere equity does not explain the reasons of policy why the later equitable right should be deemed to prevail.

The issue arose in the case of *Latec Investments v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265. In this case, a mortgagee of real property exercised its power of sale in a manner which was deemed fraudulent. Although the property was put up for auction, the main purpose of this was to gain an estimate of a reasonable price for the property rather than to effect a sale. When the highest bid failed to reach an unrealistically high reserve price,

114 Before an interest is designated property it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability": *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, Lord Wilberforce at 1247-1248; adopted by Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342. See also *Sonenco (No 77) Pty Ltd v Silvia* (1989) 89 ALR 437, Beaumont J at 445; Ryan and Gummow JJ at 457. Generally, if something is labelled property it will carry with it (a) the power to recover the property itself rather than simply compensation; (b) the ability to transfer it; (c) the continuance of remedies against third parties who may became involved with it; and (d) its place within the priorities rule.

115 Another layer of difficulty is added by the word "equity" possessing several meanings. These meanings include an ethical imperative, the necessary element in order that a party may seek relief from a court of equity and as representing an interest in property. See Skapinker D, "Equitable Interests, Mere Equities, `Personal' Equities and `Personal Equities' — distinctions with a difference" (1994) 68 *Australian Law Journal* 593; *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* (1994) V Conv R 54-487 at 65,653.

the mortgagee sold the property to its subsidiary at a price a little higher than the highest bid received at the auction. The fraudulent exercise of the power of sale gave to the mortgagor an equitable right to set aside that sale and to be restored to the position under the mortgage (but now with an equity of redemption to have the title reconveyed). However, some five years elapsed before the mortgagor brought legal proceedings, and in the meantime, the subsidiary company, as legal owner, had created an equitable charge in favour of a trustee for debenture holders. The question which arose in the case was whether the rights of the mortgagor, being first in time, prevailed over the rights of the trustee for the debenture holders. In the High Court, it was held unanimously that the mortgagor's interest was postponed to the later equitable charge.

However, the judges varied in their reasoning. Kitto J said that the mortgagor's delay in bringing an action for relief might be a reason for holding its interest to be postponed since that delay had led the trustee, as a third party gaining an equitable interest in good faith, to acquire rights in the property without notice of the earlier interest. In any event, as a separate ground for decision, Kitto J concluded that the mortgagor had a mere equity which could not prevail in competition with the bona fide purchaser of an equitable estate without notice. This conclusion was founded on the authority of Lord Westbury LC in *Phillips v Phillips* (1862) De GF & J 208; 45 ER 1164, who considered that the bona fide purchaser of an equitable estate without notice would have a title which prevailed against an equity, such as to set aside a deed for fraud, or to correct it for mistake.

Taylor J was unwilling to concur in this analysis since there were other authorities which had clearly established that the right of a transferor to set aside a property transaction for fraud would be treated as giving its holder a continuing equitable interest in the property, since in the eyes of equity, nothing more than the bare legal estate had been conveyed to the fraudulent party. Thus Lord St Leonards LC, in *Stump v Gaby* (1852) 2 De GM & G 623; 42 ER 1015, had held that such an interest (to set aside for undue influence) was devisable, while in *Dickinson v Burrell* (1866) LR 1 Eq 337, Lord Romilly MR concluded that the right to set aside a conveyance for fraud passed with a subsequent conveyance of the same property by a deed which recited the invalidity of the earlier conveyance. Thus, in Taylor J's view, these authorities demonstrated that for the purposes of devisability and assignability, the right to set aside a property transaction for fraud or undue influence is an equitable interest in the subject property, rather than a "mere" equity. Taylor J preferred to rest his decision

on a principle rather than a label. He expressed the principle that when the person entitled to the earlier interest requires the assistance of a court of equity to remove an impediment to that person's title as a preliminary to asserting her or his equitable interest, then the court will refuse to interfere if subsequently an equitable interest has been created in favour of a bona fide purchaser (*Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 286).

The third member of the court, Menzies J, endeavoured to resolve the conflicts in the 19th century authorities by suggesting that they were entirely reconcilable: a given right, such as a right to set aside a property transaction for fraud or undue influence is an equitable interest for the purposes of assignability and devisability, but is a mere equity for the purposes of determining priorities with a competing equitable interest.

The judgment of Menzies J indicates that equitable rights may be classified in different ways for different purposes, with the result that it is impossible to classify all equitable rights as mere equities or equitable interests for all intents and purposes. In explaining why this is so, however, Taylor J's judgment is to be preferred. It is axiomatic that equitable relief is normally subject to the discretion of the court, and to a variety of defences such as unclean hands; and it is in accordance with principle that a court of equity will decline to grant a particular remedy, if to do so would be prejudicial to the interests of innocent third parties taking equitable interests in the property in good faith and for value. The refusal to set aside a transaction, and therefore to restore an interest in property to a party, does not necessarily preclude the granting of other (personal) relief to the plaintiff. For example, it may, in a given case involving competing equitable interests, be more appropriate to grant equitable compensation in relation to property conveyed through undue influence, rather than setting aside the transaction, and thereby there would be no interference with third party rights. Such relief is not always possible, either on the facts, because personal relief against the fraudulent party would be valueless, or on the relevant law. Nonetheless, it should not be assumed that the granting of priority to the later equitable interest will always leave the holder of the earlier right without an alternative remedy.

A further reason for classifying certain equitable rights as "mere equities" is that their position in giving rise to an equitable interest in the property depends on the circumstances of the case. The right to set aside a transaction for fraud or undue influence may be characterised as an equitable interest only if it

is the transferor of that property who is entitled to set the transfer aside. The transferor will be treated as having never parted with that property in equity, despite the transfer of the property at law. In this sense, the transferor's equitable interest in the subject property subsists. However, such an analysis is not available where it is the transferee who is claiming the equitable relief and who wishes to rescind the contract for the purchase of the property due to the unconscionable conduct of the vendor. In such a case, the intervention of equity is requested to recover the purchase price; it cannot be said that the purchaser has any equitable interest attaching to that property in equity. Thus, in *Gross v Lewis Hillman* [1969] 3 All ER 1476, it was held that a purchaser's equitable right to rescind for misrepresentation did not attach to the land, and accordingly, could not be exercised by a third party into the hands of whom the property had passed. All this is simply an example of the proposition that the classification of an equitable interest is not a permanent classification. The classification of an equitable right as an equitable interest or a mere equity only relates to that interest in that particular context.

[317] A number of rights may be classified as equities. In addition to the right to set aside for fraud or undue influence, the following rights may be classified as mere equities with certain proprietary characteristics,[116] but cannot be termed equitable interests in the fullest sense:

- A licence to remain on property,[117] arising from an oral promise from which it would be unconscionable for the property holder to depart.
- The right to rectify for mistake. Although this has been described in one case as an equitable estate,[118] it is more usually classified as an equity.[119] Thus Lord Westbury, in *Phillips v Phillips* (1862) De GF & J 208; 45 ER 1164, regarded it as a mere equity which will not prevail against the purchaser in good faith of an equitable interest without notice. In *Blacklocks v JB Developments (Godalming) Ltd* [1981] 3 All ER

116 See further Neave M and Weinberg M, "The Nature and Function of Equities" (1978) 6 *University of Tasmania Law Review* 24 (Pt I); (1979) 6 *University of Tasmania Law Review* 115 (Pt II).

117 *Re Sharpe (A Bankrupt)* [1980] 1 WLR 219 (licence to remain in property bound trustee in bankruptcy). In *Bogdanovic v Koteff* (1988) 12 NSWLR 472, Priestley JA, for the New South Wales Court of Appeal, characterised a promise by an owner that a person could remain in the house for the rest of that person's life if she looked after the owner, and on which promise that person relied, as giving rise to an equitable interest in the land (at 475). This would bind the owner and his executor, but not the son who inherited the property. Such a right may be interpreted as arising under the principles of proprietary estoppel. Compare *Greasley v Cooke* [1980] 1 WLR 1306.

118 *Downie v Lockwood* [1965] VR 257.

119 *Smith v Jones* [1954] 2 All ER 823 (Ch); *Blacklocks v JB Developments (Godalming) Ltd* [1981] 3 All ER 392.

392, it was indicated that this equity of rectification is a "mere" equity as it is ancillary to or dependent on an equitable estate or interest when it is needed to be of an enduring character so that it may be transmissible. The court relied on *Stump v Gaby* (1852) 2 De GM & G 623; 42 ER 1015, *Dickinson v Burrell* (1866) LR 1 Eq 337 and Taylor J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265. Indeed, in *Blacklocks*, the court explicitly recognised (at 400) that the equity of rectification may be classified according to the purpose it is to serve. The right to rectification does survive transfer but it may take a subordinate place within the hierarchy of interests for the purposes of the law of priorities. In *Blacklocks*, the court indicated (at 400) that, in a priority dispute, the right is an equity and would generally lose such a dispute against an equitable estate.[120]

- A right to claim an interest in property arising from the principles of proprietary estoppel.[121] Such an equity arises where one person places detrimental reliance upon a promise of the legal owner (or some other form of encouragement) that an interest in the land either has been granted (perhaps informally)[122] or will be granted.[123] Alternatively it may arise where the owner acquiesces in a mistaken assumption of another who builds upon land believing it to belong to her or him.[124] Such a right has been held to be transmissible[125] and will also bind a third party with notice (*Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466). Whether it would bind a third party purchaser holding an equitable interest acquired later without notice has not been settled. Nonetheless, the relief where an estoppel is raised is in the discretion of the court, which may, but need not, fulfil the expectation, and which need not grant proprietary relief. It has been said that the principle on which relief is awarded in the case of an equitable estoppel is to reverse the detriment,[126] although in practice, frequently the consequence of an estoppel is to give effect to an assumption.[127] Whatever the basis for the remedy, where the conferral of an equitable interest in the property would prejudice the rights of a purchaser of an equitable interest for value and in good faith, it is likely that the relief for the estoppel would be so framed as to avoid a competition between equitable interests.[128]

120 The judgments of Taylor and Menzies JJ in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 280ff and 290-291 suggest the same conclusion.

121 See below, Chapter 7: "Estoppel".

122 *Dillwyn v Llewellyn* (1862) 31 LJ Ch 658; 45 ER 1285; *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699.

123 *Crabb v Arun District Council* [1976] Ch 179.

124 *Ramsden v Dyson* (1866) LR 1 HL 129; *Wilmott v Barber* (1880) 15 Ch D 96.

125 *Hamilton v Geraghty* (1901) 1 SR (NSW) Eq 81; *E R Ives Investment Ltd v High* [1967] 2 QB 379.

126 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, Priestley JA at 472; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, McHugh J at 501, but cf *Giumelli v Giumelli* (1999) 196 CLR 101.

127 See below, Chapter 7: "Estoppel".

128 See for example, the treatment of the interests of other family members in *Giumelli v Giumelli* (1999) 196 CLR 101.

- The right to a constructive trust. According to the High Court in *Giumelli v Giumelli* (1999) 196 CLR 101 at 103, the term "constructive trust" is used in various senses when identifying a remedy provided by a court. Up till now the most controversial variety has been the constructive trust awarded on the principles of *Muschinski v Dodds* (1985) 160 CLR 583, and *Baumgartner v Baumgartner* (1987) 164 CLR 137. However, the legitimacy of the constructive trust created from the principles of both of these cases was put beyond doubt by the High Court in *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566.[129] The principles in *Muschinski v Dodds* (1985) 160 CLR 583, and *Baumgartner v Baumgartner* (1987) 164 CLR 137.[130] were cited, with approval, in *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 as creating another species of constructive trust, one focussed primarily upon a remedy.[131] In *Muschinski v Dodds*, Deane J, with whom Mason J agreed, said that a constructive trust could be ordered where parties have pooled their resources for a joint endeavour which, when it collapses, leaves one party with property which it would be unconscionable for that person to retain. This principle was endorsed by the High Court in *Baumgartner*.[132] Although normally, a constructive trust will arise at the time of the act of wrongdoing which it is its purpose to remedy, in *Muschinski v Dodds* (1985) 160 CLR 583, Deane J indicated (at 615) that a declaration of constructive trust may be so framed that the consequences of its imposition are operative only from the date of judgment or from some other specified date. The constructive trust was imposed in this case from the date of judgment so as not to affect the rights of third parties (at 623). The same approach was taken in *Re Osborn* (1989) 91 ALR 135. Pincus J refused to hold that a constructive trust, arising in favour of a de facto spouse on the principles of *Muschinski v Dodds* and *Baumgartner v Baumgartner*, predated the bankruptcy of the man. The plaintiff argued that the constructive trust arose out of the circumstances of the de facto relationship and the joint endeavour in purchasing a home, and that created an equity predating the bankruptcy which bound the trustee in bankruptcy under the *Bankruptcy Act* 1966 (Cth), s 116. This argument was rejected because it was in the interests of certainty in bankruptcy law that trustees should not have to engage in litigation to establish the uncertain entitlements of a domestic partner in property to which

129 This case is discussed, in detail, by Wright D, "The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility" (1999) 14 *Journal of Contract Law* 221.

130 This view has also been expressed by Bradbrook A, MacCallum S and Moore A, *Australian Real Property Law* (Law Book Co, Sydney, 1991), p 116.

131 See also the High Court's decision in *Giumelli v Giumelli* (1999) 196 CLR 101. Generally, see Wright D, *The Remedial Constructive Trust* (Butterworths, 1998).

132 See further Parkinson P, "Doing Equity Between De Facto Spouses: From Calverley v Green to Baumgartner" (1988) 11 *Adelaide LR* 370; Dodds J, "The New Constructive Trust: An Analysis of its Nature and Scope" (1988) 16 *University of Melbourne Law Review* 482.

the bankrupt has an apparently absolute legal title.[133] *Re Osborn* was followed on this point by the Full Federal Court in *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357.

On this analysis, the right to a constructive trust based upon the principles of *Muschinski v Dodds* could be said to be a mere equity which would not prevail over an equitable interest created prior to the order of the court. However, there is authority to the contrary. In *Re Jonton Pty Ltd* [1992] 2 Qd R 105, Mackenzie J applied other aspects of Deane J's reasoning in *Muschinski v Dodds* to hold that, although a constructive trust of Torrens title land was not declared to exist by the District Court until 1991, the beneficiary of the constructive trust possessed an equitable interest that predated the court's declaration. The constructive trust in this case arose from a common intention in the context of a domestic relationship. Thus the beneficiary had a proprietary equitable interest independent of any court order. The importance of this finding was that it gave the beneficiary priority over the interests that were created later in time.[134] In *Parsons v McBain*[135] the Full Federal Court overruled *Re Osborn* (1989) 91 ALR 135 and limited the impact of *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357.

It is only in the case of constructive trusts arising from the breakdown of a joint endeavour that it is suggested that the right thereby created might be a mere equity. Other forms of constructive trust are likely to be held to be full equitable interests, being declaratory of the legal position which results from the circumstances giving rise to the constructive trust. Thus in *Kidner v Department of Social Security* (1993) 18 AAR 545,[136] a father and his sons had entered into an oral agreement for the sale of his properties to his sons. As this sale was not concluded, the father remained the legal owner of these properties. The father was denied a pension on the basis that he still owned these properties. Drummond J held that that the Department of Social Security was required to take into account the beneficial ownership of property which might arise by reason of the

133 See also Glover J, "Bankruptcy and Constructive Trusts" [1991] *Australian Business Law Review* 98.

134 See also the discussion in Oakley A J, "Proprietary Claims and Their Priority in Insolvency" (1995) 54 *Cambridge Law Journal* 377 at 423-424, but note his comment in his more recent work *Constructive Trusts* (3rd ed, Sweet & Maxwell, 1996), p 5 which implicitly qualifies his earlier position.

135 *Parsons v McBain* (unreported, FC Fed Ct, Black CJ, Kiefel and Finkelstein JJ, 5 April 2001), para [13].

136 See also *Kintominas v Secretary, Department of Social Security* (1991) 30 FCR 475 (right arising from an estoppel).

contributions of the sons and which would make it inequitable for the father to deny them an equitable interest. It had thus erred when it failed to consider a constructive trust had arisen to limit the father's beneficial interest in a property. In making the determination relating to the pension, the department should have considered the constructive trust, even though no court had declared any trust existed.

Other rights which might be classified as equities include situations in which adjoining landowners agree to confer reciprocal rights on one another. It has been held that a landowner cannot take the benefit without the burden.[137] It has been argued also that confidential information for which an action in breach of confidence will lie, gives rise to an equity.[138]

PRIORITIES BETWEEN EQUITABLE CLAIMS

[318] Where there is a competition between equitable claims with respect to property, the court will be called upon to determine which is the better equity, and where the merits of each of the claims are equal, "priority in time of creation is considered to give the better equity".[139] While this is the general principle, the assessment of the merits is not at large,[140] and there are a number of recognised situations in which the "first in time" rule is displaced. Although these cannot be reduced to one single, organising principle, some attempts have been made to discern common threads which explain the majority of the cases.

137 *Hopgood v Brown* (1955) 1 WLR 213; *E R Ives Investment Ltd v High* (1967) 2 QB 379. This principle has received some consideration by the High Court: *Gallagher v Rainbow* (1993) 179 CLR 624. It is treated as an equity by Neave M and Weinberg M, "The Nature and Function of Equities" (Pt I) (1978) 6 *University of Tasmania Law Review* 24 at 26.

138 Neave M and Weinberg M, "The Nature and Function of Equities" (Pt II) (1979) 6 *University of Tasmania Law Review* 115. Gummow J has stated in *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services & Health* (1990) 95 ALR 87 at 135-136 (affd (1991) 28 FCR 291) that "the degree of protection afforded by equitable doctrines and remedies to what equity considers confidential information makes it appropriate to describe it as having a proprietary character. This is not because property is the basis upon which that protection is given, but because of the effect of that protection."

139 *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, Kitto J at 276. In *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326 at 341, Mason and Deane JJ also adopted this test. However Gibbs CJ at 333 reversed the order of this test so that priority would go to the holder of the first interest-holder unless that person's conduct dictated otherwise. The order of the test makes no difference.

140 However, Brooking J in *Cash Resources Australia Pty v BT Securities Ltd* [1990] VR 576 favoured "broad principles of right and justice", and in *AVCO Financial Services Ltd v Fishman* [1993] 1 VR 90, it was said that postponement would occur where the result produced by the "first in time" rule would be "inequitable".

As has been seen, where the holder of the earlier equitable claim has a mere equity,[141] and requires the intervention of the court in order to be restored to, or to be given, an equitable interest in the property, the equity will lose in priority to a later equitable interest, as long as the holder of the later equitable estate or interest had no notice of the prior equitable claim and took its interest for value.[142] The other main categories of cases in which, apart from statute, an earlier interest may be postponed to a later one are as follows:

- where the owner of the later interest is led by conduct on the part of the owner of the earlier interest to acquire the later interest in the belief or on the supposition that the earlier interest did not then exist;
- where the holder of the earlier equitable right waives its priority specifically, or gives an express or implied licence to the owner of the property to create further interests in the property in the ordinary course of business;
- where the prior equity is in favour of a volunteer, and the later claimant gave value and took her or his interest without notice of the earlier claim;
- where there is a competition between assignees of equitable interests in personalty, in which case priority is accorded to the claimant who first gave notice to the trustees.

[319] Where the conduct of the owner of the earlier interest leads the owner of the later interest to acquire that interest in the belief or on the supposition that the earlier interest did not then exist, then priority will be accorded to the later claimant (*Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326, Mason and Deane JJ at 339). In a number of cases, priority has been accorded to the later interest, because the holder of the earlier one has armed a third party with the indicia of absolute ownership, thus allowing that person to deal with the property as apparent owner. Lord Selborne LC described the owner of the earlier interest, in this situation, as having armed the third party "with the power of going into the world under false colours" (*Dixon v Muckleston* (1872) LR 8 Ch App 155 at 160). In *Abigail v Lapin* (1934) 51 CLR 58, Mr and Mrs Lapin, the owners of real property,

141 *Latec Investments Ltd v Hotel Terrigal Ltd* (1965) 113 CLR 265, Kitto and Menzies JJ; *Phillips v Phillips* (1862) 4 De GF & J 208 at 215-218; *Westminster Bank Ltd v Lee* [1956] Ch 7; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175; *Blacklocks v JB Developments (Godalming) Ltd* [1981] 3 All ER 392; *Taylor Barnard Ltd v Tozer* (1983) 269 EG 225. But see *Breskvar v Wall* (1971) 126 CLR 376, Barwick CJ at 387, who suggested that if the earlier interest were a mere equity, it may still be competitive with a later equitable estate.

142 *Cave v Cave* (1880) 15 Ch D 639; *Westminster Bank Ltd v Lee* [1956] Ch 7; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1238; *Allied Irish Banks Ltd v Glynn* [1973] IR 188.

transferred that land to the wife of a lender as security for the loan. There was no indication that this transfer was merely by way of mortgage. Subsequently, a registrable mortgage was granted over that property to Mr Abigail, as security for a loan advanced by him. By the time he attempted to register that mortgage, Mr and Mrs Lapin had placed a caveat on the register. It was held by the Privy Council, reversing the decision of the High Court of Australia,[143] that the later equitable interest should prevail. In allowing the lender's wife to take an apparently absolute and unencumbered legal title, they had allowed the possibility that another person might take an equitable interest in the property for value, in good faith, and without notice of the earlier claim.

Similarly, in *Breskvar v Wall* (1972) 126 CLR 376, Mr and Mrs Breskvar, intending only that their real property should be security for a loan, gave the lender a blank, signed transfer form, and the certificate of title to the property. The lender fraudulently filled in the name of his grandson on the transfer form, and the grandson became the registered legal owner of the property. He then entered into a contract for the sale of the property to a purchaser for value without notice of the fraudulent transfer. Although the case might have been decided by classifying the right to set aside the fraudulent conveyance as a mere equity,[144] the High Court held rather that the later claim should prevail for the reasons it gave in *Abigail v Lapin*. Mr and Mrs Breskvar had, by giving the lender a blank signed transfer and certificate of title, created the conditions in which the fraudulent transfer was possible (and straightforward), and by which the grandson was able to hold himself out as having an absolute interest in the property.

The relevant conduct, which leads to the postponement of the earlier interest, may be of a different kind entirely. In *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326, the postponing conduct of a vendor of real property lay in allowing the "solicitor", who was employed by the purchaser, to do the conveyancing for both parties. In fact, that person was not legally qualified. The vendor signed a memorandum of transfer acknowledging receipt of the purchase price. Only a small proportion had in fact been paid, and a mortgage back for a portion of the remainder was not registered. His equitable rights, arising from a vendor's lien and the unregistered mortgage, were postponed to the interests of others who had lent money on the

143 *Lapin v Abigail* (1930) 44 CLR 166.

144 *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, discussed above, para [316].

basis that the purchaser had an apparently clear title, and who took equitable interests in the land.[145]

Although the underlying principle has been said, in a number of cases, to be estoppel,[146] such an analysis is awkward, and does not fit easily with the cases.[147] Mason and Deane JJ in *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326 at 342 preferred instead to say that the acts of the holder of the earlier interest with which the court is primarily concerned are "those acts during the carrying out of which it is reasonably foreseeable that a later equitable interest will be created and that the holder of that later interest will assume the non-existence of the earlier interest".[148] The Victorian Full Court decision in *Jacobs v Platt Nominees Pty Ltd* [1990] VR 146 indicated that either the estoppel or the "reasonable foreseeability" approach may be appropriate to resolving a priority dispute and that the selection of one approach over the other depended upon the facts of each case. It has even been suggested that the difference between the two approaches is only one of semantics.[149]

It has been said also that, in determining whether there should be postponement of a prior equitable interest on the basis of the conduct of the holder of that interest, the court should not enquire into "the question of the respective moral merits of the actors in the transaction globally". The court should not concern itself with "general naughtiness" (*FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552, Young J at 554). There must be a "foreseeable relevant causal connection between the act complained of and the acquisition of the interest being attacked" (Young J at 555).

[320] Where the holder of the earlier equitable right waives the priority specifically, or gives an express or implied licence to the owner of the property to create further interests in the property in the

145 See also *Rice v Rice* (1853) 2 Drew 73; 61 ER 646 (postponing conduct where vendors, who had not received purchase money, delivered title deeds with receipt acknowledging payment); *Lloyds Bank v Bullock* [1896] 2 Ch 192; *Secureland Mortgage Investments Nominees Ltd v Harmore & Co Solicitor Nominee Co Ltd* [1991] 2 NZLR 399.

146 *Rimmer v Webster* [1902] 2 Ch 163, Farwell J at 173: ("If the owner of property clothes a third person with the apparent ownership and right of disposition thereof … he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value"); *Heid v Reliance Finance Corp Pty Ltd* (1983) 154 CLR 326, Gibbs CJ, who treated the principle as a particular form of estoppel.

147 See *Capell v Winter* [1907] 2 Ch 376, Parker J at 382; *Abigail v Lapin* (1934) 51 CLR 58, Lord Wright at 70; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), p 231.

148 This echoed the similar language used in *IAC (Finance) Pty Ltd v Courtenay* (1963) 110 CLR 550.

149 Bradbrook A, MacCallum S and Moore A, *Australian Real Property Law* (2nd ed, Law Book Co, Sydney, 1997), para [3.47].

ordinary course of business, the earlier interest will be postponed. In *Fung v Tong* [1918] AC 403, a resident of Chicago gave money to his nephew in Hong Kong for the purpose of buying property which the nephew would hold on resulting trust for him. The nephew fraudulently created a mortgage over the property. When the uncle called for the conveyance of the legal estate, he accepted a conveyance which recited that the uncle took subject to the interest of the mortgagee.[150]

An implicit waiver of priority also occurs where the security of a creditor is so structured that the creditor allows the debtor to create further legal or equitable interests in the subject property in the ordinary course of its business.[151] A floating charge operates in such a manner, and while a first floating charge takes precedence over a later one,[152] it is implicit in the nature of the arrangement that later and competing equitable claims of other kinds might arise in the course of business, and these will have priority (*Taylor v Bank of New South Wales* (1886) 11 App Cas 596).

[321] Where the prior equity is in favour of a volunteer, and the later claimant gave value, and took her or his interest without notice of the earlier claim, then the later claim has the better equity. Authority for this proposition is founded upon the decision in *Taylor v London & County Banking Co* [1901] 2 Ch 23, in which the rights of beneficiaries who had given value, through their trustee, prevailed over the earlier interests of beneficiaries who were volunteers. Sykes and Walker have suggested that this is an extension of the principle relevant to mortgages of tacking.[153] The second equitable interest holder has a superior right to obtain the legal title than the earlier equitable interest holder must possess. This superior right may come into existence where the legal title is held on trust for the second equitable interest holder (*Stanhope v Earl Verney* (1761) 2 Ed 81, Lord Henley LC at 85; 28 ER 826). The precise circumstances required for the creation of this superior right to obtain the legal title has been the subject of several cases.[154]

150 See also *ANZ Banking Group Ltd v National Mutual Life Nominees Ltd* (1977) 15 ALR 287.

151 Whether such a security may be said to be an equitable interest before it crystallises is open to question: see above, para [309].

152 *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800.

153 Sykes E I and Walker S, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), pp 404-405. The law of tacking may be considered an exception to the general equitable priority rules. However as it is generally relevant only to mortgages it will not be discussed here. See Sykes and Walker, above, pp 393-396.

154 *Wilkes v Bodington* (1707) 2 Vern 599; 23 ER 991; *Taylor v London & County Banking Co* [1901] 2 Ch 231; *Assaf v Fuwa* [1955] AC 215. See also *McCarthy & Stone Ltd v Julian S Hodge & Co Ltd* [1971] 1 WLR 1547 at 1557.

[322] Where there is a competition between equitable assignees of interests in personalty, priority is accorded to the claimant who first gave notice to the trustees. This is known as the rule in *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475. In this case, Sir Thomas Plumer explained the reason for such a rule (at 12-13):

> "Wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which the court considers tantamount to possession, namely notice to the legal depository of the fund ... By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance"

For the rule to apply, the later assignee must have given value, and taken the assignment without notice, at the time, of the prior claim.[155] The notice is not required to be in any form and need not be in writing (*Lloyd v Banks* (1868) LR 3 Ch App 488). It was held also in *Ward v Duncombe* [1893] AC 369 that, where there are several trustees of the legal title, the equitable interest holder in that property only needs to give notice to one of those trustees to take priority under this rule.

155 For further discussion of the rule in *Dearle v Hall*, see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [819]-[843], and the analysis therein of the House of Lords decision in *B S Lyle v Rosher* [1958] 3 All ER 597.

CHAPTER FOUR

EQUITY AND RESTITUTION

Michael Bryan

INTRODUCTION[1]

[401] A restitutionary remedy deprives the defendant of a gain which has been wrongly acquired. It follows that the function of the law of restitution is to prescribe the circumstances in which the plaintiff will be entitled to the gain or benefit. The circumstances may consist of any of the following:

- an independent claim in unjust enrichment;
- a breach of contract;[2]
- the commission of a tort;[3] or
- the breach of an equitable or statutory obligation.

1 The literature on the law of restitution is considerable. On Australian law see Mason K and Carter JW, *Restitution Law in Australia* (Butterworths, Sydney, 1995); Dietrich J, *Restitution: A New Perspective* (Federation Press, Sydney, 1998); Jackman IM, *The Varieties of Restitution* (Federation Press, Sydney, 1998). On English law see Lord Goff of Chieveley and Jones G, *The Law of Restitution* (5th ed, Sweet and Maxwell, London, 1998); Birks P, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989); Virgo G, *The Principles of the Law of Restitution* (Clarendon, Oxford, 1999). For the USA see *Restatement of the Law of Restitution*, American Law Institute (1937). A second restatement is in preparation. See the symposium in (2001) 79 *Texas Law Review* 1765 for analysis of the restatement project. Palmer GE, *The Law of Restitution* (Little Brown, Boston, 1978). Canada: Maddaugh JD and McCamus J, *The Law of Restitution* (Canada Law Book, Aurora, Ont., 1990). New Zealand: Grantham RB and Rickett CEF, *Enrichment and Restitution in New Zealand* (Hart, Oxford, 2000). In addition, the *Restitution Law Review* is an important resource on the law of restitution in all jurisdictions.

2 Waddams SM, *Restitution as Part of Contract Law* in A Burrows (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1997); Birks P, "Misnomer" in W Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution Past, Present and Future* (Hart, Oxford, 1998), 1, 19-21; *Attorney-General v Blake (Jonathan Cape, Third Party)* [2001] 1 AC 268.

3 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246; *Ministry of Defence v Ashman* [1993] 3 EGLR 102; *Inverugie Investments Pty Ltd v Hackett* [1995] 1 WLR 713; *LPJ v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499; Worthington S, "Reconsidering Disgorgement for Wrongs" (1999) 62 *Modern Law Review* 218; Edelman J, "Gain-Based Remedies for Wrongdoing" (2000) 74 *Australian Law Journal* 231; Edelman J, *Gain-Based Damages* (Hart, Oxford, 2002).

This chapter will examine the requirement for an award of restitution where the basis of the claim lies in equity, either for unjust enrichment or for the commission of an equitable wrong such as breach of fiduciary obligation. The restitutionary applications of equitable remedies will also be briefly considered.

[402] Equity and restitution cannot be directly compared. The former is a jurisdictional category, comprising the doctrines and remedies applied by the Court of Chancery and other courts administering equity jurisdiction immediately prior to the enactment of the Judicature legislation 1873–1875 (Imperial) and equivalent legislation in the Australian States. It is true that equitable intervention is informed by certain recurrent organisational ideas, of which the best known is the prevention of the unconscionable enforcement of legal rights, but the jurisdiction cannot be wholly explained or rationalised in terms of these ideas. While equity is a dynamic concept in the legal system, the application of equitable principles can only be understood by reference to the history of Chancery. The law of restitution, on the other hand, is an organising category incorporating a variety of common law, equitable and statutory causes of action and remedies. The greater part of the law of restitution is derived from common law, in claims for money had and received[4] (where restitution of money is sought) or for quantum meruit[5] (where payment is claimed for the value of a service performed). Fewer restitutionary claims are sourced in equity although the remedies of equitable compensation, rescission, account of profits, equitable lien, resulting and constructive trust are restitutionary in some of their applications. Moreover, some of the grounds of unjust enrichment, such as undue influence, are based in equity. Equity's most significant contribution to the law of restitution is to make available proprietary remedies which compel the defendant to return identified property to the defendant or to hold specific property as security for the satisfaction of the plaintiff's claim. With the exception of the action of ejectment to recover land, all proprietary remedies are equitable. Regardless of the jurisdictional source of the obligation the central idea of restitution remains that of giving back, or giving up, to the plaintiff a benefit unlawfully obtained by the defendant.[6]

4 Or for money paid, where the plaintiff's claim was in respect of money paid to a third party from which the defendant had derived a benefit. See Lord Goff of Chieveley and Jones G, *The Law of Restitution* (5th ed, Sweet and Maxwell, London, 1998), p 3.

5 Or quantum valebat where payment for the reasonable price for goods supplied is sought. See Goff and Jones, *The Law of Restitution* (5th ed, Sweet and Maxwell, London, 1998).

6 Birks P, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989),p 12; Birks P, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1, 28.

THE MEANING OF UNJUST ENRICHMENT

[403] Restitution will be awarded where the defendant has been unjustly enriched at the expense of the plaintiff. This is an independent (or autonomous) claim to restitution, meaning that it is independent of the commission of any breach of contract, tort or other wrong. The role of unjust enrichment in Australian law was explained by Deane J in *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (at 256-257), with whom Mason and Wilson JJ generally agreed:

> "Unjust enrichment ... constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case."

[404] This dictum emphasises several important aspects of an unjust enrichment claim. First, unjust enrichment is not a cause of action. The claim must satisfy the requirements of a recognised common law, equitable or statutory cause of action. As a "unifying legal concept" a court is entitled to consider whether the elements of a claim brought in equity are consistent with the analysis of the identical issue in a common law action. For example, the equitable principles governing the recovery of proceeds of fraud from a defendant who has received them from the original wrongdoer should only differ from the principles applicable to a common law claim where a sufficient reason for the different treatment can be demonstrated.[7] But an integrated approach to analysing the elements of unjust enrichment cannot, without more, justify fusion of the relevant common law on equitable principles. Nor does it provide a mandate for recognising a claim in unjust enrichment where no common law or equitable foundation for the claim exists.

Secondly, the determination of an unjust enrichment claim is not synonymous with awarding a plaintiff a restitutionary

7 Compare the application of an action for money had and received to the recovery of the proceeds of fraud in *State Bank of New South Wales Ltd v Swiss Bank Corp* (1996) 39 NSWLR 294 with constructive trusteeship for "knowing receipt" of property from a fiduciary: *Koorootang Nominees Pty Ltd v ANZ Banking Group* [1998] 3 VR 16; *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437. Cf Smith L, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 *Law Quarterly Review* 412, 434-436.

remedy whenever it would be just and equitable to do so.[8] As Deane J states, the determination must be made "by the ordinary processes of legal reasoning". This means that the ingredients of an unjust enrichment claim must be strictly proved. The ingredients are as follows:

- the defendant must have received an enrichment;
- the enrichment must have been received at the plaintiff's expense;
- the enrichment must have been unjustly received, in the sense of falling within one of the recognised grounds of restitution, and
- no defence must be available to the defendant.

Each criterion requires brief analysis.

[405] Unjust enrichment differs from contract and the commission of a tort or other wrong in that it is not a direct source of legal obligation but an organising category for restitutionary obligations the precise content of which must be determined by reference to the elements of other established common law and equitable causes of action. For this reason some judges and commentators have argued that the role of unjust enrichment is auxiliary, or subsidiary, to the primary private law categories of tort, contract and trust.[9] These judges and writers consider that the prevention of unjust enrichment is secondary to the primary aims of the law of obligations, which are to compensate for harm suffered and to fulfil and perfect contracts and other legally enforceable arrangements.[10] Moreover, many civil law systems characterise unjust enrichment as a subsidiary source of obligation. But a taxonomy of private law which distinguishes primary from secondary (or subsidiary) obligations is of limited utility. First, even if not a primary source of obligation it is indisputable that unjust enrichment operates independently of tort, contract and trust in the law of obligations (*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 73 ALJR 203). Secondly, the availability of proprietary restitutionary remedies (which are not generally

8 In *Moses v Macferlan* (1760) 2 Burr 1005, 1008; 97 ER 676, 678, Lord Mansfield based the action for money had and received on "ties of natural justice and equity". Cf *Muschinski v Dodds* (1985) 160 CLR 583, 617; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203, 218-220, Gummow J.

9 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 73 ALJR 203, 217-218; Grantham R and Rickett C, "On the Subsidiarity of Unjust Enrichment" (2001) 117 *Law Quarterly Review* 273.

10 Contributions to this debate which explore issues extending beyond the law of restitution include Birks P, "Definition and Division: A Meditation on Institutes 3.13" in Birks (ed), *The Classification of Obligations* (Clarendon, Oxford, 1997) Ch 1; Birks P, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1; Dietrich J, *Restitution: A New Perspective* (Federation Press, Sydney, 1998); Jackman IM, *The Varieties of Restitution* (Federation Press, Sydney, 1998).

available under civil law systems) is not contingent upon proof of a breach of contract, the commission of a wrong or other source of obligation.[11] Finally, while in general terms the prevention of unjust enrichment under civil law is subordinate to the attainment of other private law objectives, the degree to which unjust enrichment is subsidiary to these categories varies significantly from one country to another, and in all jurisdictions it enjoys an independent sphere of operation.[12] A general statement that unjust enrichment is subsidiary to other sources of obligation is no substitute for identifying the precise circumstances in which such an enrichment will entitle a plaintiff to restitution.

ENRICHMENT

[406] A defendant may be enriched by the receipt of money, services or property. These are very different forms of enrichment having in common only the fact that their receipt is valuable to the recipient. A major objective of the law of unjust enrichment is therefore to determine the circumstances in which value has been unjustly received. Where the enrichment takes the form of money or other property the critical question will be whether the recipient has received property in circumstances which the law considers unjust. This necessitates an understanding of the detailed rules governing the passing of title to tangible and intangible property.[13] A thief of a chattel will not acquire title to the property although its economic use-value will certainly have passed to the thief. The recovery of property to which title has not passed is not generally considered to be a matter for the law of unjust enrichment, but for property law and for those torts, such as detinue and conversion, which vindicate title to chattels. It has, however, been suggested that restitution may in some cases be available, in addition to a proprietary action to vindicate title, to recover the use value of the property misappropriated.[14]

11 The criteria governing the award of proprietary remedies are controversial: Birks P, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989), pp 375-385; Wright D, *The Remedial Constructive Trust* (Butterworths Sydney, 1998); Grantham R and Rickett C, *Enrichment and Restitution in New Zealand Enrichment and Restitution in New Zealand* (Hart, Oxford, 2000), Ch 3; Burrows A, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 *Law Quarterly Review* 412.

12 Schrage E, "Contract and Restitution: A Few Comparative Remarks" in Francis Rose (ed), *Failure of Contracts* (Hart, Oxford, 1997), p 155; Smith, L, "Property, Subsidiarity and Unjust Enrichment" (2000) *Oxford University Comparative Law Forum* 6.

13 Fox D, "The Transfer of Title to Money" [1996] *Restitution Law Review* 60; Fox D, "Legal Title as a Ground of Restitutionary Liability" [2000] *Restitution Law Review* 465.

14 Birks P, "Property and Unjust Enrichment: Categorical Truths" [1997] *New Zealand Law Review* 623, 656-658; cf Grantham and Rickett, *Enrichment and Restitution in New Zealand Enrichment and Restitution in New Zealand* (Hart, Oxford, 2000), Ch 3, "Obligations and Property".

Money, as the universal medium of exchange, always constitutes an enrichment (*BP Exploration (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, Robert Goff J at 789). But whether the receipt of services amounts to an enrichment is more problematic. Services, unlike money, cannot be restored, and the value of their performance to the recipient may be contentious. A recipient of services who has not contracted for their performance could argue that he or she did not want the benefit of the services, or at the very least that they were not a priority for the recipient's expenditure. In the terminology of restitution writers this is known as the argument from subjective devaluation. Uncritical acceptance of the argument would result in the denial of all restitutionary claims for the performance of services. In order to defeat its application a plaintiff must show a compelling reason for requiring the defendant to pay for the receipt of a service. The best reason would be the existence of an enforceable contractual obligation to pay for the services, but even where no contract exists other grounds for ordering restitution have been recognised in the authorities.

- **Incontrovertible benefit:** A recipient has been incontrovertibly benefited by the performance of a service when no reasonable person could be heard to deny that the service constitutes an enrichment.[15] Money is the clearest example of an incontrovertible benefit. Another example is the plaintiff's discharge of a legal liability which the defendant was bound to incur.[16] The defendant's realisation of the end product of a service in money will also be regarded as an incontrovertible benefit for the same reason that money itself is enriching.[17] How far, if at all, the receipt of services will be considered to be a benefit will obviously depend on judicial willingness to apply the objective "no reasonable person" test outside these categories in order to defeat the argument from subjective devaluation.
- **Free acceptance:** Restitution will be awarded where "the recipient of the services, as a reasonable person, should have realised that a person in the position of the provider of the services would expect to be paid for them and did not take a reasonable opportunity to reject those services".[18] In *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 the High Court held that a defendant's acceptance of the benefit of a builder's work constituted the basis for awarding a quantum meruit, thereby defeating the objection that the work was not beneficial.

15 *Monks v Poynice Pty Ltd* (1987) 11 ACLR 637, Young J at 639; *Municipality of Peel v Her Majesty the Queen in the Right of Canada* (1993) 98 DLR (4th) 140, McLachlin J at 159.

16 *Exall v Partridge* (1799) 8 TR 308; 101 ER 1045; *City Bank of Sydney v McLaughlin* (1909) 9 CLR 615; *City of Carleton v City of Ottawa* (1965) 52 DLR (2nd) 220.

17 *Steele v Tardiani* (1946) 72 CLR 386; *Greenwood v Bennett* [1973] QB 195.

18 *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, Byrne J at 260. Cf Goff and Jones, *The Law of Restitution* (5th ed, Sweet and Maxwell, London, 1998), pp 18-22; Birks P, "In Defence of Free Acceptance" in A Burrows (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1992), pp 105, 127-35.

[407] The elements of free acceptance are similar to those of the concept of equitable estoppel, and a claim for payment for freely accepted services may be available in estoppel as an alternative to unjust enrichment.[19] The principal differences between the two are, first, that it is not necessary for the service provider to have relied upon the recipient's conduct in order to establish a claim to free acceptance,[20] and, secondly, that relief in estoppel is not necessarily confined to ordering the recipient to pay for the value of the services received. The court can, in an appropriate case, award the remuneration that the service provider expected to receive from the performance of the work (*Giumelli v Giumelli* (1999) 196 CLR 101).

[408] A recipient of land or chattels can also invoke the argument from subjective devaluation in order to defeat a claim to restitution. But property differs from services in that it can usually be restored to its original owner. If the property has passed under a voidable contract which has been subsequently set aside rescission will be available as a restitutionary remedy. The order for rescission will be conditioned upon the imposition of terms designed to restore both parties to their pre-contractual position.[21] The retransfer of property can also be effected by way of a resulting or constructive trust.

AT THE EXPENSE OF THE PLAINTIFF

[409] An essential requirement of a restitutionary claim based on unjust enrichment is that the enrichment must have been at the expense of the plaintiff.[22] The simplest examples of this requirement are cases of what is known as "unjust enrichment

19 Compare *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 and *Angelopoulos v Sabatino* (1995) 65 SASR 1 with *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582. For an analysis of the decisions on precontractual liability in terms of the civilian doctrine of culpa in contrahendo see Dietrich J, "Classifying Precontractual Liability: A Comparative Analysis" (2001) 21 *Legal Studies* 153.

20 Cf *Waltons Stores (Interstate Ltd) v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at 406.

21 *Reese Silver Mining Co v Smith* (1869) LR 4 HL 64; *Newbigging v Adam* (1886) 34 Ch D 582; *Alati v Kruger* (1955) 94 CLR 216; Nahan N, "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 *University of Western Australia Law Review* 66; O'Sullivan J, "Rescission as a Self-Help Remedy: A Critical Analysis" (2000) 59 *Cambridge Law Journal* 509.

22 The requirement is sometimes overlooked in the application of the unjust enrichment principle to permit a third party to sue on a contract. See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, Gaudron J at 176; Soh KB, "Privity of Contract and Restitution" (1989) 105 *Law Quarterly Review* 4; Jackman IM, "Unjust Enrichment and Privity of Contract" (1989) 63 *Australian Law Journal* 368.

by subtraction": an enrichment has been subtracted from the plaintiff's assets and added to the wealth of the defendant.[23] For instance, a plaintiff who has paid $1000 to the defendant as a result of the exercise by the latter of undue influence or unconscionable conduct is entitled to restitution on the basis that the defendant's gain is the direct result of the former's impoverishment. No immediate relationship need be shown between the plaintiff and the defendant. A victim of fraud is entitled to restitution not only from the wrongdoer but also, subject to the application of defences, from a recipient of the enrichment from the wrongdoer.[24]

[410] A recipient who has been unjustly enriched by subtraction from the plaintiff's wealth will be required to restore to the latter the amount of the enrichment, together with any interest payable. But restitution is not in principle confined to the quantum of the original enrichment. If the recipient has profitably invested the enrichment received, the plaintiff will be entitled to the proceeds of the investment.[25]

[411] The defendant may be enriched at the expense of the plaintiff even though the latter never previously enjoyed title to the property claimed. This can occur when a defendant takes property from a third party who would have transmitted it to the plaintiff but for the defendant's intervention. Such a receipt is known as unjust enrichment by interceptive subtraction.[26] The recipient must restore the property, or its value, to the plaintiff where the third party was legally obliged to transfer the benefit to the plaintiff,[27] and possibly also where the plaintiff would in practice have received the benefit even though the third party was not legally obliged to transmit it.[28]

23 Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989), pp 22-27.

24 *Holiday v Sigil* (1826) 2 C & P 176; 172 ER 81; *Agip (Africa) Ltd v Jackson* [1991] Ch 547; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548; *Koorootang Nominees Pty Ltd v ANZ Banking Group* [1998] 3 VR 16. For a different analysis see Smith L, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 *Law Quarterly Review* 412.

25 *Trustee of the Property of FC Jones v Jones* [1997] Ch 159, 169. Birks P, "At the Expense of the Claimant: Direct and Indirect Enrichment in English Law" (2000) *Oxford University Comparative Law Forum* 1.

26 Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989), pp 133_139; Smith L, "Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 *Oxford Journal of Legal Studies* 481.

27 *Official Custodian for Charities v Mackey (No 2)* [1985] 1 WLR 1308, 1314-1315.

28 *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, (1989) 61 DLR (4th) 14; *Ontex Resources Ltd v Metalore Resources Ltd* (1993) 103 DLR (4th) 158, Ont CA.

A LEGALLY RECOGNISED GROUND OF INJUSTICE

[412] The essence of a claim in unjust enrichment is that a legally recognised ground for awarding restitution exists. Some grounds are well established by authority. They include mistake, undue influence and restitution of money paid under a total failure of consideration. The independent existence of others is controversial. For example, where a victim of fraud claims restitution of the proceeds from a recipient who was, at the time of the receipt, innocent of the circumstances of the fraud, the ground of restitution has been variously described as ignorance[29] (in the sense of the victim's ignorance of the fraud practised on him or her) or property[30] (in the sense of the victim's reliance on title to the stolen property as the basis of the claim).[31] Similar reservations have been expressed about the recognition of free acceptance as a ground of restitution even though its place in the Australian law of restitution is secure.[32]

[413] Various explanations can be put forward for this surprising inability of the law of restitution to settle the basic grounds of recovery. Where the plaintiff's claim to restitution is morally overwhelming, for example where the claim is brought by a victim of fraud, courts are understandably not inclined to expatiate at length on the precise ground of restitution. In other cases, the recognition of unjust enrichment as a "unifying legal concept" has encouraged writers, and to a lesser extent judges, to define the grounds of restitution without regard to historical

29 Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989), pp 140-146; Bant E, "Ignorance as a Ground of Restitution — Can it Survive?" [1998] *Lloyds Maritime and Commercial Law Quarterly* 18.

30 Burrows A, *The Law of Restitution* (Butterworths, London, 1993), Ch 13. Burrows A, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 *Law Quarterly Review* 412. Alternatively, property may be a ground of restitution without being a legally recognised ground of injustice: Virgo G, *The Principles of the Law of Restitution* (Clarendon, Oxford, 1999) pp 8, 11-16; Grantham and Rickett, *Enrichment and Restitution in New Zealand* (Hart, Oxford, 2000), Ch 3; Smith L, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 *Law Quarterly Review* 412, 421-425.

31 These alternatives by no means exhaust the possibilities. On some facts an action for money had and received for deceit will be available: *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243; *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374; *James v Oxley* (1939) 61 CLR 433; *National Commercial Banking Corp of Australia v Batty* (1986) 160 CLR 251. The authorities are discussed in Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), [1636].

32 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221; Burrows A, "Free Acceptance and the Law of Restitution" (1988) 104 *Law Quarterly Review* 576; Birks P, "In Defence of Free Acceptance" in A Burrows (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1992), Ch 5; Simester A, "Unjust Free Acceptance" [1997] *Lloyds Maritime and Commercial Law Quarterly* 103.

factors which in practice have heavily influenced the development of the law of obligations, such as the jurisdictional separation of common law and equity or the common law forms of action. For example, it has been argued that a partial failure of consideration should entitle the payer to restitution.[33] Moreover, a failure of consideration is not limited to a failure of bargained-for consideration but can extend to some applications of the resulting trust, such as the *Quistclose* trust,[34] and of the constructive trust, such as *Muschinski v Dodds* (1985) 160 CLR 583 (see also *Roxborough v Rothmans of Pall Mall Australia* (2001) 76 ALJR 203, 207). All common law and equitable doctrines whose function is to restore benefits, or their value, to the party at whose expense the enrichment has occurred can be reorganised on the basis of the avoidance of unjust enrichment. But such a program of unification is bound to be controversial and to elicit opposition either to the program itself or to aspects of its implementation.[35] If carried out insensitively, significant differences between restitution at common law and in equity, for example as to the availability of remedies and bars to their award, will be obscured by the generality of the unjust enrichment principle. But notwithstanding fears of incoherent "fusion fallacy" and attendant legal uncertainty, the identification of carefully defined grounds of restitution (or "unjust factors") is designed to bring greater certainty and rationality to the law of restitution. As Deane and Dawson JJ stated in *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344 (at 376):

> "in a modern context where common law and equity are fused with equity prevailing, the artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law. In particular, the notions of good conscience, which both the common law and equity recognized as the underlying rationale of the law of unjust enrichment, now dictate that, in applying the relevant doctrines of law and equity, regard be had to matters of substance rather than technical form."

33 Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989), pp 242-245; Burrows, *The Law of Restitution* (Butterworths, London, 1993), pp 259-261; Virgo, *The Principles of the Law of Restitution* (Clarendon, Oxford, 1999), pp 341-344. A development precluded in Australia by *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, though note the possibility of apportioning consideration recognised in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 383; *Goss v Chilcott* [1996] AC 788; *Roxborough v Rothmans of Pall Mall Australia* (2001) 76 ALJR 203, Gummow J at 225.

34 *Barclays Bank v Quistclose Investments* [1970] AC 567. Chambers R, *Resulting Trusts* (Clarendon, Oxford, 1997), Ch 3.

35 Hon Justice Gummow AC, 'Review of Robert Chambers, *Resulting Trusts'* (1997) 19 *Adelaide Law Review* 149.

[414] The grounds of injustice are divisible into categories, organised in terms of their rationale for ordering restitution:

- Absence of intention to confer a benefit. Restitution will be granted where the property was taken from the plaintiff without his or her knowledge. This includes theft of the plaintiff's property. Another example is the receipt of a benefit from a party, such as a minor, lacking legal capacity to confer the benefit.
- Vitiated intention to confer a benefit. A plaintiff whose intention to confer a benefit on the recipient has been vitiated by mistake or undue influence will be entitled to restitution.
- A qualified intention to confer a benefit. The payment of money for a consideration which fails entitles the payer to restitution. "Consideration" for this purpose means the performance for which the payment was made, and not the recipient's counter-promise to perform.[36] Restitution is granted because the basis upon which the payment was made has failed. In contrast to restitution for vitiated intention, a qualified intention can fail after the payment has been made.

  The resulting trust imposed when property which has been settled upon an express trust fails, for example for inability to carry out its purpose, is an equitable example of restitution where the intention to confer a benefit has been qualified by the failure of the basis upon which the trust was created.[37] Some writers have argued, more broadly, that a resulting trust will be imposed as a restitutionary remedy whenever property has been transferred for a consideration which fails, provided that the recipient was not beneficially entitled to the property at the time of the transfer.[38]
- A benefit has been obtained by exploiting the plaintiff's weakness or vulnerability. Restitution of benefits procured by duress or unconscionable conduct illustrates this category of restitution.
- A non-money benefit has been received by a defendant who, having an opportunity to reject it, nonetheless chose to accept, knowing that a reasonable person in the position of the defendant would expect to pay for it. "Free acceptance" provides a criterion for determining whether the performance of services has enriched the defendant (see [406]). The High Court of Australia has also recognised free acceptance as a ground of restitution (*Pavey and Matthews Pty Ltd v Paul* (1987) 162

36 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Roxborough v Rothmans of Pall Mall Australia* (2001) 76 ALJR 203, 207; Kremer B, "Recovering Money Paid under Void Contracts: 'Absence of Consideration' and Failure of Consideration'" (2001) 17 *Journal of Contract Law* 37.

37 *Essery v Cowlard* (1884) 26 Ch D 191, *Re Ames' Settlement; Dinwiddy v Ames* [1946] Ch 217.

38 Birks P, "Restitution and Resulting Trusts" in SR Goldstein (ed), *Equity: Contemporary Legal Developments* (Hebrew University of Jerusalem 1992), p 335; Chambers R, *Resulting Trusts* (Clarendon, Oxford, 1997), Ch 3. Cf Swadling WJ, "A New Role for Resulting Trusts?" [1996] *Legal Studies* 110.

CLR 221). The recognition has been criticised by restitution writers who consider that it has the potential to reward risk-takers who have failed to safeguard their interests before entering into a contract.[39] These writers would limit restitution under this head to cases of failure of a bargained-for consideration.

- Policy-based grounds of restitution, not falling under any of the preceding heads. At a high level of generality all grounds of restitution are policy-based, since the determination of the circumstances in which the law will permit restitution of benefits is in the final analysis a question of social and economic policy. Some examples of restitution, however, are explicitly grounded in considerations of public policy. They include cases of necessity, such as restitution awarded to rescuers,[40] and recovery of "ultra vires" payments made to public authorities.[41]

The categories are not mutually exclusive. For example, the receipt of a benefit as a result of the exercise of undue influence will often also be the product of the recipient's unconscionable behaviour.[42]

[415] Most of the grounds of restitution are "plaintiff sided", in the sense that the plaintiff did not intend to confer a benefit on the recipient, either in any event or on the facts that actually occurred. Liability to make restitution on these grounds is strict. The plaintiff need not show that the recipient, or any other party to the transaction, was at fault although the recipient will in some cases be blameworthy, for example by exercising undue influence over the plaintiff. Strict liability is distinguishable from absolute liability: defences are available to the recipient, the application of which will often depend upon proof of the recipient's good faith (see [417]).

Other grounds of restitution are "defendant sided" insofar as the reason for awarding restitution relates to the defendant's conduct, or the conduct of a third party which causes the defendant's enrichment, than to the absence of intention to confer a benefit. Since equity acts on the conscience of the

39 Burrows A, "Free Acceptance and the Law of Restitution" (1988) 104 *Law Quarterly Review* 576; Birks P, "In Defence of Free Acceptance" in Burrows (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1992), Ch 5. Cf Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), [928].

40 Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), Ch 8.

41 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, cf *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1995) 182 CLR 51. For a non-restitutionary analysis of this category see Grantham and Rickett, *Enrichment and Restitution in New Zealand* (Hart, Oxford, 2000), Ch 10.

42 Bigwood R, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'" (1996) 16 *Oxford Journal of Legal Studies* 503.

defendant, it comes as no surprise that the primary example of defendant-sided restitution (apart from the controversial ground of free acceptance) is restitution of a benefit procured by unconscionable conduct.

[416] Some writers have argued that defendant-sided grounds of restitution should be narrowly circumscribed. These critics consider that the predictive value of conscience-based grounds is lower than the plaintiff-sided grounds imposing strict liability.[43] More specifically, such grounds are said to impose on the plaintiff a burden to establish facts, such as the recipient's knowledge of the plaintiff's position of disadvantage or vulnerability, which, in terms of the structure of the law of restitution, ought to rest on the defendant as an ingredient of the defences of change of position or good faith purchase. Unconscionable conduct is, however, too well established as a ground of equitable restitution, especially in Australian law, to be lightly displaced by other plaintiff-sided grounds. Legal certainty in the application of any equitable doctrine ultimately depends on a careful analysis of the requirements of that doctrine. The policies informing restitutionary defences such as change of position, which protects a good faith recipient's interest in security of receipt, also inform the application of bars on equitable relief, for example the denial of rescission where a third party has in good faith acquired an interest in the subject-matter of the transaction. In the final analysis the centrality of equitable and statutory relief on the ground of unconscionable conduct, as well as increasing recognition of the unconscionable enforcement of legal rights as a basis of intervention,[44] will inevitably inhibit the development of a law of restitution predicated upon the notion of strict liability.

DEFENCES TO A CLAIM IN RESTITUTION

[417] Some defences, which are of general application in defeating or barring the enforcement of common law and equitable claims, operate to bar those common law or equitable claims which are restitutionary in character. So, for example, the application of the *Limitation Act*,[45] the equitable bar of laches and the

43 Birks P, *Restitution — The Future*, (Federation Press, Sydney, 1992), pp 59-60.

44 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. See Ch 5: "Unconscientious Dealing".

45 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 387-389; *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112.

settlement or compromise of a disputed restitutionary claim[46] will all defeat restitutionary claims as they defeat other claims in the law of obligations. In addition, some defences to an unjust enrichment claim explicitly protect a recipient's interest in the security of an executed transaction. The principal defences are:

- change of position;
- estoppel;
- good faith purchase for value without notice; and
- the impossibility of counter-restitution.

[418] In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 the High Court recognised (at 385) that "the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the faith of the receipt".[47] The defence was recognised in the context of a claim to restitution for money paid under a mistake and has been applied most frequently to common law claims. The defence is not, however, jurisdiction-specific, and there is no reason in principle why it should not apply to equitable claims. For example, it has been suggested that change of position is the true explanation of the denial of tracing remedies where it would be inequitable to trace.[48]

The defence is only available to recipients who have changed their position in good faith.[49] It is unclear how the defence might apply to a defendant-sided ground of restitution, such as unconscionability. A recipient who has knowingly exploited another's position of special disadvantage might 'ex hypothesi' be considered to be in bad faith (*Bridgewater v Leahy* (1998) 194 CLR 457). But the defence should be available, assuming a

46 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 373-374, where the High Court approved a broader principle of voluntary submission to an honest claim. Bryan M, "Mistaken Payments and the Law of Unjust Enrichment" (1993) 15 *Sydney Law Review* 461, 475-484.

47 See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548; *State Bank of New South Wales Ltd v Swiss Bank Corp* (1996) 39 NSWLR 294; *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318.

48 *Re Diplock's Estate* [1948] Ch 465; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, 570; *Gertsch v Atsas* [1999] NSWSC 898, but cf *Gray v Richards Butler (a firm),* The Times, July 23, 1996, for a rejection of this suggestion.

49 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548; *Mercedes-Benz (NSW) Pty Ltd v ANZ and National Mutual Royal Savings Bank Ltd* (unreported, SC NSW, 1992), Palmer AJ, noted [1993] *Restitution Law Review* 55; Birks P, "Change of Position: The Nature of the Defence and its Relationship to Other Defences" in M McInnes (ed), *Restitution: Developments in Unjust Enrichment* (LBC, Sydney, 1996), pp 49, 58-59.

change of position has occurred, to a recipient of property from a victim of unconscionable conduct exerted by a third party, provided that the recipient was unaware of the improper pressure.

[419] Estoppel will defeat a claim to restitution where the recipient of a benefit has reasonably relied to his or her detriment on the conduct of the plaintiff so that it would be inequitable to award restitution to the latter. In spite of some superficial resemblances between the two defences estoppel is distinguishable from change of position. The principal differences are as follows:

1] The focus of estoppel is upon the conduct of the party against whom the estoppel is alleged in the adoption of the assumption relied upon by the other party.[50] In contrast, change of position focuses upon the recipient's change of position which need not have been induced by the acts, omissions or representations of any other party. For this reason it is possible to rationalise change of position as going to the issue of whether the recipient has been enriched whereas a successful plea of estoppel denies the injustice of the plaintiff's claim.[51]

Estoppel is usually said to depend upon the existence of a representation by one party which is relied upon by the representee to his or her detriment.[52] While a payer's statement to the effect that the payee is entitled to retain money which was initially paid under mistake will, if relied upon detrimentally, clearly estop the payer from relying on mistake as the ground of restitution, the preclusionary role of estoppel in preventing an unconscientious departure from an assumption suggests that the operation of the defence should not be confined to misrepresentations (see generally Ch 7: "Estoppel"). An assumption as to whether the payee is entitled to spend money as his or her own may be as much created by the payer's conduct, construed in the context of the transaction between the parties, as by an express representation as to the validity of the transaction.[53]

2] Estoppel provides a complete defence to a claim in restitution, in contrast to change of position which operates 'pro tanto', as a partial or complete defence depending on the extent to which the recipient

50 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 Dixon J at 676; *Waltons Stores (Interstate Ltd) v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at 404.

51 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385. Birks P, "Change of Position" in M McInnes (ed), *Restitution: Developments in Unjust Enrichment* (LBC, Sydney, 1996), pp 49, 67-68. Cf Virgo, *The Principles of the Law of Restitution* (Clarendon, Oxford, 1999), p 726.

52 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, Lord Goff at 579; *Avon County Council v Howlett* [1983] 1 WLR 605, Slade LJ at 602.

53 *Thompson v Palmer* (1933) 47 CLR 507, Dixon J at 547; *Waltons Stores (Interstate) Ltd v Maher* (1998) 164 CLR 387, Brennan J at 415; *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444.

has changed his or her position.[54] The apparent inflexibility of estoppel is the most serous objection to its application as a restitutionary defence. The justification for the all-or-nothing application of estoppel is evidentiary: a plaintiff will not be permitted to prove facts establishing a ground of restitution if they would be inconsistent with the plaintiff's conduct which has been reasonably relied upon by the defendant (*Avon County Council v Howlett* [1983] 1 WLR 605). But the prevailing view in Australia is that estoppel is not only a preclusionary evidentiary rule but a substantive doctrine conferring an independent cause of action on the party who relies to his or her detriment on the defendant's unconscionable conduct.[55] With the emphasis placed in some estoppel judgments on enforcement of the "minimum equity" necessary to protect the defendant's interest, it is possible that estoppel could provide a recipient of a benefit with a partial defence measured by the expenditure which has been incurred in reliance on the validity of the receipt.[56]

The relationship between the defensive application of estoppel and change of position is still being worked out. In some Canadian jurisdictions the defence cannot be relied upon where change of position is available and will achieve a more complete justice between the parties (*RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230). This is logical. If change of position is recognised as the primary mode of protecting a recipient's interest in security of the enrichment received, the scope for applying estoppel, which also protects this interest, must be limited. But recent English decisions have recognised the continued co-existence of change of position and estoppel.[57] The revitalisation of estoppel in Australian equity also suggests it is unlikely to be superseded by change of position as a restitutionary defence. The grounding of estoppel in consideration of conscience indicates that the primary function of the defence will be to prevent a plaintiff from establishing a ground of unjust enrichment where it would be unconscionable to do so, applying the elements of estoppel laid down in recent High Court decisions.

54 *Avon County Council v Howlett* [1983] 1 WLR 605; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, Lord Goff at 579; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385. But cf *National Westminster Bank Plc v Somer International UK Ltd* (2001) 145 SJ 153.

55 *Waltons Stores (Interstate Ltd) v Maher* (1998) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394, though see Deane J at 439; *Giumelli v Giumelli* (1999) 196 CLR 101. See Ch 7: "Estoppel".

56 *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ 411-412. *Crabb v Arun District Council* [1976] Ch 179, Scarman LJ at 198. Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), [2413], cf *Giumelli v Giumelli* (1999) 196 CLR 101.

57 *Derby v Scottish Equitable Plc* [2001] 3 All ER 818; *National Westminster Bank Plc v Somer International (UK) Ltd* (2001) 145 SJ 153; Fung E and Ho L, "Establishing Estoppel after the Recognition of Change of Position" [2001] *Restitution Law Review* 52, 68. See Ch 7: "Estoppel".

[420] The defence of good faith purchase for value without notice[58] applies at common law to bar restitutionary claims to money which has passed into circulation as currency, in addition to a wider application in equity to defeat claims to an equitable proprietary interest. At common law an action for money had and received will fail where a defendant has in good faith received money which has passed into circulation as currency for which valuable consideration has been provided.[59] Good faith purchase here resembles change of position in that it protects a recipient's interest in security of transaction. Payees need not enter into detailed inquiries into the title of payers who have benefited from the receipt of goods or services under executed contracts.

The defence also destroys a plaintiff's claim to an equitable proprietary interest in property to which the defendant has legal title (*Re Nisbet and Pott's Contract* [1906] 1 Ch 386). Equitable proprietary remedies, such as the resulting trust, constructive trust and the equitable lien, may be imposed over defined property so as to effect restitution to the plaintiff. None of these remedies can be imposed over property acquired by a good faith purchaser of the legal interest in the property without notice of the facts entitling the plaintiff to the remedy. The rationale of the application of the good faith purchase in equity is to determine priority of title between competing claimants to property (*Wheatley v Bell* [1982] 2 NSWLR 544). A successful assertion of the defence will defeat a proprietary restitutionary claim. Any personal restitutionary remedy will survive against the original wrongdoer, and perhaps also against the subsequent good faith recipient of the property, provided that a recognised ground of restitution, such as breach of fiduciary duty or undue influence, can be established and that no other defence bars the claim.[60]

[421] Good faith purchase is similar to change of position, but the policies informing the application of the defences, especially in relation to equitable claims, are very different. In equity the former protects a recipient's interest in security of title to property but does not preclude the availability of a personal claim for restitution. Change of position, on the other hand,

58 Barker K, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Birks P (ed), *Laundering and Tracing* (Clarendon, Oxford, 1995), p 191; Swadling W, "Restitution and Bona Fide Purchase" in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (British Institute of International and Comparative Law/UKNCCL, London 1997), p 29.

59 *Miller v Race* (1758) 1 Burr 452, 457-458; 97 ER 398, 401; *Clarke v Shee & Johnson* (1774) 1 Cowp 197; 98 ER 1041; *Ilich v The Queen* (1987) 162 CLR 110, Brennan J at 139; Fox D, "Bona Fide Purchase and the Currency of Money" (1996) 55 *Cambridge Law Journal* 547.

60 *McKenzie v McDonald* [1927] VLR 134; *Mahoney v Purnell* [1996] 3 All ER 61.

protects a recipient's broader interests in security of transaction. Application of the defence bars both personal and proprietary claims to restitution. Moreover, as Lord Goff explained in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 the requirements which must be proved in order to establish the former also differ "because change of position will only avail a defendant to the extent that his position has been changed; whereas, where bona fide purchase is involved, no inquiry is made (in most cases) into the adequacy of the consideration" (at 580-581).

[422] A further defence is that counter-restitution is impossible.[61] As a condition for the award of restitution the plaintiff must restore to the defendant any benefit received under the impugned transaction. Inability to do so is a ground for denying restitution. Although references to the concept of counter-restitution can be found in the authorities[62] it is at present an idea informing other defences rather than a defence in its own right. This is because the equitable discretion to grant relief upon terms has in practice provided effective machinery for effectuating counter-restitution. Counter-restitution in equity occurs in two situations:

1] Rescission on terms.[63] Where a plaintiff elects to rescind a contract, the court has power to impose terms in order to achieve practical justice between the parties. Rescission at common law for a vitiating factor such as mistake or misrepresentation will be refused unless the parties can be placed in their precise pre-contractual position. The remedy is not so limited in equity. It can be ordered so long as the plaintiff can make substantial counter-restitution.[64] It is immaterial that the plaintiff cannot return the precise benefits received so long as the reasonable value of that benefit can be paid to the defendant. The stated aim of equity in conditioning relief upon the satisfaction of terms is to achieve practical justice between the parties. In substance the terms will prevent both parties from being unjustly enriched.[65] The restitutionary objective of rescission upon terms will be clearest where

61 Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989), pp 415-424; Birks P (ed), *Laundering and Tracing* (Clarendon, Oxford, 1995), pp 336-341. Nahan N, "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 *University of Western Australia Law Review* 66, 76-79.

62 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, Brennan J at 392.

63 See Ch 25: "Rescission".

64 *Cooper v Phibbs* (1867) LR 2 HL 149; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1278-1279,; *Newbigging v Adam* (1888) 13 App Cas 308; *Spence v Crawford* [1939] 3 All ER 27, 284; *Alati v Kruger* (1955) 94 CLR 216, 222; *Maguire v Makaronis* (1997) 188 CLR 449.

65 *Brown v Smitt* (1924) 34 CLR 160, 168; Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), [1434]; Friedmann D, "Valid, Voidable, Qualified and Non-existing Obligations: An Alternative Perspective on the Law of Restitution" in A Burrows (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1992), p 262.

the contract has been vitiated by a mistake, misrepresentation or breach of fiduciary obligation necessitating the restoration of the state of affairs immediately preceding entry into the contract. But even where a contract is "prospectively" rescinded by discharge upon breach adjustments may have to be made to prevent the parties from receiving more than their accrued benefits under the discharged contract.[66]

2] **Equitable remuneration or allowance.** A fiduciary who, in breach of obligation, has obtained a personal advantage or benefit which ought properly to have belonged to the beneficiary must account for profits derived from the breach (see Ch 10: "Fiduciary Obligations"). The fiduciary may nonetheless be entitled to an allowance or remuneration reflecting the personal skill, effort and financial resources which contributed to the making of the profit.[67] The beneficiary's entitlement to disgorgement of the profits derived from the breach of the obligation will be offset by the fiduciary's entitlement to counter-restitution for services performed. A beneficiary who claims the profits from the wrongful business activities will not be allowed to deny that the fiduciary's services constituted an enrichment.

RESTITUTIONARY REMEDIES IN EQUITY

[423] Restitutionary remedies are either personal or proprietary. Personal remedies restore to the plaintiff the value of a benefit received by the defendant. Retention of the original benefit is not a precondition to the award of a personal remedy, which creates the relationship of debtor and creditor between the parties. Proprietary restitutionary remedies, on the other hand, entitle a plaintiff to rights in, or over, an asset held by the defendant. Depending on the remedy awarded the plaintiff will be able either to claim property to which the defendant has title or to assert a security interest over that property. The defendant must have legal or equitable title to the property subject to the remedy. Successful assertion of a proprietary remedy entitles the plaintiff to claim the property, or the proceeds of its sale, in priority to the claims of the defendant's unsecured creditors. Property subject to a proprietary order may be traced through

66 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457. Apportionment of consideration serves a similar role of preventing unjust enrichment where restitution is sought on the ground of total failure of consideration of benefits conferred under a contract: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 383; *Goss v Chilcott* [1996] AC 788; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203.

67 *Boardman v Phipps* [1967] 2 AC 46; *O'Sullivan v Management Agency and Music* [1985] QB 428; *Guinness Plc v Saunders* [1990] 2 AC 773; *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584.

substitutions and mixtures, by application of established tracing principles, in the event of its wrongful disposal by the original recipient. Like other interests whose enforcement is dependant on notions of equitable conscience equitable proprietary remedies are subject to the usual infirmity that they cannot be enforced against a purchaser in good faith of the property for value and without notice of the plaintiff's interest. But even in the event of the proprietary claim being met by a successful assertion of good faith purchase the plaintiff will be entitled in the alternative to maintain a personal claim against the immediate recipient as well as a proprietary claim over any surviving consideration paid by the purchaser for the plaintiff's property.

[424] A second classification of restitutionary remedies differentiates remedies which return a benefit, or its value, to the plaintiff from those which compel the defendant to disgorge wealth which had never previously belonged to the plaintiff. The aim of the first type of remedy is to achieve corrective justice by restoring to the plaintiff an enrichment, or its value, of which he or she has been wrongly deprived.[68] Disgorgement, on the other hand, is justified on the principle that a wrongdoer will not be permitted to profit from the commission of a wrong. The inclusion of disgorgement remedies within the category of restitutionary remedies is controversial. It is premised upon a definition of restitution to include the giving *up*, as well as the giving *back*, of an enrichment.[69] The extended definition carries the law of restitution beyond its traditional corrective function and is inconsistent with the assumption, discussed earlier, that restitution performs a gap-filling or auxiliary role in the legal system. It also characterises equitable remedies such as the account of profits and the constructive trust, which in their application to defaulting fiduciaries pursue prophylactic objectives, as being restitutionary. This underlines the point that the definition of a restitutionary remedy is inseparable from the perspective adopted as to the scope and purpose of the law of restitution.

Some equitable remedies are restitutionary in the first sense of restoring value to the plaintiff. These include some awards of equitable compensation and the resulting trust. Others, such as

68 Which will include interest payable for the plaintiff's loss of the opportunity to use the enrichment. See Mason and Carter, *Restitution in Australia* (Butterworths, Sydney, 1995), Ch 28.

69 See [401]. Birks P, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1, 28; Smith L, "The Province of the Law of Restitution" (1992) 71 *Canadian Bar Review* 672; Edelman J, "Gain-Based Remedies for Wrongdoing" (2000) 74 *Australian Law Journal* 231; Edelman, *Gain-Based Damages* (Hart, Oxford, 2002).

the account of profits, are restitutionary only in the second, extended meaning encompassing disgorgement of the fruits of wrongdoing. The constructive trust can be fashioned so as to effect restitution in either sense of that term as the justice of the individual case requires. The following paragraphs examine the restitutionary functions of the principal equitable remedies:

1] Equitable compensation.[70] This remedy compensates the victim of a breach of fiduciary obligation or other equitable wrong[71] for the loss suffered as a result of the breach of duty. The obligation of a defaulting trustee is to effect restitution to the trust estate.[72] The notion of effecting restitution is, however, ambiguous.[73] In most cases the remedy is purely compensatory: the trustee must compensate the trust estate for the diminution of the estate caused by the breach.

The prevention of unjust enrichment provides the basis for an award of equitable compensation where the wrongdoer's gain correlates to a loss incurred by the victim. For example, a defendant who by the exercise of undue influence over the plaintiff obtains money or other property from the latter will be required to pay compensation where the property cannot be returned 'in specie'.[74] Similarly, compensation will be payable for the unauthorised use of confidential information where the wrong consists not in making a profit, for which an account of profits can be ordered, but in failing to negotiate a licence from the plaintiff for the use of the information.[75] Finally, liability under the so-called "first limb" of *Barnes v Addy* (1874) LR 9 Ch App 244, for receipt of property from a fiduciary who has acted in breach of obligation, is

70 See Ch 22: "Equitable Compensation". See also the essays on equitable compensation in P Birks and F Rose (eds), *Restitution and Equity*, Vol 1, *Restitution and Equitable Compensation* (Mansfield Press, 2000).

71 For undue influence see *Mahoney v Purnell* [1996] 3 All ER 61, discussed by Heydon JD, (1997) 113 *Law Quarterly Review* 8, Birks P, [1997] *Restitution Law Review* 72. For breach of confidence see *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, (1989) 61 DLR (4th) 14; *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577. For dishonest assistance in a breach of fiduciary duty see *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

72 *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159; *Re Dawson Deceased* [1966] 2 NSWLR 211; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129; *Target Holdings v Redferns (a firm)* [1996] 1 AC 421; *Maguire v Makaronis* (1997) 188 CLR 449; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664.

73 Elliott SB, "Restitutionary Compensatory Damages" (1998) 6 *Restitution Law Review* 135.

74 *Mahoney v Purnell* [1996] 3 All ER 61. See Nolan RC, "Conflict of Interest, Unjust Enrichment and Wrongdoing" in W Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution Past, Present and Future* (Hart, Oxford, 1998), pp 87, 114-116; Nahan N, "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 *University of Western Australia Law Review* 66; Birks P, [1997] *Restitution Law Review* 72; Ho L, "Undue Influence and Equitable Compensation" in P Birks and F Rose (eds), *Restitution and Equity*, Vol 1, *Restitution and Equitable Compensation* (Mansfield Press, 2000), 193.

75 *Seager v Copydex Ltd* [1967] 1 WLR 923; *Talbot v General Television Pty Ltd* [1980] VR 224; *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577.

restitutionary, so that the recipient will be required to compensate the beneficiary or the trust estate for the value of the property received from the fiduciary.[76]

2] Rescission.[77] Where a plaintiff rescinds a transaction for mistake, misrepresentation or breach of fiduciary obligation, an order of the court which restores the parties to the position they occupied before entering into the transaction reverses an unjust enrichment.[78] The defendant must restore all benefits received under the transaction to the plaintiff, and the plaintiff must in turn make counter-restitution to the defendant. Even an executory contract is theoretically restitutionary in that each party gives back the personal right of action derived from the contract.

Rescission is also the term sometimes given to the right of a party to a contract to treat it as having been terminated for breach of condition or for substantial deprivation of the benefit of the contract (*McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457). Rescission, or termination, in this sense operates prospectively, and rights accrued under the contract are not affected by the termination. But the terms imposed upon the parties as a condition of rescission may include the restitution of benefits received by either party for which no contractual payment has been made (*McDonald v Dennys Lascelles Ltd*). The ground of restitution in such a case will be the total failure of consideration for the benefit.

Terms may be imposed upon either or both of the parties as a condition for granting rescission. In fashioning relief the court will do practical justice between the parties. This will not necessarily be confined to the reversal of unjust enrichment.[79] But, to the extent that either party has been unjustly enriched at the expense of the other under the transaction, restitution and counter-restitution of benefits received will be ordered as part of the adjustive process.

3] Account of profits.[80] A wrongdoer who makes a profit from a breach of obligation owed to the plaintiff may be ordered to account for the profit to the plaintiff. The remedy is personal, requiring the wrongdoer

76 But see Smith L, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 *Law Quarterly Review* 412, for the argument that liability under this head is an example of restitution for wrongs and not of restitution for unjust enrichment. See also *Citadel General Assurance Co v Lloyds Bank of Canada* [1997] 3 SCR 805.

77 See Ch 25: "Rescission". Nahan N, "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 *University of Western Australia Law Review* 66; O'Sullivan J, "Rescission as a Self-Help Remedy: A Critical Analysis" (2000) 59 *Cambridge Law Journal* 509.

78 *Newbigging v Adam* (1886) 34 Ch D 582; *Alati v Kruger* (1955) 94 CLR 216.

79 *Solle v Butcher* [1950] 1 KB 671; *Grist v Bailey* [1967] Ch 532.

80 See Ch 26: "Taking Accounts". Worthington S, "Reconsidering Disgorgement for Wrongs" (1999) 62 *Modern Law Review* 218; Edelman J, "Gain-Based Remedies for Wrongdoing" (2000) 74 *Australian Law Journal* 231; Edelman J, *Gain-Based Damages* (Hart, Oxford, 2002).

to account for the value of the profit made, although performance of the duty to account can be secured by the imposition of an equitable lien over property from which the profit has been derived.[81]

Wrongs giving rise to the duty to account include breach of fiduciary obligation,[82] breach of confidence,[83] infringement of patent and other interferences with statutory intellectual rights,[84] and breach of contract where the breach also constitutes a breach of faith (*Attorney-General v Blake (Jonathan Cape Ltd, Third Party)* [2001] 1 AC 268). The aim of preventing unjust enrichment has been identified as the basis for taking accounts where a patent or other intellectual property right has been infringed[85] but has been rejected, at any rate as the exclusive justification of the fiduciary's obligation to account (*Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557). The difference in the analysis of the account of profits reflects the disagreement, discussed above, as to whether disgorgement is a proper objective of the award of a restitutionary remedy (see [424]).

In accounting for the wrong a fiduciary may be ordered to disgorge to the plaintiff a greater profit than the beneficiary could have made by the exercise of his or her own rights. The fiduciary in such a case may be awarded equitable remuneration or an allowance to reflect his or her personal contribution, assessed in terms of personal effort and financial resources, to the making of the profit. The remuneration or allowance effects counter-restitution by requiring the beneficiary to pay for the value of the services received as a condition for the award of the profit (see [424]).

4] The resulting trust.[86] Equity will, in defined circumstances, require a recipient of property to hold the property on trust for the transferor or for the provider of the purchase money for the transfer. The theoretical basis for the imposition of a resulting trust is unsettled. On one view, a resulting trust will arise only when the transferor of property, or payer of the purchase money, is presumed to have intended that the property would be held on trust for him or her on the occurrence

81 *Scott v Scott* (1963) 109 CLR 649; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

82 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

83 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

84 *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101.

85 *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, 111.

86 Chambers R, *Resulting Trusts* (Clarendon, Oxford, 1997); Birks P, "Appendix 1: Restitution and Resulting Trusts", Swadling W, "A New Role for Resulting Trusts" and Rickett C and Grantham R, "Resulting Trusts — A Rather Limited Doctrine", all in P Birks and F Rose (eds), *Restitution and Equity*, Vol 1, *Restitution and Equitable Compensation* (Mansfield Press, 2000); Glover J, "Re-assessing the Uses of the Resulting Trust: Modern and Medieval Themes" (1999) 25 *Monash Law Review* 110.

of certain events.[87] The alternative view is that the basis of the trust is the absence of an intention to benefit the recipient. This view, which distinguishes the resulting trust from the express trust (founded on an actual intention to create a trust) and from the constructive trust (arising by operation of law, without regard to any intention to create a trust), explains the outcome of a number of decisions in which the transferor either could not have intended the occurrence of a resulting trust[88] or lacked capacity to form any intent to create such a trust.[89]

It has been argued that a resulting trust will be imposed upon proof of one of the established grounds of restitution provided that at the time of the claim the recipient has title to the plaintiff's property, or to its traceable proceeds, and that the ground of restitution was not established before the recipient acquired full beneficial title to the property.[90] On this analysis the *Quistclose* trust[91] can be characterised as a resulting trust imposed upon money lent arising upon a failure of the consideration, or basis, for which it was lent, the lender having no intention to benefit the borrower.

The most significant advantage of situating the resulting trust within the law of unjust enrichment is that a previously under-theorised area of equity enjoys greater intellectual coherence. On the other hand, a drawback to this proposal is that it increases the risk of "proprietary overkill", in the sense that the plaintiff will enjoy an equitable proprietary interest in almost every case that unjust enrichment can be established, provided that the defendant has traceable title to the plaintiff's property and has not acquired full beneficial ownership. Any enlargement of the class of equitable proprietary interests will have a correspondingly detrimental impact on the entitlements of unsecured creditors of the recipient of the property.[92] It was for this reason, in addition to the adoption of a narrow category-based analysis of the authorities on resulting trusts, that the majority of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (Lord Browne-Wilkinson at 716) rejected the argument that the resulting trust had a role to play in reversing unjust enrichment.

87 *Tinsley v Milligan* [1994] 1 AC 340, Lord Browne-Wilkinson at 371; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne-Wilkinson at 708; *Allen v Snyder* (1977) 2 NSWLR 685, Samuels JA at 698.

88 *Vandervell v IRC* [1967] 2 AC 291.

89 *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39; *Williams v Williams* (1863) 32 Beav 370, 55 ER 145; *Re Vinogradoff* [1935] WN 68. See also *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399.

90 Robert Chambers, *Resulting Trusts* (Clarendon, Oxford, 1997), Part II, esp p 162.

91 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681, Gummow J at 689-694.

92 Robert Chambers, *Resulting Trusts* (Clarendon, Oxford, 1997), pp 235-236.

5] The constructive trust.[93] The varieties of constructive trust are designed to achieve a wide range of remedial objectives. These include the fulfilment of the expectations of a contributor to the acquisition of property, the perfection of incomplete transactions and compensation for harm suffered, as well as the prevention of unjust enrichment. Moreover, the consequences of imposing a constructive trust will vary according to the circumstances governing its imposition. These can include liability to pay compensation for loss,[94] an award of personal restitution for the value of a benefit received,[95] or the imposition of proprietary constructive trusteeship over property to which the defendant has title. It is therefore inaccurate to define the purpose of the constructive trust solely in terms of the reversal of unjust enrichment.[96]

However, some applications of the constructive trust are restitutionary either because they reverse unjust enrichment or because they compel a wrongdoer to give up the proceeds of equitable wrongdoing. A fiduciary who has acted in breach of obligation will be required to hold property acquired in consequence of the breach on constructive trust for the beneficiary.[97] Where the property has been acquired directly or indirectly from the beneficiary the basis for the imposition of the constructive trust will be the reversal of unjust enrichment.[98] But a constructive trust imposed upon a fiduciary who personally retains property which he or she was under a duty to acquire for the beneficiary is an example of restitution, in the sense of disgorgement, for an equitable wrong since the property was not obtained directly from the beneficiary. Another illustration of restitution for an equitable wrong is the constructive trust imposed upon the land acquired with the proceeds of a bribe in *Attorney-General for Hong Kong v Reid* [1994]

93 Oakley AJ, *Constructive Trusts* (3rd ed, Sweet & Maxwell, London, 1997); Elias G, *Explaining Constructive Trusts* (Clarendon, Oxford, 1990); Wright D, *The Remedial Constructive Trust* (Butterworths, Sydney, 1998).

94 For example, the liability imposed upon a dishonest participant in a breach of fiduciary obligation: *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

95 For example, the liability imposed upon the recipient of property from a fiduciary who has acted in breach of obligation: *Barnes v Addy* (1874) LR 9 Ch App 244; *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437; *Koorootang Nominees Pty Ltd v ANZ Banking Group* [1998] 3 VR 16.

96 Cf *Restatement of the Law of Restitution*, American Law Institute (1937), para 160. For Canadian law contrast *Pettkus v Becker* (1980) 117 DLR (3d) 257 with *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214.

97 *Boardman v Phipps* [1967] 2 AC 46; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; *Chan v Zacharia* (1984) 154 CLR 178; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488.

98 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, criticised in *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, (1989) 61 DLR (4th) 14 and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne-Wilkinson at 714-715.

1 AC 324.[99] The decision cannot be explained in terms of the reversal of unjust enrichment. The bribe money had never previously belonged to the beneficiary, the Hong Kong government, nor was the fiduciary under any duty owed to the beneficiary to obtain the money. Nevertheless, the defendant was compelled to give up to the beneficiary the property acquired with the bribe money.

The constructive trust based on the legal owner's unconscionable denial of the plaintiff's claim[100] furthers a number of distinct remedial objectives which are apt to be obscured by the language of unconscionability. Awards of equitable interests under this model of constructive trusteeship are for the most part designed to fulfil the reasonable expectations of the claimant which have been denied by the titleholder's unconscionable conduct. But the constructive trust awarded in *Muschinski v Dodds* (1985) 160 CLR 583 was restitutionary in function, restoring to the parties the contributions each had made to the failed joint venture. Moreover, in formulating the model of constructive trusteeship based on the notion of "failed joint venture or endeavour" Deane J drew on authorities on restitution of money paid under a frustrated contract and under a dissolved partnership.[101] Finally, the restitution of benefits received, or the payment for services performed, may in some cases be the most appropriate method of preventing unconscionable conduct (*Kais v Turvey* (1994) 17 Fam LR 498). The avoidance of unconscionable conduct and the prevention of unjust enrichment are sometimes assumed to be antithetical objectives in equity, but this is not necessarily the case. The constructive trust imposed to prevent unconscionable conduct is flexible enough to accommodate orders of proprietary restitution within its discretionary framework. Rather more problematic is the fact that in awarding restitution under this head of constructive trusteeship courts often fail to distinguish between the prevention of unjust enrichment and the disgorgement of an unauthorised gain.

6] Equitable lien. An equitable lien is imposed over property to which the defendant has title in order to secure performance of a personal remedy, including a personal restitutionary remedy. Failure to make restitution will entitle the plaintiff to apply for an order of sale of the property to satisfy the judgment. Like the resulting trust and some applications of the constructive trust the equitable lien is a proprietary remedy. But in contrast to these remedies the lien secures only

99 See also *Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484; Birks P, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1; Goode R, "Proprietary Restitutionary Claims" in W Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution Past, Present and Future* (Hart, Oxford, 1998), p 63; Burrows A, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 *Law Quarterly Review* 412.

100 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 174 CLR 137.

101 *Atwood v Maude* (1868) 3 Ch App 369; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265. See also *Roxborough v Rothmans of Pall Mall Australia* (2001) 76 ALJR 203, 207.

repayment of the amount secured, together with interest, and not to any appreciated value of the property. An equitable lien can be imposed over specific property belonging to the defendant whenever good conscience requires (*Hewett v Court* (1983) 149 CLR 639). Without limiting the generality of this proposition the imposition of an equitable lien will usually be considered appropriate, first, where the plaintiff's money has been wrongly applied by the defendant in the improvement of property, as opposed to its acquisition,[102] and secondly, where the defendant has used the plaintiff's money, together with that of an innocent third party, to acquire property (*Re Diplock's Estate* [1948] Ch 465, 547). Where the plaintiff's money has been mixed with the defendant's money in the latter's bank account the plaintiff will be entitled to a lien over the account to secure repayment of the money. If sufficient funds remain in the account the plaintiff may elect to take the money out of the account.[103] But if the balance of the account is insufficient to make full restitution to the plaintiff the latter must have recourse to the personal remedy of equitable compensation for the amount of the deficiency. The remedy will obviously be insufficient if the defendant is bankrupt.

OTHER EQUITABLE PROCESSES FOR ESTABLISHING AN UNJUST ENRICHMENT CLAIM

[425] Tracing[104] is the process by which the plaintiff establishes that the value of property to which he or she originally had title has been received by the defendant even though the defendant never received, or no longer has title to, the original property.[105] Strictly speaking, tracing describes only the process of identifying the defendant's enrichment as representing property which had previously belonged to the plaintiff. The plaintiff's entitlement to a restitutionary remedy is a wholly distinct question dependent upon proof of one of the grounds of unjust enrichment or some other basis for awarding restitution.[106] But in

102 *Boscawen v Bajwa* [1996] 1 WLR 328, Millett LJ at 335. Cf *Foskett v McKeown* [2001] AC 102.

103 *Re Hallett's Estate* (1880) 13 Ch D 696, Jessel MR at 711; *Brady v Stapleton* (1952) 88 CLR 322; *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331, Hope JA at 347.

104 See Ch 23: "Tracing"; Smith L, *The Law of Tracing* (Clarendon, Oxford, 1997).

105 Cf *Boscawen v Bajwa* [1996] 1 WLR 328, Millett LJ at 334, contrasting tracing with "following", which is the process for showing that the actual property to which the plaintiff has title has been received by the defendant. See Smith, *The Law of Tracing* (Clarendon, Oxford, 1997), p 4. See also *Foskett v McKeown* [2001] AC 102, 128.

106 "Claiming", Smith, *The Law of Tracing* (Clarendon, Oxford, 1997), pp 11-14.

practice the term "tracing" has been used compendiously to refer to both the identification of the plaintiff's property and the award of the equitable remedy. References to "tracing remedies" can be found in the judgments.[107]

Tracing may be required to establish entitlement to either a personal remedy or a proprietary remedy (*Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548). The tracing rules will be applied to identify the plaintiff's property through mixing in bank accounts, or by incorporation in a product which contains materials contributed by the defendant or by third parties, or through substitutions of the plaintiff's property by the property belonging to other parties. The major limitation on tracing at common law is that it is not possible to trace into mixed products.[108] The restriction has been held to extend to tracing through inter-bank clearing[109] which, if correct, constitutes a serious obstacle to the availability of restitution at common law to recover the proceeds of money laundering. Even if this limitation is abolished, however, a major drawback to common law tracing is the absence of proprietary remedies at common law. A plaintiff who traces the value of his or her property into property belong to an insolvent defendant will require a proprietary remedy, such as an equitable lien or constructive trust, in order to assert title to the property in priority to the recipient's unsecured creditors.[110]

[426] The detailed tracing rules are discussed elsewhere (see Ch 23: "Tracing"). Restitution scholars have placed special emphasis on the necessity for distinguishing clearly between tracing, as a technique of identifying the plaintiff's value in property to which the defendant has title, and the claim to a personal or proprietary remedy which requires the plaintiff to establish a ground of restitution. This argument has received a measure of judicial acceptance in the English authorities[111] but remains untested in other jurisdictions, including Australia. Acceptance

107 *Sinclair v Brougham* [1914] AC 398; Cf *Foskett v McKeown* [2001] AC 102, Lord Millett at 128: "Tracing is thus neither a claim nor a remedy."

108 *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721. See Smith L, "Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench" [1995] *Lloyds Maritime and Commercial Law Quarterly* 240 for the argument that *Taylor v Plumer* turned on tracing in equity. The argument was accepted by Millett LJ in *Trustee of the Property of FC Jones v Jones* [1997] Ch 159, 169 though the traditional limitation on the availability of common law tracing was nonetheless applied in that case.

109 *Agip (Africa) Ltd v Jackson* [1991] Ch 417; *Trustee of the Property of FC Jones v Jones* [1997] Ch 159, 168.

110 *Re Hallett's Estate* (1880) 13 Ch D 696; *Re Oatway* [1903] 2 Ch 356; *Brady v Stapleton* (1952) 88 CLR 322; *Foskett v McKeown* [2001] AC 102.

111 *Boscawen v Bajwa* [1996] 1 WLR 328; *Trustee of the Property of FC Jones v Jones* [1997] Ch 159; *Foskett v McKeown* [2001] AC 102.

of the proposition that tracing is the process of identification should logically result in unification of the common law and equitable tracing rules, though equitable proprietary remedies, together with equitable principles governing their award, constitutes a distinctive equitable contribution to the recovery of the plaintiff's property.

[427] Equitable subrogation[112] is a process for transferring rights from one person to another by operation of law.[113] It enables a plaintiff to rely on the rights of a third party against a defendant, or on the rights of a defendant against a third party. Subrogation may be contractual or equitable, but only equitable subrogation can be considered to be restitutionary. It enables a plaintiff to establish that the restitutionary remedy awarded to reverse unjust enrichment may include the enforcement of the remedies to which a third party was entitled against the defendant where those remedies are more advantageous than those to which the plaintiff would be entitled, and where it would be equitable to permit the plaintiff to take advantage of the remedies (cf *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221). For example, a plaintiff who discharges a mortgage over the defendant's property in the mistaken belief that rights over the property will thereby be obtained may be subrogated to the rights of the original mortgagee if the justice of the case so requires.[114] Equitable subrogation can operate as a proprietary or personal remedy. A personal remedy will be awarded if proprietary restitution would confer an unfair advantage on the plaintiff over other creditors who advanced money to the defendant in good faith (*Banque Financière de la Cité v Parc (Battersea) Ltd*).

In *Banque Financière de la Cité v Parc (Battersea) Ltd* the House of Lords held that an award of equitable subrogation as a restitutionary remedy requires proof of a recognised ground of injustice, such as mistake. It does not, in terms, depend on any intention or assumption on the part of the party discharging the obligations of another that any rights will thereby be acquired against that other party (Lord Hoffmann at 234). Nevertheless, the intention of the party claiming the benefit of equitable subrogation will be relevant in some cases. For example, it will not be just to subrogate the plaintiff to a security interest where the plaintiff discharged a mortgage with no intention of acquiring

112 See Ch 15: "Subrogation"; Mitchell C, *The Law of Subrogation* (Clarendon, Oxford, 1995).

113 *Orakpo v Manson Investments Ltd* [1978] AC 95, Lord Diplock at 104.

114 *Butler v Rice* [1910] 2 Ch 277; *Ghana Commercial Bank v Chandiram* [1960] AC 732; *Paul v Speirway* [1976] Ch 220; *Boscawen v Bajwa* [1996] 1 WLR 328.

the mortgagee's interest over the mortgaged property (*Paul v Speirway* [1976] Ch 220). Moreover, the plaintiff's intention will be material to proving the existence of a ground of unjust enrichment such as mistake or failure of consideration.[115]

CONCLUSION

[428] Equity and restitution can no more be compared directly than chalk and cheese. One is a jurisdictional division while the other is a remedial category comprising those common law, equitable and statutory remedies which compel a defendant to give up a gain which has been wrongly acquired. But as common law courts increasingly recognise the place of restitution in the law of obligations, the identification of individual equitable claims as being founded on the principle of avoiding unjust enrichment, and of equitable remedies as being restitutionary, becomes critical.[116] The recognition in *Pavey and Matthews Ltd v Paul* (1987) 162 CLR 221 (Deane J at 256-257) that unjust enrichment constitutes a "unifying legal concept" failed to settle the question as to which areas of the common law and equity should be unified under this rubric. In the absence of authoritative decisions on the point judicial and academic pronouncements on the proper scope of the unjust enrichment principle and, more generally, of the law of restitution have multiplied. The process of integrating equitable remedies within a restitutionary framework is particularly complex. This is not simply because the award of equitable remedies requires the exercise of discretion: the principles governing that exercise are firmly established, and give rise to few problems in practice.[117] A more serious obstacle to integration is that equitable remedies fulfil a variety of objectives, both restitutionary and non-restitutionary, and that the principles governing their award often conceal the precise purpose that the award of the remedy is designed to achieve. For example, an award of equitable compensation or the imposition of a constructive trust may sometimes be restitutionary, but in other situations these remedies compensate for loss suffered or, in the case of the constructive trust, fulfil reasonable expectations or perfect an incomplete arrangement.

115 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221; Jackman IM, "Restitution and Subrogation" (1999) 73 *Australian Law Journal* 110; Villiers T, "A Path Through the Subrogation Jungle: Whose Right Is it Anyway?" [1999] *Lloyds Maritime and Commercial Law Quarterly* 223.

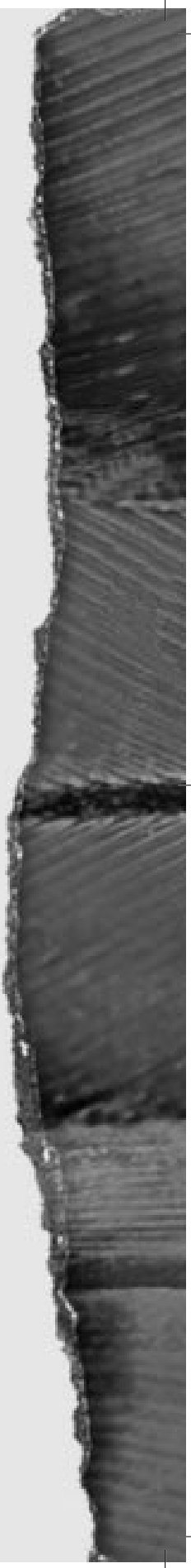
116 Beatson J, "The Use and Abuse of Unjust Enrichment", Ch 9 in *Unfinished Business: Integrating Equity* (Clarendon, Oxford, 1991); Birks P, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 1.

117 Cf Birks P, "Equity, Conscience and Unjust Enrichment" (1999) 23 *Melbourne University Law Review* 1.

Most equitable doctrines and remedies, considered in isolation, are not restitutionary. The critical questions for the restitution lawyer are, first, to identify the specific applications of an equitable doctrine which reverse unjust enrichment and, secondly, to determine which applications of equitable remedies which are restitutionary.

PART II

Unfair Dealing



CHAPTER FIVE

UNCONSCIENTIOUS DEALING

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INTRODUCTION

Elements of unconscientious dealing

[501] Unconscientious dealing occurs where a party to a transaction (A) is under a special disability in dealing with the other party (B), and A's special disability was sufficiently evident to B to make it prima facie unfair or unconscionable for B to take the benefit of the transaction.[1] The usual remedy is for the court to set aside the transaction or, alternatively, to refuse B specific performance. In some cases, the setting aside of the whole transaction may give A a windfall at B's expense. Then the court has jurisdiction to achieve "practical justice" between the parties (*Vadasz v Pioneer Concrete Pty Ltd* (1995) 184 CLR 102). For example, it may set aside only part of the transaction, or it may set aside the whole transaction subject to the making of an allowance in B's favour. The aim in all cases is to balance A and B's competing interests (*Bridgewater v Leahy* (1998) 194 CLR 457 at 494).

The focus of the doctrine is on "the exploitation by one party of another's position of disadvantage".[2] The sorts of disadvantage that may attract the doctrine are varied but include:[3]

1 This statement is adapted from *Louth v Diprose* (1992) 175 CLR 621, Deane J at 637. See also Brennan J at 626-627, Toohey J at 650.

2 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Dawson J at 489; *Blomley v Ryan* (1956) 99 CLR 362, Kitto J at 415.

3 *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 405.

> "Poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy, or lack of education, lack of assistance or explanation where assistance or explanation is necessary".

This list is not an exhaustive one. The situations it refers to are no more than "particular exemplifications of an underlying general principle".[4] Disadvantage in the relevant sense does not necessarily involve "physical frailty or enfeeblement" (*Bridgewater v Leahy* (1998) 194 CLR 457 at 490).

According to Meagher, Gummow and Lehane, in cases of unconscientious dealing in contrast to presumed undue influence:[5]

> "There is no presumption against the transaction raised by any anterior relation of influence; rather attention is focused upon the position of the parties at the time of the transaction and the nature of the benefits passing under it."

In other words, whereas presumed undue influence is concerned with the exploitation of relationships of influence, the main concern of unconscientious dealing is with ad hoc exploitation. Nevertheless, the doctrines overlap.[6]

To establish unconscientious dealing, it is not enough to prove that A, to B's knowledge, was affected by a special disadvantage at the time of transacting. Proof of exploitation is required.[7] Without this requirement, the doctrine would threaten legitimate transactions between A and B, and it would become difficult for persons with known disabilities to enter into contracts or make binding gifts. On the other hand, if A had to lead affirmative evidence of exploitation, unconscientious dealing would frequently go unremedied. The problems of proof would be insurmountable. The solution is to allow A to establish exploitation by inference, leaving it to B to present any relevant countervailing evidence (see *Louth v Diprose* (1992) 175 CLR 621, Brennan J at 632). This approach represents a halfway house between the alternatives of conclusively presuming exploitation

4 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J at 462. See below, para [512].

5 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1602].

6 See *Louth v Diprose* (1992) 175 CLR 621, Brennan J at 626-628; *Bridgewater v Leahy* (1998) 194 CLR 457 at 477-479.

7 "The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation": *Louth v Diprose* (1992) 175 CLR 621, Deane J at 638.

once known disadvantage is established (in which case there would be too many interventions), and requiring A to prove exploitation affirmatively (in which case there would be too few).[8]

The basis of equity's intervention

[502] Related common law doctrines include the rules governing fraud (in the common law sense of cheating), duress, non est factum and capacity. The main concern of these rules is said to be with the quality of A's consent to the transaction. Lack of effective consent provides the basis for setting the transaction aside (*Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 401-402). By contrast, the main concern of the unconscientious dealing doctrine is with B's wrongdoing. The transaction is set aside because, given the wrongdoing, it would be unconscionable for B to retain the benefit of it.[9]

However, this is perhaps a difference more of emphasis than substance. At common law, B's wrongdoing is important because proof of fraud, duress and the like is the usual way of impeaching the quality of A's consent to the transaction. Correspondingly, in equity, a crucial factor in determining whether B's conduct is unconscionable will be its tendency to impair A's consent. The real difference between common law and equity lies in equity's more robust approach to intervention. Equity takes a broader view of what amounts to actionable wrongdoing on B's part. Also, as the drunkenness cases demonstrate, equity may intervene even though A's consent is only partially affected; the common law requires an absence of consent, an "extreme state of intoxication, that deprives a man of his reason".[10]

Subject to what has just been said, in equity — as at common law — sanctity of contract considerations are important: "Chancery mends no man's bargain."[11] In *Wilton v Farnworth* (1948) 76 CLR 646, Latham CJ said (at 649):

8 Epstein R, "Unconscionability: A Critical Reappraisal" (1975) 18 *Journal of Law and Economics* 293 at 301-302.

9 *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 401-402; *Chesterfield v Janssen* (1751) 2 Ves Sen 124, Lord Hardwicke LC at 154; 28 ER 82.

10 *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 405, quoting Sir William Grant MR in *Cooke v Clayworth* (1811) 18 Ves Jun 13 at 16; 34 ER 222.

11 *Maynard v Moseley* (1676) 3 Swans 651, Lord Nottingham LC at 655; 36 ER 1009.

> "Where a man signs a document knowing that it is a legal document relating to an interest which he has in property, he is in general bound by the act of signature. He may not trouble to inform himself of the contents of the document, but that fact does not deprive the party with whom he deals of the rights which the document gives to him. In the absence of fraud or some other of the special circumstances [such as undue influence, mistake, lunacy, duress, non-disclosure of material facts when there is a duty to disclose, abuse of confidential relationship], a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions."

A somewhat more lenient attitude may be taken in relation to gifts,[12] but even in the case of a gift the presumption is still in favour of validity.

[503] The courts will not set aside a transaction just because the outcome in hindsight seems unfair. To justify intervention, proof is required of wrongdoing by B in some relevant sense, resulting in impairment of A's consent to the transaction.[13] The doctrine of unconscientious dealing is concerned with "procedural unfairness", not "contractual imbalance" alone (*Hart v O'Connor* [1985] AC 1000 at 1018 (PC)). To adopt Leff's terminology, the focus is on "procedural unconscionability", in contrast to "substantive unconscionability".[14] An unfair outcome is relevant only in so far as it supports an inference of unfair dealing (see below, para [511]).

Applications of the doctrine

Gifts

[504] There used to be a view that a voluntary disposition of property would be set aside unless the donee discharged the onus of showing that the donor understood the transaction and freely

12 *Wilton v Farnworth* (1948) 76 CLR 646, Latham CJ at 649.

13 *Hart v O'Connor* [1985] AC 1000 (PC). See also above, para [204].

14 Leff A A, "Unconscionability and the Code — The Emperor's New Clause" (1967) 115 *University of Pennsylvania Law Review* 485.

consented to it. The doctrine, first stated by Lord Romilly,[15] has been discredited (see below, para [1104]). The donor must prove some substantial reason for setting the transaction aside, and unconscientious dealing is one such ground (*Wilton v Farnworth* (1948) 76 CLR 646, Rich J at 655). Although Lord Romilly's doctrine has been rejected, unconscientious dealing may be more readily presumed in cases of a substantial gift than in the case of a business transaction. It is the voluntary nature of the transaction that makes the difference (Latham CJ at 649).

A leading case is *Wilton v Farnworth* (1948) 76 CLR 646. The plaintiff was a Kalgoorlie miner who was aged about 40 when he married a widow in her mid-60s. Shortly afterwards, the couple's "married felicity" was interrupted when she moved to Perth to set up a boarding house. The plaintiff stuck to his work as a miner and refused to join his wife in Perth. He agreed to pay her maintenance, even though she was conducting an apparently profitable business. The wife was murdered, and after her death it was discovered that she had been trafficking in gold. She held substantial amounts of money in various bank accounts and also owned Commonwealth Bonds. She died intestate, and as a consequence the plaintiff became entitled to a large share of her estate. Not knowing the amount involved, he was induced to transfer his entitlement to his stepson, the defendant, by a deed of gift. According to evidence at the trial, the plaintiff was deaf, dull-witted and poorly educated. The deed of gift was set aside on the ground of unconscientious dealing, and the High Court dismissed an appeal. Rich J said (at 655):

> "It has always been considered unconscientious to retain the advantage of a voluntary disposition of a large amount of property improvidently made by an alleged donor who did not understand the nature of the transaction and lacked information of material facts such as the nature and extent of the property particularly if made in favour of a donee possessing greater information who nevertheless withheld the facts. In the present case the capacities of the plaintiff and defendant were quite unequal. The plaintiff was sufficiently handicapped by his defect of hearing in gaining an understanding of the facts relating to his wife's property, his interest therein and the transaction into which he was invited to enter. But his intelligence placed him in an even more unequal position in dealing with the defendant in the transaction. To all this the defendant must have been fully alive. We have here an improvident transaction entirely voluntary springing from no sensible motive. The donor has no education, small intelligence and a history of curious conduct."

15 *Hoghton v Hoghton* (1852) 15 Beav 275; 51 ER 545.

Another leading case concerning gifts is *Louth v Diprose* (1992) 175 CLR 621. In this case, the plaintiff was a 48 year old male solicitor, who had become infatuated with the defendant, a younger woman. She did not return his feelings, but for a period of about seven years, she allowed him to make advances to her and she accepted gifts from him. Ultimately, to help her through a period of personal crisis, he gave her money for a house. Some years later, they had a falling out, and he demanded that she transfer the house into his name and pay him rent. She refused. The plaintiff brought an action in the Supreme Court of South Australia seeking a declaration that the defendant held the house on constructive trust for him and an order that she transfer the property into his name. The main basis for the claim was unconscientious dealing. The plaintiff succeeded at trial, and successive appeals to the Full Court and the High Court failed. The result is at first glance surprising. As Dawson, Gaudron and McHugh JJ pointed out in the High Court (at 639), the plaintiff was a male solicitor with, presumably, some experience of worldly affairs, while the defendant was a woman experiencing financial hardship and personal difficulties. Nevertheless, the trial judge had found that the relationship was an unusual one, and that the defendant manipulated the plaintiff's feelings for her so as to induce the gift. In particular, the judge held that the defendant had deliberately manufactured an atmosphere of crisis in relation to her living arrangements (she had at one point threatened suicide), and that this was dishonest and smacked of fraud. Although some reservations were expressed in the High Court about these findings, the majority was not prepared to overturn them. Taking the findings as given, the case was a clear one.

Contracts of sale

[505] *Blomley v Ryan* (1956) 99 CLR 362 concerned a contract for the sale of a grazing property. The vendor was in his late 70s, and he was physically and mentally impaired through a combination of old age and alcoholism. The purchaser's agent brought a bottle of rum to the negotiations, and the vendor was ill and partly intoxicated by the time he agreed to the transaction. The purchase price was £25,000, some £8,500 less than the market value of the property, and the payment terms were very favourable. The purchaser sued for specific performance of the contract, but relief was refused and the court ordered instead that the contract be set aside on the ground that it was an unconscionable bargain. The decision was upheld on appeal to the High Court.

Bridgewater v Leahy (1998) 194 CLR 457 is a more borderline case. The disputed transaction was between a wealthy grazier (A) and his nephew (B) and B's wife. The transaction comprised a sale of several properties by A to B and B's wife for close to $700,000 coupled with a deed of forgiveness for all but $150,000 of the sale price. In substance, A made a gift to B and his wife of nearly $550,000 in money's worth. B was A's nephew. He had worked on A's properties for nearly all his adult life and he had a close relationship with A. A and B became partners in 1981 and B took over responsibility for the day to day management of the partnership business. The disputed transaction was completed in 1988 when A was 84 years old. A died the following year and the transaction was challenged by A's widow and daughters. The evidence showed that although A was a "fragile elderly man", he was "of sound mind and capable of making decisions about his personal affairs". A knew and understood what he was doing when he entered into the transaction (at 491). Nevertheless the High Court by a majority (Gaudron, Gummow and Kirby JJ, Gleeson CJ and Callinan J dissenting) held that the doctrine of unconscientious dealing applied. It said the question was not whether A knew what he was doing, but how his intention to benefit B was produced.[16] The relationship between A and B meant that when B initiated the transaction, the parties were meeting on unequal terms. "[B] took advantage of this position to obtain a benefit through a grossly improvident transaction on [A's part]" (at 493).

Unconscientious dealing depends on a finding of disadvantage, but the majority judgment is not clear about what A's disadvantage was. The judgment could be read as suggesting that A was disadvantaged because of his relationship with B. The trouble is that this sounds like undue influence and the courts below had specifically rejected allegations of undue influence on B's part. Alternatively, the judgment could be read as inferring A's disadvantage from the "grossly improvident" nature of the transaction. If so, the case is an unusual one. Courts are generally reluctant to draw such inferences in the absence of additional supporting evidence. There are good policy reasons for this caution: see below para [511].

Contracts of guarantee

[506] Since the High Court decision in *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, it has become common

16 *Bridgewater v Leahy* (1998) 194 CLR 457 at 491 quoting from *Huguenin v Baseley* (1807) 14 Ves Jun 273 at 299-300.

practice in Australia to plead the doctrine of unconscientious dealing in cases to attack a contract of guarantee.[17] This is in contrast to the practice in England, where such cases are usually fought on the basis of undue influence. In *Amadio*, the plaintiff guarantors were elderly Italians with a limited command of written English and no relevant business experience. They agreed to execute a mortgage guarantee in respect of their son's business overdraft, in the mistaken belief that the business was flourishing. Their son had lied to them about the financial situation, and the bank itself had contributed to the deception because it had adopted a practice of selectively dishonouring the son's cheques to create the appearance of solvency. The Amadios had also been lied to about the extent of their liability under the guarantee. They received no independent advice before the transaction. The bank manager brought the documents to the Amadios' home for execution, and they signed the papers without reading them.

These facts disclose a clear case of undue influence on the part of the son with at least constructive notice on the part of the bank. However, the case was not pleaded this way. Instead, undue influence was alleged directly against the bank and, in the alternative, unconscientious dealing. The evidence failed to support undue influence on the part of the bank, and this left unconscientious dealing as the mainstay of the plaintiffs' case.[18] Mason J criticised (at 464) the pleadings for overlooking undue influence on the son's part with notice on the part of the bank, and expressed the hope that the amended statement of claim would not "find its way into the precedent books". Regrettably, this is just what has happened. Since *Amadio*, it has become increasingly common for the guarantor to plead unconscientious dealing against the financier rather than notice on the financier's part of wrongdoing by the borrower.[19]

The culmination of this trend occurred in *Akins v National Australia Bank* (1994) 34 NSWLR 155, where it was held that, following *Amadio*, Australian courts should apply the unconscientious dealing doctrine in guarantee cases and not the

17 See also below, para [1107]. In many cases, statutory relief is sought in the alternative to relief in equity: see below, para [515]ff.

18 Implied misrepresentation was also pleaded, but only Gibbs CJ was prepared to find for the plaintiffs on this ground.

19 See, for example, *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227; *Borg-Warner Acceptance Corp (Australia) Ltd v Diprose* (1987) NSW Conv R 55-364; *Broadlands International Finance Ltd v Sly* (1987) NSW Conv R 55-342. See Sneddon M, "Unfair Conduct in Taking Guarantees and the Role of Independent Advice" (1990) 13 *University of New South Wales Law Journal* 302 at 316-319.

doctrine of undue influence. In *Amadio*, there was evidence of actual wrongdoing by the bank itself. By selectively dishonouring the son's cheques, the bank had contributed to the Amadios' false impression that the business was solvent. In this respect, at any rate, the plea of unconscientious dealing against the bank was not inappropriate. However, there was nothing similar in *Akins*. Accordingly, in order to make the plea of unconscientious dealing fit, the court was forced to make two critical concessions, namely that:

- the guarantor's susceptibility to the borrower's undue influence may itself amount to a special disadvantage for the purposes of the unconscientious dealing doctrine;[20] and
- constructive notice on the bank's part of the borrower's undue influence may be enough to hold it liable.[21]

The first of these propositions is tautologous. The second is open to objection because it threatens the policy basis of the unconscientious dealing doctrine (see above, para [502]-[503]). In particular, it is inconsistent with the Privy Council's ruling in *Hart v O'Connor* [1985] AC 1000, that unconscientious dealing requires proof of victimisation or advantage-taking on B's part. These difficulties could be avoided if, accepting Mason J's recommendation, the courts were to recognise that cases like *Akins* may be better argued on undue influence grounds. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 signals a shift in this direction at least in cases where the debtor and guarantor are husband and wife or the like (see below paras [1123]-[1128]).

Loan contracts

[507] A loan contract may be set aside on the ground of unconscientious dealing. Some of the earliest cases fell into this category. They concerned expectant heirs attempting to raise finance, often on exorbitant terms, by the sale or mortgage of their interests to money lenders. The history of the jurisdiction is interesting.[22] Equity's sympathy for these victims of youthful folly was so great that, by the middle of the 19th century, it was prepared to set transactions aside on the ground of inadequate consideration alone without proof of actual advantage-taking. The expectant heir cases represent an early example of the drift

20 For an apparently similar view, see *Bridgewater v Leahy* (1998) 194 CLR 457: see above, para [505].

21 See below, para [1127].

22 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1608]-[1611].

from procedural to substantive unconscionability concerns. The trend was eventually corrected by legislation, out of concern for its potential effect on legitimate business dealings.[23]

Asia Pacific International Pty Ltd v Dalrymple [2000] 2 Qd R 229, is a modern case in a similar vein. The borrowers needed bridging finance. They obtained a loan from the plaintiff for a period of one month. The loan agreement provided for the payment of interest at a rate of 20 per cent per month compounding monthly. The borrowers never repaid the loan. Interest continued to accrue on the outstanding loan balance at the contract rate. Accrued interest was capitalised in accordance with the provision for compounding in the loan agreement. As a consequence, in the space of about 21 months, the borrowers' indebtedness to the plaintiff rose from about $70,000, this being the amount they originally borrowed, to more than $3 million. The court held (at 235) the interest rate the plaintiff charged combined with the right to capitalise unpaid interest "clearly discloses unconscionable conduct on the part of the plaintiff". The borrowers were in urgent need of finance, and the plaintiff took advantage of their vulnerable position to impose unreasonable terms on them.

This characterisation is open to question. The loan was a commercial one made at arm's length. Arrangements for the loan were made through a mortgage broker engaged by the borrowers. The borrowers were commercially experienced and they obtained independent legal advice before they entered into the transaction. They needed money urgently, but that is unsurprising: the whole purpose of bridging finance is to cater for urgent short-term money needs. There was evidence to show that other companies in the bridging finance market charged comparable rates. The court's decision was clearly influenced by how the interest charging provisions in the loan agreement had caused the borrowers' total indebtedness "to rise like a skyrocket" (at 231). In other words, there was a heavy emphasis on the contract outcome. The order the court made was for variation of the loan agreement by:

- removing the provision for compounding; and
- reducing the interest rate to 15 per cent monthly.

Debtor over-commitment has been a prominent concern of consumer groups in recent years. Various attempts have been

23 *Sale of Reversions Act* 1867 (Imp) (see now *Law of Property Act* 1925 (UK), s 174). This legislation was copied in Australia: see, for example, *Conveyancing Act* 1919 (NSW), s 37C.

made to use both the statutory re-opening provisions and the equitable doctrines as a basis for arguing that a financier owes a duty to a consumer borrower to assess the borrower's ability to repay before extending credit. In *Australian Societies Group Financial Services (NSW) Ltd v Bogan* (1989) ASC s 55-938, 58,557 (SC(NSW)), a decision under the reopening provisions of the *Credit Act* 1984 (NSW), Campbell J rejected this suggestion (at 58,562):

> "Neither the Act nor law support the proposition that not to seek confirmatory evidence of matters going to ability to repay a loan is sufficient to make a contract unjust".

Clearly what is required is something more.

Vital Finance Corp Pty Ltd v Taylor (1991) ASC s 56-099, 57,032 (SC(NSW)), which was decided in equity, is an example of a case where something more was found. The case concerned a contract for the lease of a truck together with a loan to pay out the lessees' obligations under an earlier lease agreement. The lessees' obligations under both the loan contract and the lease were secured by successive mortgages over their family home. The lessees were in financial difficulties at the time of the contract, and the evidence established the financier was aware of this. The lessees defaulted and an action was brought against them for possession of the house. They cross-claimed, arguing among other things unconscientious dealing against the financier. The court upheld their claim. Among the matters emphasised in the judgment were the following:

- the lessees were in a dubious financial position from the outset;
- they lacked commercial experience and had a limited understanding of the documents they were signing;
- they were reliant on the financier's expertise, and were persuaded by its assurance that they would be able to meet the payments;
- the financier knew at the time of making the assurance that there was a high probability of default and covered itself by taking additional security; and
- the financier exploited the lessees' vulnerable position to its own advantage.[24]

24 For similar cases decided under the *Contracts Review Act* 1980 (NSW), see *O'Brien v Hooker Homes Pty Ltd* (1993) ASC 56-217 (home loan contract secured by mortgage); *Smith v Elders Rural Finance Ltd* (unreported, SC NSW, Bryson J, 25 November 1994) (loan contract to purchase farming property secured by mortgages).

In *Vital Finance*, the "something more" included the fact that the credit provider knew about the risk of the debtor's default but protected its own position by taking additional security. However, there were the other relevant factors mentioned above as well. In the absence of these other relevant factors, would it have been appropriate for the court to grant relief? In equity, the answer is probably not. However, there are statutory provisions that affect the position. Section 70(2)(l) of the *Consumer Credit Code* invites the court to reopen a contract if "the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay".[25] This provision represents a significant shift of ground. In equity, proof of victimisation or advantage-taking is required before a contract will be set aside. By contrast, s 70(2)(l) of the *Consumer Credit Code* appears to make imputed carelessness on the financier's part a sufficient basis for intervention. Insofar as the provision takes the law beyond the position represented by the *Vital Finance* case, it is open to question. It is not self-evident that, as a general rule, financiers are better placed than borrowers themselves to assess a borrower's ability to repay. The reform may encourage excessive caution on the part of financiers, raising the cost of credit and making it harder for some borrowers to obtain finance.

DISADVANTAGE

Introduction

[508] The doctrine of unconscientious dealing depends upon proof of special disadvantage. Relevant kinds of special disadvantage cannot be exhaustively catalogued, but they appear to fall into three main categories:

- first, physical incapacity (resulting from factors such as sickness, old age or disablement);
- secondly, intellectual and emotional deficiencies (including mental illness, low intelligence, stress and drug- or alcohol-induced impairments); and
- thirdly, lack of endowments (for example, poor education, language difficulties and ignorance).[26]

25 See further, Duggan AJ and Lanyon EV, *Consumer Credit Law* (Butterworths, Sydney, 1999), para [9.4.9].

26 See, for example, *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 405, Kitto J at 415.

The underlying common requirement is that the condition must be one which "seriously affects the ability of the innocent party to make a judgment as to his own best interests" (*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J at 462).

In *Commercial Bank of Australia Ltd v Amadio*,[27] the plaintiffs' special disability rested on a combination of several factors including their ages, their lack of business experience, their limited command of written English, their mistaken belief about the solvency of their son's business, the circumstances in which they were asked to sign the mortgage documents, and their lack of knowledge or understanding of what the documents contained. In *Wilton v Farnworth* (1948) 76 CLR 646,[28] there was again a combination of factors at work including the plaintiff's deafness, lack of education, limited intelligence and his ignorance about the value of the property that was at stake. In *Louth v Diprose* (1992) 175 CLR 621, the emotional dependence of an infatuated lover was held to be a special disability.

As *Blomley v Ryan* (1956) 99 CLR 362 demonstrates, drunkenness may be a special disability. However, where drunkenness is alleged, the courts tend to be cautious. According to Fullagar J (at 405), the reason is

> "not so much because intoxication is a self-induced state and a reprehensible thing, but rather because it would be dangerous to lend any countenance to the view that a man could escape the obligation of a contract by simply proving that he was `in liquor' when it was made".

Before a court will intervene, it must be established that the judgment of one party was seriously affected by drink and the other party was aware of the situation (at 405).

Sickness, old age, infirmity, and drunkenness are disadvantages that only a natural person can suffer from. Can a corporation rely on the doctrine of unconscientious dealing? The question was addressed in *Commonwealth Bank of Australia v Ridout Nominees Pty Ltd* [2000] WASC 37.[29] Wheeler J thought that there were some kinds of special disadvantage a corporation could suffer from, for example, urgent financial need coupled with lack

27 See above, para [506].

28 See above, para [504].

29 Discussed in Hammond C, "Can a Company be the 'Victim' of Undue Influence and Unconscionability?" (2001) 19 *Companies and Securities Law Journal* 74.

of advice. Apart from this, in exceptional cases it may be appropriate to attribute to the corporation a special disadvantage affecting a director who is the corporation's directing mind and will. There is obviously more scope for attribution if the corporation is a small family-run concern. Even here, though, the courts should not apply the unconscientious dealing doctrine too readily. "Small corporations could be adversely affected if they are not in a position to take action quickly when commercial circumstances require it, because of the need to convince lenders or others that their directors are not under a relevant disability" (Wheeler J at para [56]).

Information imbalance

[509] Most cases where unconscientious dealing is successfully pleaded involve some kind of cognitive deficiency in the weaker party. "Cognitive deficiency" refers to a physical, intellectual or emotional impairment which affects the party's ability to process information relevant to the transaction. Sometimes, however, the plaintiff's problem may be not so much an inability to process relevant information as the lack of relevant information to process. If one party induces a mistake in the other, the contract is liable to be set aside, usually for misrepresentation. The outcome will be the same if one party deliberately conceals relevant information from the other (see, for example, *Taylor v Johnson* (1983) 151 CLR 422). However, the position is less clear where one party simply stands by and allows the other party to contract on the basis of some mistaken assumption or incomplete information. The outcome may depend on the nature of the mistake. Contrast the following cases:[30]

- A is an art dealer. She has a painting she wishes to sell for $150,000, with a $15,000 down payment. As the result of a printing error, the catalogue price is shown as $15,000. B, the purchaser, is aware of A's mistake but makes no attempt to correct it. The contract is signed for the sale of the painting at a price of $15,000.
- A, the vendor, and B, the purchaser, sign a contract for the sale of a painting at a price of $15,000. A mistakenly believes the painting to be a modern copy worth only $15,000. B knows that the painting is an original worth $150,000. B says nothing to A.

The first case relates to a pricing error, and the second case to a valuation error. There are authorities to suggest that for B to take

30 Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), pp 48-49.

advantage of A's pricing error is unconscionable conduct, and the contract may be set aside on that basis.[31] A mistake, no less than illiteracy, drunkenness or an enfeebled intellect can place a person at a disadvantage.[32] However, the position may be different in the case of valuation errors. There is a long line of cases indicating that where one party (to the knowledge of the other) is mistaken about the value of the contract subject matter, equity will not intervene unless there are special circumstances. A leading case is *Fox v Mackreth* (1788) 2 Cox Eq Cas 320. There, Lord Thurlow LC illustrated the point by reference to the case of a purchaser who, knowing of a mine on the vendor's estate and knowing that the vendor was ignorant of it, contracted for the purchase of the estate at only half its real value. The point was made also by Gleeson CJ in *Lam v Ausintel Investments (Australia) Pty Ltd* (1989) 97 FLR 458 at 475:

> "Where parties are dealing at arm's length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stand. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice. It would normally only be if there were an obligation of full disclosure that a different result would follow."

Parties routinely contract on the basis of unequal information. If information imbalance was not tolerated, a substantial threat would be posed to the security of transactions.

Why should information imbalance be tolerated in the second case (valuation errors), but not the first case (pricing errors)? The answer probably has to do with a concern to preserve incentives for the discovery and exploitation of socially valuable information. If, for example, mining prospectors were required to disclose their finds to property owners before contracting a purchase, they would be forced to share the gains (in the form of higher purchase prices). If the prospective gains from search and discovery are diminished, there will be less of an incentive

31 *Taylor v Johnson* (1983) 151 CLR 422; *Deputy Commissioner of Taxation v Chamberlain* (1990) 93 ALR 729; *Hartog v Colin and Shields* [1939] 3 All ER 566. See also Finn P, "Equity and Contract" in Finn P (ed), *Essays on Contract* (Law Book Co, Sydney, 1987), p 138; Greig D W and Davis J L R, *The Law of Contract* (Law Book Co, Sydney, 1987), p 926.

32 Finn P, "Equity and Contract" in Finn P (ed), *Essays on Contract* (Law Book Co, Sydney, 1987), p 139.

to undertake such activities in the first place. Valuable information will remain undiscovered and valuable resources will be unexploited. These considerations affect the second case, but they do not apply in the first case where B's superior information is purely redistributive and has no social value.[33]

Poverty

[510] Poverty is often referred to as an example of a special disability (for example see, *Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 405). However, for the doctrine of unconscientious dealing to apply it is not enough to show that A is poor, or that A will suffer hardship if the transaction is enforced. Intervention on these grounds alone would turn the doctrine into an instrument for wealth redistribution with probably adverse long-term effects for the poor at large. Trebilcock makes the point as follows:[34]

> "While it is clear that poor people will often be compelled, *eg*, to enter into consumer credit transactions at very high rates of interest, or to rent accommodation of very low quality, it is not at all clear that this apparently differential treatment of poor people in the marketplace is in any way attributable to objectionable behaviour on the part of the suppliers who deal with them. Even though the demand on the part of poor people for certain necessities of life may be highly inelastic, *ie*, unresponsive to price, given their resources, it does not follow from that fact alone that they will be exploited. Exploitation will only occur, in the sense of a charging of supra-competitive prices etc, if there are restrictions on supply in the relevant markets. Studies of low-income markets disclose with remarkable consistency that the rates of return earned by merchants in these markets are entirely normal. Thus, however objectionable the distributive outcomes from these markets, the source of the problem does not lie with the supply side of the market but instead with the simple fact of lack of endowments and the implications this carries for successful participation in market activity. Moreover, the objectionable conditions are not amenable to abatement by judicial intervention which prevents contract enforcement. As again studies of low-income markets have shown, this simply produces substitution effects, with resources being moved away from low-income consumers in

33 For a fuller analysis, see Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), Ch 5.

34 Trebilcock M J, "An Economic Approach to the Doctrine of Unconscionability" in Rieter B J and Swan J (eds), *Studies in Contract Law* (Butterworths, Toronto, 1980), pp 379, 419-420.

> such markets. For example, consumer credit will be withdrawn from low-income consumers if constraints are imposed on the interest rates that can be charged or collection remedies that can be invoked. Rental accommodation is withdrawn from such markets if rent controls are imposed at below competitive levels."

The common incidents of poverty extend beyond financial need and include poor education, lack of understanding, illness and psychological and emotional vulnerability. Factors like these may well justify intervention. *Vital Finance Pty Ltd v Taylor* (1991) ASC 56-009[35] is an example of a case about poverty in this extended sense. The Taylors were hardly destitute (on the contrary, Taylor ran his own brick-carting business). However, they were struggling financially, and they lacked the education and commercial understanding to assess the viability of the transaction proposed to them by the financier. The financier took advantage of their situation to negotiate a deal that was very favourable to itself and highly risky for the Taylors. The transaction was set aside.

Adequacy of consideration

[511] Inadequacy of consideration is neither a necessary nor a sufficient condition for intervention. It is not necessary because, although there must be some form of detriment to the weaker party (otherwise exploitation will not have been established), the detriment need not be manifest in the contract itself.[36] For example, if it is apparent that, in the absence of the conduct complained of, A would not have entered into the contract, intervention may be warranted even though the contract terms are not themselves unreasonable.[37] Inadequacy of consideration is not a sufficient condition for intervention because, as already discussed, the concern of the unconscientious dealing doctrine is with procedural, not substantive, unconscionability (see above, para [503]). However, inadequacy of consideration may be important in supporting an inference of unconscientious dealing. It may tend to show both that A was at a disadvantage, and that B made unfair use of the occasion (*Blomley v Ryan* (1956) 99 CLR 362, Fullagar J at 405).

35 See above, para [507].

36 *Blomley v Ryan* (1956) 99 CLR 366, Fullagar J at 405; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Deane J at 475.

37 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1524].

There are dangers in drawing inferences about procedural unfairness from transactional outcomes. The more readily such inferences are drawn, the less tenable the distinction between procedural and substantive unconscionability becomes. To say that B must have been guilty of unconscientious dealing because A could not possibly have consented to such a one-sided outcome is in effect to say that the outcome itself is unfair. Yet in the absence of some direct evidence that A was imposed upon, it is hard to see how such a conclusion can be justified.

The courts have mostly resisted the urge to travel down this road (but see below, para [514]). Usually, when the inadequacy of consideration is raised as a relevant factor, the purpose is to support other grounds for a finding of unconscientious dealing. *Blomley v Ryan* (1956) 99 CLR 362 is a good example. It was alleged there that Ryan's judgment had been affected by alcohol at the time of the contract. The difficulty with such a claim is that proof of intoxication is not itself proof of impaired judgment. There are degrees of intoxication. However, proof of intoxication coupled with an apparently one-sided contractual outcome does reflect on the quality of the affected party's consent. That is why, in *Blomley v Ryan*, Fullagar J said (at 405) that in cases involving drunkenness, adequacy of consideration is likely to be "a matter of major, and perhaps decisive, importance".

Inequality of bargaining power

[512] In *Lloyds Bank Ltd v Bundy* [1975] QB 326, Lord Denning MR suggested that the underlying concern of the unconscientious dealing doctrine was to remedy inequality of bargaining power, and that this was true also of the rules relating to duress, undue influence, undue pressure and the salvage cases. He said (at 339) that all these rules

> "rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other.

> I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases."

This attempt to restate the law in terms of a unified doctrine of inequality of bargaining power was rejected by the House of Lords in *National Westminster Bank plc v Morgan* [1985] AC 686. It has also been rejected in Australia. In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J (at 462) made it clear that the doctrine of unconscientious dealing is limited to cases of special disadvantage, saying that:

> "I qualify the word 'disadvantage' by the adjective 'special' in order to disavow that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasise that the disability, condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests."

The problem with broad references to "inequality of bargaining power" is that they are indeterminate. Bargaining power is hardly ever equal. There will nearly always be some imbalance between contracting parties in terms of wealth, experience, information and the like. If absolute equality were always insisted upon, there would be no more contracts. However, if the call is for less than absolute equality, it then becomes necessary to ask questions like "how much?" and "of what kind?". Lord Denning's statement provides no guidance on this score.

References to inequality of bargaining power are common in unconscionable contracts legislation. Speaking of s 2-302 of the *Uniform Commercial Code* (USA) — the precursor of the *Contracts Review Act* 1980 (NSW) and related Australian laws[38] — Leff concluded:[39]

> "The gist of the tale is simple: it is hard to give up an emotionally satisfying incantation and the way to keep the glow without the trouble of the meaning is continually to increase the

38 See below, para [515].

39 Leff A A, "Unconscionability and the Code — The Emperor's New Clause" (1967) 115 *University of Pennsylvania Law Review* 485 at 558, 559.

> abstraction level of the drafting and explaining language … But the lesson of its drafting ought nevertheless to be learned: it is easy to say nothing with words. Even if the words make one feel all warm inside, the result of sedulously preventing thought about them is likely to lead to more trouble than the draftsman's cosy glow is worth, as a matter not only of statutory elegance but of effect in the world being regulated. Subsuming problems is not as good as solving them."

The same could be said of Lord Denning's attempt to formulate a judicial doctrine of inequality of bargaining power.

KNOWLEDGE

[513] Proof that B knew of A's disability is a requirement for unconscientious dealing. The reason for this was explained in *Hart v O'Connor* [1985] AC 1000. Equity intervenes to provide relief against fraud, and fraud in the equitable sense means victimisation. Victimisation can consist of either the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances (at 1024). Either way, proof that B knew of A's disability is necessary because, in the absence of knowledge, B's conduct cannot be characterised as victimisation (at 1028). Intervention without proof of B's knowledge could only be for the purpose of remedying a contractual imbalance (substantive unconscionability), and this is not a legitimate function of the unconscientious dealing doctrine. *Hart v O'Connor* concerned a contract for the sale of a farming property in New Zealand by an elderly farmer to a neighbour. Relatives of the vendor attempted to have the contract set aside on the ground that he was of unsound mind. There was no evidence that the purchaser was aware of the vendor's disability. The New Zealand courts allowed the claim, holding that the state of the purchaser's knowledge was irrelevant. However, the Privy Council rejected this view, for the reasons just discussed.

In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, it was held that proof B actually knew of A's disadvantage is not required. It is sufficient if B was aware of the possibility that the situation might exist, or of facts that would raise this possibility in the mind of a reasonable person (Mason J at 467, Deane J at 479). The leading judgments were delivered by Mason and Deane JJ. Both quoted with approval a statement of Lord Cranworth LC in *Owen and Gutch v Homan* (1853) 4 HLC 997 (at 1035) that "wilful ignorance is not to be distinguished in its equitable consequences from knowledge".

Amadio is commonly assumed to be authority for the proposition that proof of constructive notice is sufficient for unconscientious dealing.[40] On this basis, it is hard to reconcile with *Hart v O'Connor*. According to *Hart v O'Connor*, the function of unconscientious dealing is to prevent victimisation, and this necessarily implies actual knowledge on B's part of A's disadvantage. How can it be said that B has victimised A if B was unaware of the relevant facts?[41] An alternative view of *Amadio* is that it extends knowledge to include wilful ignorance, but no further.[42] Wilful ignorance — wilfully shutting one's eyes to the obvious — is a form of dishonesty, whereas constructive notice is not.[43] Read in this way, *Amadio* is consistent with *Hart v O'Connor*.

There are sound reasons in support of the narrower view. The further the courts relax the knowledge requirement, the closer they come to dispensing with it altogether. The New Zealand Court of Appeal decision in *Nichols v Jessup* [1986] 1 NZLR 226 provides a good illustration. In that case, the defendant agreed to grant a right of way over her property to the plaintiff in order to improve the plaintiff's access to his own land. The defendant later refused to complete the transfer, and the plaintiff sued for specific performance. It emerged at the trial that the effect of the transfer would be to increase the value of the plaintiff's property by $45,000 and diminish the value of the defendant's property by $3,000. The trial judge refused specific performance on the ground that the bargain was unconscionable. He found that the defendant was ignorant about property matters, unintelligent and muddle-headed. Moreover, she had received no independent advice before entering into the agreement. There was no evidence that the plaintiff was aware of these disadvantages. However, the case was heard before the Privy Council decision in *Hart v O'Connor*, and the trial judge held that proof of knowledge

40 For example, *Akins v National Australia Bank Ltd* (1994) 34 NSWLR 155; *Borg-Warner Acceptance Corp (Australia) Ltd v Diprose* (1987) NSW Conv R 55-364; *Broadlands International Finance Ltd v Sly* (1987) NSW Conv R 55-342; *Nichols v Jessup* [1986] 1 NZLR 226; *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157.

41 But see *Nichols v Jessup* [1986] 1 NZLR 226.

42 The distinction between wilful ignorance and constructive notice has been explored in some depth in the *Barnes v Addy* (1874) LR 9 Ch App 244 line of cases concerning constructive trust liability for knowing assistance in a breach of trust and knowing receipt of misappropriated trust funds. See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) for a review of the cases and a restatement of the law in this context. In *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, Debelle and Wicks JJ said (at 115):

> "if the law is to stigmatise one party's conduct as unconscionable, it must make credible demands of that party [I]t cannot stray too far from actual knowledge before it leaves itself open to the criticism of pursuing a policy of protecting the mistaken or disadvantaged under the guise of proscribing what is essentially innocent behaviour."

43 *Agip (Africa) Ltd v Jackson* [1990] Ch 265, Millett J at 293; affd [1991] Ch 547. See also *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).

was not a requirement; it was sufficient that the bargain was one-sided and unfair. The plaintiff appealed. *Hart v O'Connor* was decided before the appeal was heard. On the basis of *Hart v O'Connor*, the Court of Appeal reversed the trial judge on the proof of knowledge issue. However, it went on to say that knowledge includes constructive notice, suggesting that the plaintiff ought to have realised the imbalance of the arrangement. In other words, an unequal outcome is a sufficient basis for imputing to B knowledge of A's transactional incapacity. The case was remitted to the trial judge for further hearing in the light of *Hart v O'Connor*. In the result, predictably enough, the transaction was again held to be unconscionable and specific performance was refused.

Attenuation of the knowledge requirement in this way marks an important shift in the philosophical underpinnings of the unconscientious dealing doctrine. Relief of A's misfortune replaces prevention of B's wrongdoing as the basis for intervention. There are significant costs entailed. A disadvantaged person can take various precautions to avoid misfortune in dealings. The most obvious course is to seek advice before entering into substantial transactions, or to entrust all business matters to a third party (such as a lawyer or an accountant). Of course, A may be so seriously disadvantaged as to not appreciate the need for taking precautions at all. However, if that is the case, A's incapacity is almost certain to be obvious to B. If the doctrine of unconscientious dealing applied regardless of whether B actually knew of A's disability — or, at least, wilfully disregarded it — parties in A's position would in future be less inclined to take whatever steps might be within their capacity to protect their own interests. Correspondingly, parties in B's position would be faced with the prospect of investing resources to discover whether the other party might be the subject of a disadvantage likely to result in the transaction being set aside. The alternatives would be to incur this expenditure, or to take the risk of judicial intervention. Either way, transactions would become more costly.

REBUTTING THE PRESUMPTION

[514] Proof of A's special disability and B's knowledge raises a presumption of unconscientious dealing on B's part. The evidentiary onus then shifts to B to demonstrate that no advantage was taken (*Louth v Diprose* (1992) 175 CLR 621, Brennan J at 632). The presumption may be rebutted by B showing that the transaction was not unfair. For example, in the

case of a gift, B may attempt to prove that the transaction was not improvident; in the case of a contract of guarantee, it may be relevant to show that the benefits to the guarantor (A) outweighed the risk of loss; and in the case of a sale, proof that A received adequate consideration may assist (see also below, para [1117]). However, proof of adequate consideration will not necessarily be decisive; relief may still be granted if it is apparent that, but for B's conduct, A would not have entered into the contract at all (see above, para [511]).

An alternative way of rebutting the presumption is to show that B took appropriate steps to remedy A's disadvantage at the time of transacting. The nature of A's disadvantage will determine what steps are appropriate:[44]

> "A lack of facility in the English language might be cured by the use of an interpreter, whereas a lack of understanding of the nature of the transaction is likely to require an explanation of the transaction, and of its technical terms. Ignorance of the financial risks involved in the transaction might require some disclosure of relevant financial information and clear independent advice on the prudence of the weaker party's entering into the transaction. Where the stronger party itself seeks to remedy a special disability by providing an explanation or making disclosure, there is a risk that a duty of care will be found to have arisen from the giving of the advice, or that a misrepresentation or misleading conduct or a fiduciary duty and breach of it will be established. Although independent advice is not always necessary to redress a special disability, referral of the weaker party to an independent adviser is usually desirable."

The taking of such steps may be relevant in one of two ways: it may either negate the inference of A's disability or, alternatively, be used to show that there was no advantage-taking on B's part.

The method most commonly relied on is to show that A received independent advice. Where the purpose is to negate the inference of A's disability, it will not be sufficient for B to show that A was urged to obtain independent advice if the advice was not actually obtained.[45] Furthermore, it must be shown that the advice was both independent and adequate, and, in this connection, the courts will scrutinise the content of the advice and the circum-

44 Lindgren K, Subtitle 35.9 "Unconscionable Dealing" *The Laws of Australia* (Law Book Co, Sydney, 1993), para [23].

45 Sneddon M, "Unfair Conduct in Taking Guarantees and the Role of Independent Advice" (1990) 13 *University of New South Wales Law Journal* 302 at 319-320.

stances in which it was given.[46] By contrast, where independent advice is relied on to negate the inference of advantage-taking, the issue is not so much what the adviser actually said to A, as what B is entitled to assume was said. Accordingly, proof that A received inadequate advice will not necessarily be fatal to B, provided B did not know the advice was inadequate. In this connection, B will normally be entitled to assume that the adviser has done their job properly. However, the position may be otherwise if B has failed to ensure that the adviser is sufficiently informed about material aspects of the transaction. On the same basis, if B urges A to obtain independent advice, A's failure to do so will not necessarily be fatal to B provided B was unaware that the advice was not actually obtained.[47]

Occasionally, a court may be prepared to draw inferences about the adequacy of independent advice from the fact that A went ahead with the transaction anyway.[48] The reasoning can be reduced to the following syllogism:

- the transaction was foolhardy from A's perspective;
- no person in their right mind and who had been properly advised would have agreed to it;
- therefore, the advice obtained must have been inadequate (either that, or A was out of her or his mind).

This kind of degenerative analysis puts B in a no-win situation: if the advice is adequate, A will refuse to transact; but if A does transact, the contract will be struck down later on the ground that the advice was inadequate. The harder the courts make it for B to rebut a presumption of unconscientious dealing, the greater the shift in the administration of the doctrine towards substantive unconscionability concerns (see above, para [503]).

The presumptive aspect of the unconscientious dealing doctrine acts as an incentive for B to take precautions against A's loss at the time of transacting. This makes sense because A's ability to take precautions is liable to be affected by the disadvantage

46 The question of what amounts to adequate independent advice is discussed more fully below, para [1119].

47 Sneddon M, "Unfair Conduct in Taking Guarantees and the Role of Independent Advice" (1990) 13 *University of New South Wales Law Journal* 302 at 323-325. See also *Massey v Midland Bank plc* [1995] 1 All ER 929 (CA); *Banco Exterior International v Mann* [1995] 1 All ER 936 (CA); *Allied Irish Bank v Byrne* [1995] 1 FCR 430 (Ch D); *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021.

48 For example, *Beneficial Finance Corp Ltd v Adams* (unreported, SC NSW, Giles J, 19 May 1989) (affd sub nom *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256).

which gives rise to the need for precautions in the first place.[49] Therefore, assuming B knows about A's disadvantage, the cost of precautions to B is likely to be lower than for A.[50] Furthermore, given A's disadvantage, B is probably better placed to assess whether the taking of precautions is warranted given the expected benefits from transacting. In this connection, the rule confronts B with three choices: first, to abandon the transaction; secondly, to take the precautions; and thirdly, to proceed with the transaction but without taking precautions.

The choice between the first and second options will depend on whether the cost of precautions exceeds the expected gains from the transaction to B.[51] Assume the following facts:

B is negotiating with A for the purchase of a widget which B values at $80. A is subject to a special disadvantage so that it is impossible to be sure at the outset about the real value A places on the widget: there is a 50 per cent chance that A values the widget at $100 and a 50 per cent chance that A values the widget at only $30. B offers to pay A $40. The cost of effective precautions is $50.

If the precautions are taken, B stands a 50 per cent chance of having to pay a contract price of $100 and a 50 per cent chance of having to pay $40. Therefore, the expected contract price is $70 ($50 + $20). When this amount is added to the cost of the precautions ($50), it becomes clear that it is uneconomical for B to take the precautions: B values the widget at $80, but the expected outlay is $120. On this basis, it will be better for B to abandon the contract than take the precautions. However, the outcome will be different if the cost of the precautions is, say, $5. Then the expected outlay will be only $75 and there is still a surplus for B. Therefore, B will prefer to take the precautions rather than abandon the contract.[52]

49 This is subject to the possibility raised earlier that A may sometimes be in a position to take threshold precautions against exploitation, for example by entrusting her or his affairs to a third party: see above, para [513].

50 The same considerations apply to undue influence: see below, para [1127]. Different considerations apply where B has no knowledge of A's disability: see above, para [513].

51 The cost of precautions will at least in part be a function of the nature and extent of A's disability.

52 As this analysis demonstrates, in choosing whether to take precautions or abandon the contract, B will consider her or his own interests but not A's. If the contract is not in B's interests, it will be abandoned. This will be a socially undesirable outcome if the contract is nevertheless in the joint interest of A and B. However, for the contract to be in the joint interest of A and B, A's expected gain from the contract would have to be high enough to offset B's expected net loss. This condition is unlikely to be satisfied. Recall that A's expected gain is uncertain, and it has to be discounted to reflect the uncertainty. In the example under discussion, the discount factor is 50 per cent. In these circumstances, it is a safe assumption that B's interest and the parties' joint interest will correspond.

The third option is for B to proceed with the transaction, but without taking precautions. If precautions are not taken, the consequence will be to increase the risk that A will later successfully challenge the contract in litigation. This will in turn lower B's expected gains from the transaction and raise the expected cost. Therefore, the third option is unlikely to be attractive. Returning to the example, assume that the cost of effective precautions is $5, and that B's legal costs, if A litigates successfully, will be $60. If precautions are not taken, B stands to gain $80 (the value B places on the widget), but there is a 50 per cent chance that this will be lost if A successfully challenges the contract. Therefore, B's actual expected gain is only $40. The cost of the transaction to B is $70 (represented by the contract price of $40 plus a 50 per cent chance of having to pay $60 litigation costs). The transaction is clearly uneconomical on this basis, and it will be better for B to take either the first or second option. As already discussed, the second option will be better if the cost of precautions is only $5.[53]

STATUTORY DEVELOPMENTS

Introduction

[515] Unconscionability legislation has been high on the Australian legislator's agenda for the past decade or so. The main initiatives are as follows:

- *Contracts Review Act* 1980 (NSW);
- the re-opening provisions of the uniform credit legislation;
- *Trade Practices Act* 1974 (Cth), Part IVA;
- Fair trading legislation.

The statutory measures have a common origin in that they were all substantially influenced by s 2-302 of the *Uniform Commercial Code* (US). References to s 2-302 lie at the heart of reform

53 The analysis assumes that A is certain to litigate if, as it turns out, A values the widget at $100. A may not litigate. The decision is likely to turn at least in part on the amount of A's stake in the transaction relative to A's total wealth. If this is high, a decision to litigate is more likely. Financiers accustomed to taking security from a guarantor in the form of a mortgage over the guarantor's family home have learned the truth of this in recent years.

proposals which led to the enactment of the provisions,[54] and the proposals themselves are justified in terms which echo the Official Comment to s 2-302. For example, the *Peden Report*, which led to the enactment of the *Contracts Review Act* 1980 (NSW) states as follows:[55]

> "[W]hile often paying lip-service to the sanctity of contract doctrine, the courts have felt the need to respond to changing needs and expectations in the community and have developed a number of devices to subvert the doctrine of sanctity of contract in order to do justice in individual cases. These devices include the extension of the existing principles of duress, undue influence and illegality, and principles of construction such as the implication of additional terms, the doctrines of fundamental breach, reading down of exclusion clauses, the collateral warranty device, and the doctrine of frustration and equitable estoppel.
>
> The main criticisms of the devices referred to in the last paragraph are not that they failed to achieve justice in the individual cases to which they were applied, but that
>
> **a]** they do not make a frontal attack on the root cause of the problem, and by using technical devices the courts invite the contract draftsman to try again;
> **b]** they tend to present a multitude of individual decisions which fail to accumulate experience or authority in marking out the minimal requirements of fairness;
> **c]** since they often turn upon construction of terms which are necessarily misconstrued to avoid injustice, difficulties are created for the construction of similar terms in subsequent wholly legitimate contracts."

It will be apparent from the passage just quoted that there is a substantial overlap between the unconscionability legislation and the doctrines of undue influence and unconscientious dealing. The purpose of the following analysis is to describe the legislation in outline, indicating the main points of comparison with the position in equity.[56]

54 Committee of the Adelaide Law School, *Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law Relating to Consumer Credit and Money Lending* (South Australian Government Printer, Adelaide, 1969), p 58; Peden J R, *Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales on Harsh and Unconscionable Contracts* (Sydney, 1976), p 13 and Appendix B (the "Peden Report").

55 Peden J R, *Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales on Harsh and Unconscionable Contracts* (Sydney, 1976), pp 5-6.

56 For a fuller account, see Lindgren K, Subtitle 35.9 "Unconscionable Dealing" *The Laws of Australia* (Law Book Co, Sydney, 1993), paras [32]-[109].

Statutory framework

Contracts Review Act 1980 (NSW)

[516] Section 7(1) of the *Contracts Review Act* 1980 (NSW) provides for the re-opening of a contract if it is found by a court to be unjust. "Unjust" is defined in s 4(1) to include "harsh, unconscionable or oppressive". In deciding whether a contract is unjust, the court is directed (in s 9(1)) to have regard to the public interest and all the circumstances of the case, as well as to a list of other factors (in s 9(2)), including:

- whether or not there was any material bargaining inequality between the parties;
- whether or not the provisions of the contract were the subject of negotiation;
- whether or not it was reasonably practicable for the parties seeking relief to negotiate for alteration or removal of any of the provisions of the contract;
- whether or not any of the provisions of the contract imposed conditions which were unreasonable;
- whether or not a party to the contract was unable to protect their interests because of age or physical or mental incapacity;
- the relative economic circumstances, educational background and literacy of the parties;
- the form and intelligibility of the contract;
- whether independent advice was obtained by the party seeking relief;
- the extent to which the contract was explained to, and understood by, the party seeking relief;
- whether there was any undue influence, unfair pressure or unfair tactics exerted on the party seeking relief;
- the conduct of the parties in relation to similar dealings; and
- the commercial setting of the contract.

The Act binds the Crown, but the Crown may not be granted relief under the Act (s 5). Also barred from seeking relief are public and local authorities, corporations and a person who enters into a contract in the course of, or for the purpose of, a trade, business or profession (other than a farming undertaking) (s 6(2)). In its application to buyers, the Act is therefore effectively limited to consumer dealings (*Baltic Shipping Co v Dillon ("The Mikhail Lermentov")* (1991) 22 NSWLR 1, Kirby P at 20). However, subject

to the limitations just mentioned, a supplier can claim relief under the Act. In granting relief, the court may:

- refuse to enforce all or any part of the provisions of the contract;
- declare the contract void in whole or part; or
- vary the contract.[57]

The Act may be relied on either by way of application to the court, or as a defence to an action brought against the party claiming relief (*Commercial Banking Co of Sydney Ltd v Pollard* (1983) 1 NSWLR 74).

Credit laws

[517] Section 70(1) of the *Consumer Credit Code* states that the court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into, the contract, mortgage or guarantee was unjust, reopen the transaction that gave rise to the contract, mortgage or guarantee. "Unjust" includes "unconscionable, harsh or oppressive" (s 70(7)). Section 70(2) sets out a list of factors relevant to determining whether a contract is unjust. The wording derives from the *Contracts Review Act* 1980 (NSW).

Jurisdictional arrangements under the Code reopening provisions vary from State to State. In New South Wales, jurisdiction is vested concurrently in the Fair Trading Tribunal and the courts. In Victoria, the Victorian Commercial and Administrative Tribunal (VCAT) has exclusive jurisdiction. In South Australia, jurisdiction is vested exclusively in the District Court. In Tasmania, it is vested in the Supreme Court, Courts of Request and the Magistrates' Court. In Queensland, the ordinary courts, including the small claims tribunals, have jurisdiction. In Western Australia, the Commercial Tribunal has exclusive jurisdiction. In the Northern Territory, jurisdiction is vested in the ordinary courts. In the Australian Capital Territory, jurisdiction is shared between the Credit Tribunal and the courts.[58]

Trade Practices Act 1974 (Cth), Part IVA

[518] Part IVA of the *Trade Practices Act* 1974 (Cth) comprises three provisions: ss 51AA, 51AB and 51AC.

57 *Contracts Review Act* 1980 (NSW), s 7(1).

58 See further, Duggan AJ and Lanyon EV, *Consumer Credit Law* (Butterworths Sydney, 1999), Ch 9.

Section 51AB was the earliest provision enacted. Originally, it was s 52A of the Act.[59] It provides as follows:

> "A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is in all the circumstances unconscionable."

The provision is limited to consumer dealings,[60] and as the text makes plain, it applies only to the supplier's conduct. "Conduct" is defined (in s 4(2)) to include the making of a contract, so that the entry into a contract which is unconscionable or contains unconscionable terms may be a contravention. The word "unconscionable" is not defined, but in general, conduct will be unconscionable when it is so against conscience that a court should intervene (*Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445, Hill J at 463; affd (1990) ATPR 41,058). Section 51AB(2) lists factors relevant to determining whether conduct is unconscionable. These are as follows:

- the relative strengths of the bargaining positions of the corporation and the consumer;
- whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- whether the consumer was able to understand any documents relating to the supply or possible supply of goods or services;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
- the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

59 This was inserted into the principal Act by the *Trade Practices Revision Act* 1986 (Cth).

60 The reference to goods or services is to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption: s 51AB(5). Furthermore, the section does not apply where goods are acquired for the purpose of resupply: s 51AB(6). Section 51AB(5) raises a question about the application of the section to loan contracts. Does a loan contract involve the provision of services of a kind that are "*ordinarily* acquired for personal, domestic or household use or consumption?" (emphasis added). See Duggan A J, "*Trade Practices Act* 1974 (Cth), Section 52A and the Law of Unjust Contracts" (1991) 13 *Sydney Law Review* 138 at 159-160.

In *Dai v Telstra Corporation Ltd* (2000) 171 ALR 348, the court (at 354) pointed out that this list is not an exhaustive one and said that its effect may be

> "to take the s 51AB concept of unconscionability beyond that developed by courts of equity. For example, the relative strengths of the bargaining positions of the corporation and the consumer may comprehend a degree of disadvantage which would not amount to the 'special disability' or 'special disadvantage' spoken of in the High Court authorities."

An injunction may be awarded to restrain a contravention of s 51AB, at the suit of the Minister, the Australian Competition and Consumer Commission or any other person (including the aggrieved consumer). Relief can also be sought in the form of an order made pursuant to s 87 on application by any person who has suffered loss or damage, or is likely to do so, as a result of the contravention. The kinds of order that can be made under s 87 include an order:

- avoiding a contract in whole or part;
- varying a contract or particular terms; and
- requiring the payment of compensation.[61]

[519] Following the enactment of the then s 52A, there was pressure to extend it to cover non-consumer dealings, especially from the small business sector.[62] It was urged that the restrictive trade practices provisions in Pt IV of the Act, and particularly the prohibition of monopolisation in s 46, were ineffective to protect small business interests against larger players. Areas of concern included commercial leases, long-term contracts in the rural sector, and franchise agreements.[63]

The proposal to extend the legislation into these areas encountered opposition, and eventually the government compromised. Section 52A was repealed and re-enacted as s 51AB, and a new s 51AA was enacted as follows:[64]

61 See also below, para [623].

62 See Taperell G Q, "Unconscionable Conduct and Small Business: The Possible Extension of Section 52A of the *Trade Practices Act* 1974" (1990) 18 *Australian Business Law Review* 370.

63 Note (1992) 66 *Australian Law Journal* 43; Note (1995) 69 *Australian Law Journal* 320.

64 This was enacted in 1992 and commenced on 21 January 1993.

"(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 51AB."

Section 51AA(2) says that s 51AA does not apply to conduct that is prohibited by s 51AB or 51AC. Section 51AB is limited to consumer transactions (see above, para [518]). Section 51AC applies to small business transactions (see below, para [520]). Section 51AA applies in any other case.

Section 51AA prohibits conduct that is unconscionable within the meaning of the unwritten law. The "unwritten law" is non-statutory law as developed by courts of common law and equity throughout Australia.[65] Conduct that is "unconscionable" within the meaning of the unwritten law includes conduct to which the equitable doctrines of unconscientious dealing, undue influence, estoppel, relief from forfeiture and the like apply.[66] Section 51AA is specifically limited by reference to these doctrines. By contrast, ss 51AB and 51AC are not.[67]

What is the purpose of prohibiting by statute conduct for which relief is already available in equity? By declaring such conduct to be a contravention of the statute, the section provides a basis for intervention by the Australian Competition and Consumer Commission. The Commission can sue under s 80 for an injunction to restrain contraventions. One consequence of s 51AA is therefore to add a public law component to the policing of unconscionable conduct in commercial settings. Another consequence is to extend the remedies provided for in s 87 to cases of undue influence and unconscientious dealing. This is significant because the range of orders that can be made under s 87 is wider than the kinds of relief traditionally available in equity.

[520] Section 51AC was enacted in 1998 also in response to pressures from the small business sector. The aim is to protect small business purchasers and suppliers in their dealings with large

65 See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) 169 ALR 324, French J at 328-330.

66 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) 169 ALR 324, French J at 330-337.

67 See *Dai v Telstra Corporation Ltd* (2000) 171 ALR 348 (s 51AB) and *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2001) 178 ALR 304 (s 51AC).

corporations. The section prohibits unconscionable conduct in trade or commerce in connection with the supply to a small business purchaser ("business consumer") or the acquisition from a small business supplier of goods or services. It does not apply if the business consumer or small business supplier is a public listed company, and it is limited to transactions where the price is $1 million or less.

There are special provisions governing the application of the $1 million limit to financial transactions. In summary, they apparently mean that the section will not apply if:

- First, in the case of a lease, hire-purchase agreement or conditional sale contract, the cash price of the goods net of interest and other charges exceeds $1 million;
- Secondly, in the case of a loan contract, the "capital value of the loan" (presumably meaning the amount financed) plus interest and other charges exceeds $1 million;
- Thirdly, in the case of a loan facility, the maximum amount agreed to be lent plus interest and other charges exceeds $1 million.

Why interest and other charges should be taken into account in cases (2) and (3), but not in case (1) is unclear. In case (3), the test is unworkable because the amount of interest payable under a loan facility cannot be determined at the time of contracting.

Section 51AC(3) and (3A) set out factors relevant to determining whether conduct is unconscionable. They are expanded versions of the s 51AB(2) list. Items mentioned in s 51AC(3) and (3A) that are not referred to in s 51AB(2) include:

1] the extent to which the supplier's conduct towards the business consumer (or the acquirer's conduct towards the small business supplier) was consistent with the supplier's (acquirer's) conduct in similar transactions;

2] the requirements of any applicable industry code;

3] non-disclosure of an intended course of conduct that might affect the interests of the business consumer or small business supplier; and

4] the extent to which the parties acted in good faith.

Remedies for contravention include an award of damages under s 82 in addition to injunctions (s 80) and discretionary orders (s 87).

In contrast to s 51AA, s 51AC is not limited to cases of unconscionability as understood in the unwritten law (*Australian*

Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd (2001) 178 ALR 304, Sundberg J at 315).

Fair Trading Laws

[521] For constitutional reasons, Pt IVA of the *Trade Practices Act* 1974 (Cth) is by and large limited to conduct that is engaged in by a corporation. However, State and Territory fair trading statutes[68] include provisions which mirror s 51AB, and these apply whether the supplier is incorporated or not.[69] There is no counterpart in the fair trading laws to s 51AA of the *Trade Practices Act* 1974 (Cth). In Queensland, relief is only available where the applicant is a consumer,[70] but this restriction has not been adopted in the other States.

The statutory provisions and equitable doctrines compared

Introduction

[522] In an important early case on the *Contracts Review Act* 1980 (NSW), *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, McHugh JA said (at 620) that:

> "A contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice."

This passage marked the formal reception of the procedural-substantive unconscionability dichotomy into Australian contract law.[71] The distinction has been heavily relied on in later cases.

It is generally acknowledged that the legislation provides greater scope than the equitable doctrines for granting relief in cases of

68 *Fair Trading Act* 1992 (ACT); *Fair Trading Act* 1987 (NSW); *Consumer Affairs and Fair Trading Act* 1990 (NT); *Fair Trading Act* 1989 (Qld); *Fair Trading Act* 1987 (SA); *Fair Trading Act* 1990 (Tas); *Fair Trading Act* 1985 (Vic); *Fair Trading Act* 1987 (WA).

69 For example, *Fair Trading Act* 1987 (NSW), s 43.

70 *Fair Trading Act* 1989 (Qld), s 100(6). "Consumer" is defined in s 6.

71 See above, para [503] and Chapter 2: "The Conscience of Equity".

substantive unconscionability.[72] So, for example, it has been said that — notwithstanding the last sentence in the passage just quoted — in an appropriate case, gross disparity between the price of goods or services and their value may justify intervention under the legislation (*West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, McHugh JA at 622). Under the relevant equity doctrines, by contrast, an excessive price is at best evidence from which procedural unconscionability might be inferred (see above, para [511]). The re-opening provisions of the former credit laws allowed a court to intervene if the interest rate was excessive whether or not the contract was otherwise harsh, unconscionable or oppressive. In other words, substantive unconscionability alone was enough to justify re-opening. Section 70(2)(n) of the *Consumer Credit Code* provides that, in a re-opening application, the court must have regard (among other things) to "the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases". Whether this provision indicates a change of philosophy is unclear.[73]

Knowledge

[523] Unconscientious dealing requires proof that B knew, or at least had reason to know, of A's disadvantage (see above, para [513]). The consequence of this requirement is to limit the doctrine to cases involving victimisation or advantage-taking on B's part. By contrast, it has been suggested that a contract may be unjust in the statutory sense even if B has no knowledge of A's disadvantage.[74] The granting of statutory relief is discretionary, and it would be unusual for a court to favour A without proof of B's knowledge or means of knowledge (*Collier v Morlend Finance Corp (Vic) Pty Ltd* (1989) ASC 55-716, Meagher JA at 58,433). However, the possibility cannot be discounted.[75]

72 For example, *Louth v Diprose* (1992) 175 CLR 621, Toohey J at 654. See Sneddon M, "Unconscionability in Australian Law: Development and Policy Issues" (1992) 14 *Loyola of Los Angeles International and Comparative Law Journal* 345 at 353.

73 See Duggan AJ and Lanyon EV, *Consumer Credit Law* (Butterworths Sydney, 1999), para [9.4.20].

74 *Baltic Shipping Co v Dillon ("The Mikhail Lermentov")* (1991) 22 NSWLR 1, Kirby P at 20; *Collier v Morlend Finance Corp (Vic) Pty Ltd* (1989) ASC 55-716, Meagher JA at 58,433; *Nguyen v Taylor* (1992) 27 NSWLR 48 (all three cases were decisions of the New South Wales Court of Appeal concerning the *Contracts Review Act* 1980 (NSW)). Contrast *Custom Credit Corp Ltd v Lupi* (1991) ASC 56-024 (a decision of the Full Court of the Supreme Court of Victoria concerning the *Credit Act* 1984 (Vic), Pt IX): see further, Duggan AJ and Lanyon EV, *Consumer Credit Law* (Butterworths Sydney, 1999), para [9.4.1]-[9.4.4].

75 See, for example, *St Clair v Petricivec* (1988) ASC 56-688 (CA NSW).

Independent advice

[524] In the *Contracts Review Act* 1980 (NSW) and also the *Consumer Credit Code*, the list of factors relevant to determining whether a contract is unjust includes a reference to whether independent advice was obtained. In the context of the *Contracts Review Act* 1980 (NSW), a question has arisen as to whether the statute makes the absence of independent advice a sufficient ground for setting aside a contract of guarantee — in other words, whether a credit provider is under a statutory duty to make sure that a guarantor is independently advised before transacting.

This is not the position in equity. In equity, a credit provider may end up being liable if the guarantor did not obtain independent advice. However, the guarantor must first establish undue influence, unconscientious dealing or other wrongdoing by the borrower or the credit provider itself. In *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256, Meagher JA said (at 276):

> "There is no duty on a financier to provide either a borrower or a third-party guarantor with any commercial advice, although if any such advice is tendered the financier may assume a duty of care."

Contrary views and reservations were expressed in this and a number of later cases, most notably by Kirby P,[76] but the overall trend is in support of Meagher JA's view.[77] It follows that the statutory position is the same as in equity. The obtaining of independent advice is relevant, but not decisive. A contract may be upheld without independent advice.[78] Conversely, a contract may be set aside even if independent advice has been obtained.[79] It will not always be cost-effective to insist on independent advice, and there may be other ways of assisting the party in question.

Standard form contracts

[525] There is a widespread assumption that standard form contracts are inherently unfair. They are said to be the product of unequal bargaining power, in the sense that the contract is the supplier's

76 *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256, Kirby P at 268; *Bosnjak v Farrow Mortgage Services Pty Ltd (in liq)* (1993) ASC s 56-225, 58,325, Kirby P at 58,327 and also Priestley JA at 58,327; *Gough v Commercial Bank of Australia* (1994) ASC s 56-270, 58,831 Kirby P at 58,845.

77 *Bosnjak v Farrow Mortgage Services Pty Ltd (in liq)* (1993) ASC s 56-225, 58,325 Cripps JA at 58,333; *Gough v Commonwealth Bank of Australia* (1994) ASC s 56-270, 58,831 Mahoney JA at 58,855.

78 For example, *Goldsbrough v Ford Credit Australia Ltd* (1989) ASC 56-946.

79 For example, *Beneficial Finance Corp Ltd v Karavas* (1991) 23 NSWLR 256.

document and the individual consumer has no say in its content, no opportunity to read it before signing and no prospect of understanding the subsidiary terms. The provisions of standard form contracts are rarely the subject of negotiation, and standard form contracts are typically presented to consumers on a "take-it-or-leave-it" basis. This is the rhetoric that has characterised judicial assaults on standard form contracts, in particular through the doctrine of fundamental breach.[80]

What the rhetoric overlooks is that standard form contracts perform a valuable economic function. They reduce transactions costs. In a sophisticated economy, business could not be carried on if all contracts had to be individually negotiated. Not just business, but life itself, would become intolerable under these conditions. The prevalence of standard form contracts reflects a social preference for the allocation of time and other resources to pursuits that are more highly valued than repeated contract negotiation. In this respect, at any rate, standard form contracts are not the product of unequal bargaining power. If standard form contracts were routinely set aside, the social costs would be substantial.[81] In equity, a contract will not be set aside simply on the ground that one party has not read it or understood its contents. As Latham CJ pointed out in *Wilton v Farnworth* (1948) 76 CLR 646 (at 649), any weakening of this stance "would make chaos of every-day business transactions". By contrast, the unconscionability legislation picks up the rhetoric of the fundamental breach cases;[82] in doing so, it invites the argument that a standard form contract is necessarily an unjust contract. However, the courts, in interpreting the legislation, have rejected this view. They have held that it is wrong to take a mechanistic approach to the statutory criteria of unconscionability. The presence of one or more of them in a particular case is not decisive. Nor is their absence. It is necessary to look at "the substance of the circumstances preceding and surrounding the execution of the contract" in order to determine whether the contract is "unjust".[83] Accordingly, it is not enough for a party

80 Trebilcock M J, "An Economic Approach to the Doctrine of Unconscionability" in Rieter B J and Swan J (eds), *Studies in Contract Law* (Butterworths, Toronto, 1980), pp 379, 381-386.

81 For a detailed discussion of these issues see Trebilcock M J, "An Economic Approach to the Doctrine of Unconscionability" in Rieter B J and Swan J (eds), *Studies in Contract Law* (Butterworths, Toronto, 1980), p 379; Dewees D and Trebilcock M J, "Judicial Control of Standard Form Contracts" in Burrows P and Veljanovoski C, *An Economic Approach to Law* (Butterworths, London, 1981), Ch 4; Trebilcock M J, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 *University of Toronto Law Journal* 359.

82 See above, para [516].

83 *Commonwealth Bank of Australia Ltd v Cohen* (1988) ASC 55-681, Cole J at 58,159. See also *Esanda Finance Corp Ltd v Murphy* (1989) ASC 55-703; *Hogan v Howard Finance Ltd* (1987) ASC 55-594.

to show, for example, that the contract was not the subject of negotiation, or that alteration or removal of particular provisions was not feasible.

However, the position might be different if, for example, it is proved that the supplier used fine print or took advantage of the consumer's limited opportunity for reading the document before signing to impose unusually harsh terms on the consumer. Relief might also be appropriate in a case where the supplier knows that the consumer misunderstands the terms of the contract, but does nothing to correct the situation. Such instances will be rare.[84]

Impact of legislation

[526] The unconscionability legislation is contentious. The architect of the *Contracts Review Act* 1980 (NSW), Professor John Peden, claimed that it was drafted with a view to making the law "sharp in focus, conceptually sound and explicit in its policy underpinnings", preserving judicial rigour in the application of the legislation and avoiding "ad hocery" in decision-making.[85] These claims are open to challenge. It can be argued that the legislation is:

- not "sharp in focus", because it fails to specify where the balance is to be struck between procedural and substantive unconscionability concerns (in particular, the list of factors which the courts are directed to consider when deciding whether to grant relief is a mish-mash of process-oriented and outcome-oriented considerations and no attempt is made to give them any relative weighting);
- not "conceptually sound", because insofar as proof might be required of procedural unconscionability, no guidance is offered as to how far this proof might legitimately be derived by inference from one-sided outcomes (the more readily such inferences are drawn, the less the distinction between procedural and substantive unconscionability will matter); and
- not "explicit in its policy underpinnings", because it is quite unclear whether the legislation is motivated primarily (or at all) by efficiency considerations, distributional considerations or paternalistic concerns

84 But see *Westpac Banking Corp Ltd v Sugden* (1988) NSW Conv Rep 55-377 (particular clauses in bank's standard form of guarantee found to be unconscionable); *George T Collings (Aust) Pty Ltd v H F Stevenson (Aust) Pty Ltd* (1991) ATPR 41-104 (sole agency clause in estate agent's standard form of contract held to be unconscionable).

85 Peden J R, *The Law of Unjust Contracts* (Butterworths, Sydney, 1982), p 95.

> (depending on how it is interpreted, it could be made to relate to any of these goals).[86]

McHugh J has made the following observations about the *Contracts Review Act* 1980 (NSW):[87]

> "Civil litigation has ... increased because courts are increasingly directed by legislatures to re-arrange people's legal rights by reference to vague standards which sound attractive but which are so indefinite that they are extremely difficult to apply to everyday disputes ...
>
> The difficulties in applying such vague criteria [as those contained in the *Contracts Review Act*] mean that parties to contracts have difficulty in knowing what their rights are. Litigation is forced upon them. When courts have to apply vague standards, consistency of decision-making — which is one of the primary benefits of the rule of law — is difficult to achieve. Moreover, the decision of a court applying such vague criteria often seems arbitrary. Dissatisfaction with the decision-maker in particular cases is often the result. In time, confidence in the judicial system is undermined".

This statement echoes Arthur Leff's eloquent attack on the indeterminacy of s 2-302 of the *Uniform Commercial Code* (US): "It is easy to say nothing with words."[88] Leff's warning was sounded in 1967, nearly 10 years before the *Peden Report*[89] was written, 13 years before the *Contracts Review Act* 1980 (NSW) was enacted, and 28 years before McHugh J's paper. It is a pity no one paid attention at the time.

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86 Duggan A J, "Some Reflections on Consumer Protection and the Law Reform Process" (1991) 17 *Monash University Law Review* 252 at 274-277; see also Terry A L, "Unconscionable Contracts in New South Wales: The Contracts Review Act 1980" (1982) 10 *Australian Business Law Review* 311. Contrast Goldring J, "Certainty in Contracts, Unconscionability and the Trade Practices Act: The Effect of Section 52A" (1988) 11 *Sydney Law Review* 514.

87 McHugh J, "The Growth of Legislation and Litigation" (1995) 69 *Australian Law Journal* 37 at 43. Contrast the views of Priestley L J, "A Guide to the Comparison of Australian and United States Contract Law" (1989) 12 *University of New South Wales Law Journal* 4 at 10: "An important factor, in my opinion, in the growing willingness to use old unconscionability rules more freely, has been the steadily increasing use in Australia this century of expansive definitions of unconscionability in both State and Commonwealth statutes. These have authorised courts to interfere with contractual relations in a way almost scandalous to adherents of nineteenth century Anglo-Australian doctrine and have caused both lawyers and people regularly encountering contract law to become much more comfortable with the court's potential presence as a contract alterer and fixer. In this area of the law the legislatures appear to have been for a period more responsive to overall community sentiment than the courts." The difference in judicial philosophy could not be starker.

88 Leff A A, "Unconscionability and the Code — The Emperor's New Clause" (1967) 115 *University of Pennsylvania Law Review* at 559: see above, para [512].

89 Peden J R, *Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney-General for New South Wales on Harsh and Unconscionable Contracts* (Sydney, 1976).

CHAPTER SIX

MISREPRESENTATION

Anthony J Duggan

INTRODUCTION

[601] There is jurisdiction in equity to grant relief in respect of pre-contractual misrepresentations. An actionable misrepresentation is a statement made by one person to another, in advance of a contract being made, about some present or past fact, which induces the other party to enter into the contract.[1]

[602] At common law, the representee's rights depended on whether the misrepresentation was fraudulent. According to Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374, for the purposes of the tort of deceit, fraud requires proof that a representation was made with knowledge of its falsity, or at least that it was made recklessly without regard to its truth. The same test has been assumed to apply in cases where a contract is rescinded for fraudulent misrepresentation.[2] The test requires proof of actual dishonesty, and the consequence is to impose a heavy onus on the party seeking relief (*Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 953-954). If fraud is proved, the representee may[3] either affirm the contract and sue in tort for damages for deceit,[4] or rescind the contract and, if necessary, bring proceedings to confirm the rescission and obtain consequential restitutionary relief.[5]

1 See further below, [607]-[613].

2 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1301].

3 *Alati v Kruger* (1955) 94 CLR 216 at 222: If the representation has been incorporated into the contract, the representee will have a third option — to sue for damages for breach of warranty.

4 Strictly speaking, the remedies are cumulative, not alternative: see below, Chapter 25: "Rescission". However, actual damage is an essential element of the action for deceit so that, if by rescinding the contract the representee avoids any loss, no further action will lie: see *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 at 706 (FC Fed Ct).

5 See further below, Chapter 25: "Rescission".

The common law remedies for non-fraudulent (innocent) misrepresentation are limited. As a general rule, damages are not available. The exceptions are where, first, the statement is promissory in character, in which case damages may be awarded for breach of contract[6] or, secondly, the representor is subject to a duty of care, in which case damages may be awarded in tort (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465).[7]

At common law, a contract cannot be rescinded for innocent misrepresentation unless the misrepresentation establishes that there is a complete difference between the subject matter of the bargain and what was actually received, so as to constitute a total failure of consideration (*Kennedy v Panama, New Zealand & Australian Royal Mail Co Ltd* (1867) LR 2 QB 580).

[603] Equity has a twofold jurisdiction in relation to misrepresentation. First, equitable rescission may be awarded in cases where fraud in the common law sense is established. This is significant

6 In *Blakney v J J Savage & Sons Pty Ltd* [1973] VR 385, Gillard J formulated a series of propositions relevant to the distinction between a promise and a mere representation, which he later repeated in *Mihaljevic v Eiffel Tower Motors Pty Ltd and General Credits Ltd* [1973] VR 545 at 555-556. They are as follows:

> "First, to establish that a statement made during the course of negotiations was promissory or contractual in character, proof of a common intention in the parties to impose a contractual obligation on the person making the statement is essential. Secondly, it is unnecessary that the statement must contain an express form of words. It is sufficient if in the context the words used import the requisite meaning to impose on the person making the statement a contractual obligation by way of promise or guarantee. Thirdly, whether a statement was intended to be contractual or not must be determined objectively in the light of the whole of the circumstances. Fourthly, whether an *animus contrahendi* exists is a question of fact and can only be determined by looking at all the circumstances attending the transaction. Fifthly, in the process of drawing such a conclusion, the tribunal of fact is not entitled to draw any inference contrary to the express terms of any written contract made between the parties. Sixthly, it is easier to draw an inference that a warranty was intended where the person making the statement of the condition or quality of an article has a personal knowledge thereof and the person to whom the statement is made is to the knowledge of both parties, ignorant of the condition or quality of the article and is relying on the first party's knowledge. Finally, in order to determine whether such intention be inferred ... the method suggested by Lord Denning MR in *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 328 and *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970 at 972 is the most useful way to arrive at a decision. His Lordship said: 'If an intelligent bystander would reasonably infer that a warranty was intended, that would suffice even though neither party in fact had it in mind'."

Gillard J's decision in *Blakney* was overturned by the Full Court on appeal, but was restored by the High Court in *J J Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435. See also *Ellul and Ellul v Oakes* [1972] 3 SASR 377; *Ross v Allis-Chalmers Australia Pty Ltd* (1980) 55 ALJR 8. Cf *Dick Bentley v Harold Smith Motors Ltd* [1965] 1 WLR 623.

7 There must be a duty of care, and the mere fact that the statement was made in the course of pre-contractual negotiations is not sufficient to satisfy this requirement. The question is likely to turn on "the material provisions of the contract documents, the position, the conduct, knowledge and intention of each of the parties and the communications passing between them": *Dillingham Constructions Pty Ltd v Downs* [1972] 2 NSWLR 49, Hardie J at 56. See also *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] 1 QB 574.

because, originally, the capacity of the common law courts to administer the rescission remedy was limited. They did not have the same facility as courts of equity for making the adjustments between parties necessary to restore them to their pre-contractual positions.[8] Secondly, equity will grant relief for misrepresentation without proof of fraud in the strict sense. This relief may take one of two forms. Equity may refuse a decree of specific performance at the suit of the representor, or allow rescission of the contract at the instance of the representee.

[604] The range of available remedies for innocent misrepresentation has been further increased by statute. Relevant legislation includes the *Misrepresentation Act* 1972 (SA), the *Law Reform (Misrepresentation) Act* 1977 (ACT), the *Goods Act* 1958 (Vic), and, most importantly, the *Trade Practices Act* 1974 (Cth) and the State and Territory fair trading laws. The focus of this chapter is on the availability of relief for innocent misrepresentation and the statutory reforms. In some cases, the setting aside of the whole transaction may give the representee a windfall at the representor's expense. Then the court has jurisdiction to achieve "practical justice" between the parties (*Vadasz v Pioneer Concrete Pty Ltd* (1995) 184 CLR 102). For example, it may set aside only part of the transaction, or it may set aside the whole transaction subject to the making of an allowance in the representor's favour. The aim is to balance the parties' competing interests.

THE BASIS OF EQUITY'S INTERVENTION

[605] The equitable jurisdiction to rescind a contract for innocent misrepresentation was confirmed in *Redgrave v Hurd* (1881) 20 Ch D 1. The case concerned a contract for the sale of a house by an elderly solicitor in Birmingham at a price of £1,600. The contract was part of an arrangement under which the purchaser was to take over the vendor's legal practice. The vendor had misrepresented the income from the business, and, when the purchaser discovered the truth, he refused to complete the contract. The vendor sued for specific performance, and the purchaser counterclaimed for rescission. There was no allegation of dishonesty against the vendor. Fry J, at first instance (at 6-10), found for the vendor on the ground that the purchaser had taken insufficient care to verify the accuracy of the vendor's statements. This decision was reversed on appeal.

8 See further below, Chapter 25: "Rescission".

The leading judgment was delivered by Sir George Jessel MR. On the question of the purchaser's negligence, he held (at 13):

> "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded to you of discovering its falsity, and did not choose to avail yourself of them'. I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the *Statute of Limitations*."[9]

Regarding equity's jurisdiction to relieve against innocent misrepresentation, he held that there were two ways of stating the rationale, "either of which was sufficient".[10] First, it could be said that:

> "A man is not allowed to get a benefit from a statement which he now admits to be false. He is not allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it."

Secondly, it could be said that:

> "Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements".

The first proposition focuses on the representor's conduct at the time of contracting. The basis in conscience for intervening at this point is that the representor ought to have discovered the truth before speaking out. The underlying concern seems to be with penalising careless behaviour. By contrast, the second proposition focuses on the representor's conduct at the time the truth is discovered. The basis in conscience for intervening at this point is that the representor should not seek to profit from a false statement. Here, the underlying concern is with the prevention of unjust enrichment. The second proposition begs the question why it is wrongful to take advantage of one's own

9 1623 (21 Jac I c 16).

10 (1881) 20 Ch D 1 at 12-13.

false statement, given that it was innocently made in the first place. If the reason is that the representor should have been more careful at the time, then the first and second propositions are indistinguishable.

[606] The suggestion that the representor should have been more careful implies, first, that there were economical means available of discovering the truth[11] and, secondly, that it would have been cheaper for the representor to make the investigation than for the representee.

If the first condition is not met, then it will be cheaper for the parties to forego the precautions and to take the risk of a mistake.[12] If the second condition is not met, it will follow that the careless party was not the representor but the representee. It is a reasonable assumption in most cases that both conditions will be met. The relative cost of precautions to the representor is likely to be low, particularly in the case of a sale where the representor is the seller. A seller will typically have easy opportunities for inspection and discovery or readily available means of inquiry that are not open to the buyer.

This suggests a rationale for allowing rescission in cases of negligent misrepresentation. However, the rule is not so limited. What is the justification for allowing rescission even in cases where the representor has not been careless in the sense described above? The answer is that such a rule discourages carelessness in a secondary sense. It acts as an incentive for representors to be more circumspect, in cases where they cannot be sure of their information, by making disclaimers. A disclaimer is a signal to the representee either that there are no economical means of discovering the truth, or, alternatively, that it is cheaper for the representee to investigate.

The effect of the disclaimer is to transfer to the representee the risk of loss if the statement turns out to be untrue. If there are no economical means of discovering the truth, the representee will then have to decide whether to terminate negotiations or to carry on, perhaps seeking an adjustment of the contract price to compensate for the risk of an unfavourable outcome. Alternatively, if it is cheaper for the representee to investigate,

11 That is, the marginal cost of mistake to the representee multiplied by the probability of its occurring exceeds the marginal cost of discovering the truth: *United States v Carroll Towing Co* 159 F 2d 169 (1947).

12 The parties will then have to decide which of them is to bear the risk: see further text at n 13, below.

the representee will have to decide whether the cost of investigation is worthwhile given the value of the contract opportunity. In either case, the effect of the disclaimer is to minimise the risk of mistakes.[13]

Take the facts of *Redgrave v Hurd* (1881) 20 Ch D 7 itself. The contract price of the house was £1,600. If the purchaser had known the truth about the value of the business, he would not have agreed to buy the house for any price, because the prospect of taking over the business was the only reason he had for moving to Birmingham. Therefore, the actual value of the house to the purchaser — given the true state of affairs — was zero, and the cost to him of the contracting error was £1,600 (£1,600–£0). Assume that the vendor valued the house at £1,000, this being the lowest price at which he would have been prepared to sell. Then the vendor's gain from the contract was £600 (£1,600–£1,000). Other things being equal, the social cost of the contract is the difference between the purchaser's loss (£1,600) and the vendor's gain (£600), namely £1,000. This loss would have been avoided if the vendor's statements had been accurate.

If the vendor had kept proper books of account, the cost of taking precautions to ensure the accuracy of his statements to prospective purchasers should have been trivial. It would simply have been a matter of consulting the books, verifying the figures and providing a clear explanation. The purchaser might have discovered the information for himself, for example by auditing the vendor's books, but that would have been a more costly option. Therefore, it was in both parties' interests for the vendor to supply the information. A rule allowing rescission for innocent misrepresentation facilitates this outcome because it allows the purchaser to rely on the accuracy of the vendor's information, and it acts as an inducement for the vendor to be careful. Such a rule also avoids the duplication of effort and wasted costs that would be involved if there were a succession of prospective purchasers, and each were required to carry out their own investigations.

As it happened, in *Redgrave v Hurd*, the vendor did not keep proper books of account. The only records he was able to show the purchaser were some letter-books, diaries and a day-book. He also produced bills of costs for the years 1877, 1878 and 1879 but these were incomplete, accounting for only part of the annual income the vendor alleged the practice brought in. In short, it is

13 See generally, Bishop W, "Negligent Misrepresentation Through Economists' Eyes" (1980) 96 *Law Quarterly Review* 360.

clear that the vendor's business records were in disarray. In these circumstances, it cannot be said so confidently that the vendor would have been the lowest-cost information provider. However, a rule allowing rescission for innocent misrepresentation is still justified because it is an incentive for the vendor either to tell the purchaser he could not guarantee the accuracy of the figures, or decline to provide any figures at all. It would then be for the purchaser to decide between abandoning negotiations or proceeding with the contract, but with a discount factor built in to take account of the risk involved.

Redgrave v Hurd results in a strict liability rule for representors, but representors remain free to contract around the rule in the manner just envisaged. By contrast, Fry J's decision at first instance would have resulted in a no liability rule for representors, but, under this alternative regime, the representor could agree to assume liability by guaranteeing the accuracy of statements made. The difference, in other words, is between an opt-out and an opt-in liability rule, respectively. Does this difference matter? The answer depends on transactions costs. If contracting parties at large are more likely than not to favour liability for innocent misrepresentation, it makes sense for the law to reflect this position. Otherwise, parties will incur transactions costs in negotiating around the law to their preferred positions. It is true that transactions costs will be incurred either way; if the law adopts a liability rule, transactions costs will be incurred by parties for whom this is not the preferred position. However, the objective should be to minimise transactions costs and, assuming a liability rule represents the majority preferred position, an opt-out regime is likely to be cheaper than an opt-in one. This is the assessment on which, from a policy perspective, *Redgrave v Hurd* depends. The assessment is probably correct because, as mentioned earlier, in the usual case, the information in question is likely to be accessible to the representor at lower cost than it is to the representee, and the parties will want to exploit this cost advantage.

ACTIONABLE STATEMENTS

A statement of fact

[607] In order to be actionable, a misrepresentation must be one of present or past fact. Such statements are to be distinguished from statements of opinion, forecasts or predictions and promises. Statements of fact are also distinguishable from statements of law. Commendatory statements or "mere puffs" are not

actionable. As a general rule, a positive statement is required, and simple non-disclosure or the withholding of information provides no basis for relief. Liability for actionable misrepresentation can be excluded or limited by contractual stipulation.

Statements of opinion and promises

[608] A statement of opinion itself is not actionable because its truth or falsity cannot be presently assessed. However, a statement of opinion may be taken to imply a further statement either that the opinion is genuinely held or that there are reasonable grounds for the opinion. In either case, if the further statement is untrue, an action will lie. As Bowen LJ observed in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483, "the state of a man's mind is as much a fact as the state of his digestion".

An opinion is more likely to be taken to imply a statement about the opinion-giver's state of mind if the facts are not equally well known to both sides (*Smith v Land & House Property Corp* (1884) 28 Ch D 7, Bowen LJ at 15).[14] The circumstances in which the opinion is given or the manner in which it is expressed will also be relevant. In some cases, it may be clear that the representor is not professing knowledge or expertise, and, in that event, the statement will not be actionable.[15]

Predictions and forecasts are subject to a similar analysis. Generally speaking, such statements are not actionable because they are incapable of being presently true or false. However, the position will be different if the statement can be taken to imply a further representation that the representor "now believes that his prediction will come true or that he has the means of bringing it to pass" (*R v Sunair Holidays Ltd* [1973] 2 All ER 1233, MacKenna J at 1236).

[609] A representation of existing fact or past event is to be distinguished from a promise. Failure to keep a promise does not itself make the promise actionable as a misrepresentation, although the position may be otherwise if, at the time of making the promise, the promisor had no intention of keeping it (*British Airways Board v Taylor* [1976] 1 All ER 65, Lord Wilberforce at 68). Conversely, the dissemination of false information is not itself actionable as a breach of contract, although the position may be otherwise if the representor warrants the correctness of the information.

14 See also *Bissett v Wilkinson* [1927] AC 177.

15 For example, *Bissett v Wilkinson* [1927] AC 177.

Statements of law

[610] The traditional rule is that a statement of law cannot form the basis of an actionable misrepresentation,[16] except in the case of fraud (*Public Trustee v Taylor* [1978] VR 289). However, the distinction between statements of fact and law is an elusive one. It is also difficult to justify as a matter of policy.[17] On the other hand, as Cheshire and Fifoot[18] point out: "There is no modern case of misrepresentation of law, which was not fraudulent, which has grounded relief". The distinction is ripe for reappraisal. In the related area of estoppel, there have been suggestions in the High Court that the distinction no longer applies, and that there is no reason why estoppel "should be inapplicable to a case where the representation relates to the state of the law" (*Foran v Wight* (1989) 168 CLR 385, Deane J at 435).[19] In *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ said, in the context of estoppel, that "the distinction between assumptions as to fact and assumptions as to law is artificial and obscure" (at 413).[20] The same must be true in the context of misrepresentation.

Silence

[611] The question as to whether there should be a general duty of disclosure between contracting parties has been debated at least since Roman times. Cicero, in his treatise on duties (*De Officiis*) gives the example of a grain merchant who carries a cargo of corn from Alexandria to Rhodes at a time of famine. In the course of the voyage, the merchant's ship overtakes a number of other vessels, all carrying grain and all bound for Rhodes. The question posed by Cicero is whether, upon arrival, the merchant should tell the Rhodians about the other ships, or whether he should say nothing and sell his cargo at the famine price. The merchant is assumed to be honest, and the issue is whether an honest man would regard it as wrong to keep the Rhodians in ignorance. Cicero presents both sides of the case through an imaginary dialogue between two Stoic philosophers, Diogenes of

16 *Beattie v Lord Ebury* (1872) LR 7 Ch App 777.

17 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), para [11.12].

18 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), para [11.12].

19 See also *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394.

20 Similarly, the mistake of fact and law distinction has now been reappraised: *David Securities v Commonwealth Bank* (1992) 175 CLR 353.

Babylon and his pupil Antipater. Antipater says that the information should be revealed. Diogenes disagrees, but Cicero himself ends up by taking Antipater's side.[21]

The general rule in Anglo-Australian law is that mere silence is not actionable. A positive misrepresentation is required.[22] On the other hand, very little is needed to tip the balance: "a single word, a nod or a wink, or a shake of the head or a smile" may be sufficient.[23] There are three exceptions to the general rule that silence is not actionable. The first exception arises in cases where silence distorts a positive misrepresentation. There are various ways that this can occur. In particular:

- where a representation conveys a half-truth, or, in other words, tells only part of the story, the representor will be liable on the ground that an incomplete statement constitutes a misrepresentation;[24]
- where the accuracy of a statement is affected by new facts which come to light before the contract is concluded, the representor will be under a duty to disclose the new position;[25]
- where the representation amounts to a statement of intention relevant to the contract, but the representor has a change of mind before the contract is concluded, a duty of disclosure will arise (*Jones v Dumbrell* [1981] VR 199).

The second exception to the general rule that silence is not actionable arises in relation to contracts of the utmost good faith, in particular insurance contracts.[26] The rationales for a rule favouring full disclosure by the insured are, first, that the proper

21 See Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), Ch 1.

22 *Smith v Hughes* (1871) LR 6 QB 597; *W Scott, Fell & Co Ltd v F H Lloyd* (1906) 4 CLR 572.

23 *Walters v Morgan* (1861) 3 De GF & J 718, Lord Campbell LC at 723-724; 45 ER 1056.

24 A classic though possibly apocryphal — example is the case of the toothpaste manufacturer which advertised its product as having been subjected to rigorous university testing, failing to disclose that it had failed all the tests. Similar examples, drawn from the law of misrepresentation, and catalogued in Turner, Sir A K, *Bower's The Law of Actionable Misrepresentation* (3rd ed, Butterworths, London, 1974), para [84], include: a declaration in a proposal for a life insurance policy that the proposer was resident in a certain town when he was "resident" there only in the sense that he was being held in the local jail for debt (*Hugenin v Rayley* (1815) 6 Taunt 186); a statement in relation to a contract for sale of a property, that certain farms located on it were all let, failing to disclose that the tenants had given notice to quit (*Dimmock v Hallett* (1866) 2 Ch App 21); and a statement by a solicitor acting for the vendor of a property that he knew of no restrictions on its use, without revealing that he had not made inquiries (*Nottingham Patent Brick & Tile Co v Butler* (1886) 16 QBD 778).

25 As where there is a material change of circumstance or where new facts come to light which reveal that the representor was mistaken: see *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch D 469, Fry LJ at 475.

26 There have been significant statutory developments in this connection: *Insurance Contracts Act* 1984 (Cth).

functioning of insurance markets depends on insurers being able to distinguish between high and low risk proposals and, secondly, that information concerning the size of the risk will typically be within the particular knowledge of the insured.[27]

The third exception is that a fiduciary who enters into a contract with a beneficiary must disclose all relevant facts. In this context, the disclosure requirement is not an end in itself, but an adjunct of the fiduciary's primary duty of good faith or loyalty.[28]

[612] The distinction between misrepresentation and silence produces some anomalies. Consider the following cases:

- A purchases a house from B. There is serious cracking in several of the interior walls, signifying a structural fault. B papers over the cracks before the sale. A does not discover the problem until after the purchase.
- A purchases a house from B. To B's knowledge, there is serious cracking in several of the interior walls which has been papered over by a previous owner. B says nothing about this to A. A does not discover the problem until after the purchase.

The first case is likely to be regarded as involving a positive misrepresentation. The representation can be implied from B's conduct, and A will be entitled to relief on that basis (*Schneider v Heath* (1813) 3 Camp 506; 170 ER 1462). By contrast, apart from statute, B's conduct in the second case is probably not actionable. The caveat emptor rule applies:[29]

> "[I]n the absence of fraudulent concealment or of misrepresentation or of an express agreement, a vendor of real estate is not liable to a purchaser for defects in a building or land rendering it dangerous or unfit for occupation, even if the vendor has created the defects himself or is aware of their existence."

It is difficult to see the reason in principle for distinguishing between these two cases. There is a further anomaly. In the second case, although B's conduct is probably not sufficient to

27 Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), pp 191-192.

28 See below, Chapter 10: "Fiduciary Obligations". See also Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), pp 171-175.

29 *Kadissi v Jankovic* [1987] VR 255, Crockett J at 258. See also *Demagogue Pty Ltd v Nicholas Ramensky* (1992) 110 ALR 608, Gummow J at 617-618 (at general law, a vendor of real estate is bound to disclose defects of title, but not defects of quality). The position is different under the *Trade Practices Act* 1974 (Cth), s 52: see below, para [632].

entitle A to sue for rescission or damages, it may be sufficient to prevent B from obtaining specific performance. Specific performance is a discretionary remedy, and, in the case of a contract for the sale of land, non-disclosure of a defect by the vendor is a factor which the court may take into account in deciding whether to grant relief.[30] If specific performance is refused, the vendor will be relegated to a claim for damages at law. The cases have been criticised for reflecting the courts' ambivalence over the moral dimensions of contractual non-disclosure:[31]

> "[T]he same judge ... drives from his courtroom the unconscientious plaintiff when he asks for specific performance, but welcomes him back and gives him damages for the same breach of contract."

In some United States jurisdictions, a different approach has been adopted to cases involving non-disclosure of building defects. The issue has arisen frequently in the context of termite-infested houses. The leading case, *Obde v Schlemeyer* 56 Wash 2d 449; 353 P 2d 672 (1960), is authority for the proposition that disclosure is required, whether or not the vendor has actively concealed the defect or misrepresented the truth.[32] *Stambovsky v Ackley* 572 NYS (2d) 672 (1991) is a bizarre example of the same rule at work. There, the New York Court of Appeals allowed a purchaser to rescind a contract on the ground that the vendor had failed to disclose that the house was widely reputed to be haunted. The vendor had fuelled the rumours by reporting sightings to the press, and the consequence was a substantial reduction in the value of the property. The court was "moved by the spirit of equity" to relieve the purchaser of a "most unnatural bargain" (Rubin J at 675).

Exclusion of liability

[613] A representor may attempt to exclude or limit liability for misrepresentation by contractual disclaimer. The disclaimer may

30 *Summers v Cocks* (1927) 40 CLR 321; *Beyfus v Lodge* [1925] Ch 350; *Hope v Walter* [1900] 1 Ch 257. See further below, Chapter 17: "Specific Performance".

31 Newman R A, *Equity and Law: A Comparative Study* (Oceana Publications, New York, 1961), p 19.

32 There have been similar developments in Canada, for example: *McGrath v MacLean* (1979) 22 OR (2d) 784; *CRF Holdings Ltd v Fundy Chemical International Ltd* (1982) 33 BCLR 291. As a matter of policy, the North American position is to be preferred. For a discussion of the economic considerations in support of this view, see Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), pp 157-161.

take the form of an express exclusion of liability for misrepresentation, an acknowledgment on the part of the other party that no representations were made or relied upon, or a provision excluding or limiting remedies.

Such provisions are ineffective to exclude liability for fraud.[33] However, the weight of authority suggests that, otherwise, they are likely to be upheld. In particular, there is a series of Queensland cases in which a representee was held to have been estopped from claiming relief for innocent misrepresentation by a statement in the contract to the effect that no representations had been made or relied on.[34] In *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715 at 724,[35] Pincus J doubted the correctness of these decisions, suggesting that, at least in the case of a sale where the acknowledgment clause is contained in a standard form contract prepared by the vendor, there is no injustice in allowing the purchaser to prove the misrepresentation. Elsewhere, it has been suggested that the acknowledgment clause, being part of the contract, should itself be regarded as tainted by the very misrepresentation it seeks to exclude.[36] There is an element of circularity in this proposition, because if the clause is effective to exclude the misrepresentation then the contract is not tainted at all.

The economic considerations discussed earlier suggest that representors should be allowed to rely on disclaimers if there is no negligence involved.[37] Disclaimers serve a useful function in cases where it is not economical for information providers to guarantee the accuracy of their statements. If disclaimers were prohibited, then, in such cases, representors would be faced with a choice of either watering down their statements or declining to volunteer information at all. The consequence would be to limit both the quality and quantity of available information. It is true that disclaimers also reduce the value of information. However, a full statement coupled with a disclaimer will often be more

33 *Suburban Homes Pty Ltd v Topper* (1929) 35 ALR 294; *Commercial Banking Co of Sydney Ltd v R H Brown & Co* (1972) 126 CLR 337; *S Pearson & Son Ltd v Lord Mayor of Dublin* [1907] AC 351.

34 *Brisbane Units Development Corp Pty Ltd v Robertson* [1983] 2 Qd R 105; *Dorotea Pty Ltd v Doufas Nominees Pty Ltd* [1986] 2 Qd R 91; *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715. See also *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60.

35 See also *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128; *Walker v Boyle* [1982] 1 All ER 634.

36 Heydon J D, Gummow W M C and Austin R P, *Cases and Materials on Equity and Trusts* (5th ed, Butterworths, Sydney, 1997), para [13.1.15].

37 See above, para [606]. What if the representor has been negligent? If the disclaimer covers the case and has been freely agreed to, it should be upheld. However, for the reasons discussed earlier (see above, para [606]), it is hard to see why a representee would freely agree to a representor disclaiming liability for negligence. In such cases, therefore, the disclaimer will often be open to attack on the ground that it was not freely agreed to: see further below, para [633].

valuable to a representee than either a watered down statement or no statement at all. It would be wrong to deprive contracting parties of this choice.

INDUCEMENT AND MATERIALITY

[614] A misrepresentation provides no grounds for relief unless it induces the representee to enter into the contract. The principles governing inducement were summarised by Wilson J in *Gould v Vaggelas* (1985) 157 CLR 215 at 236 as follows:

> "**1]** Notwithstanding that a misrepresentation is both false and fraudulent, if the representee does not rely upon it, he has no case.
>
> **2]** If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.
>
> **3]** The inference may be rebutted, for example by showing that the representee, before he entered into the contract, either was possessed of actual knowledge of the true facts and knew them to be true, or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation.
>
> **4]** The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract."

Accordingly, the ultimate burden of proving inducement rests with the representee. However, an inference of inducement may be drawn from the fact that the representee has entered into a contract after a material misrepresentation has been made, and at that point, the evidentiary onus shifts to the representor to obstruct the drawing of the inference. This may be done by showing, for example, that the representee was aware of the true facts or by words or conduct demonstrating the absence of reliance.

Gould v Vaggelas was a case of fraudulent misrepresentation, but Wilson J's observations apply equally to innocent misrepresentations. His analysis corresponds closely with that of Sir George Jessel MR in *Redgrave v Hurd* (1881) 20 Ch D 1, Sir George Jessel MR at 21.[38] In *Redgrave v Hurd*, Fry J at first instance (at 6-10)

38 See above, paras [605]-[606].

denied the purchaser relief based on the vendor's misrepresentation because the purchaser had taken insufficient trouble to check the accuracy of the plaintiff's statement. This fact was said to be relevant in two ways. First, as a matter of substantive law, it was relevant because the representee's own negligence is a bar to relief for innocent misrepresentation. Secondly, as a matter of evidence, it was relevant because it tended to show that the defendant did not attach importance to the plaintiff's statements and therefore did not rely on them.

Both propositions were rejected by the Court of Appeal: the first for reasons that have already been discussed, and the second on the ground that it failed to take account of the inference of fact which arises once it is established that a material misrepresentation was made and that the representee entered into the contract. To rebut the inference, "it must be shewn either that [the representee] had knowledge of the facts contrary to the misrepresentation, or that he stated in terms, as shewed clearly by his conduct, that he did not rely on the representation" (Sir George Jessel MR at 21).

[615] It is commonly said that a misrepresentation will not be actionable unless it is material.[39] In *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30 at 34, Holland J said:

> "If a vendor makes a material false representation which is calculated to induce a purchaser to enter into a contract for the sale of land and the purchaser does so, the vendor cannot hold the purchaser to performance of the contract in equity and the purchaser may elect to rescind and approach the equity court for an order declaring the contract rescinded … Inducement may be inferred from the fact that the purchaser entered into the contract, unless the vendor proves that the purchaser either knew that the representation was false or did not rely on it … If the representation is one that would affect the mind of an ordinary person, and did in fact affect the mind of the purchaser, it is a material representation, and, if it led him to enter, or was a contributory influence upon him in entering, into the contract, he is entitled to be relieved of the contract … The purchaser does not have to establish that the misrepresentation went to the root of the consideration, or that the property offered by the vendor in performance of the contract is substantially different from that as represented to the purchaser."

39 For example, *Wilson v Brisbane City Council* [1931] QSR 360; *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30; *Duralla Pty Ltd v Plant* (1984) 54 ALR 29 (FC Fed Ct).

The last part of this statement makes it clear that, despite earlier suggestions to the contrary,[40] "materiality" in the case of innocent misrepresentation does not mean a total failure of consideration. To hold otherwise would be to put a significant gloss on *Redgrave v Hurd* (1881) 20 Ch D 1. It would mean that rescission for innocent misrepresentation was no more readily available in equity than at common law.[41]

Accordingly, it is clear enough what "materiality" does not mean. However, as an inclusive definition, Holland J's statement is less satisfactory. What is the relevance of materiality? Two different answers are suggested by the cases, both of which are hinted at by Holland J. The first is that the materiality requirement relates to proof of the representor's intention to induce.[42] The second is that the requirement relates to proof of the representee's inducement.[43]

An actionable misrepresentation must have been "calculated to induce" the contract.[44] This requirement may be satisfied by proof either that the representor actually intended to induce the representee to enter into the contract, or that the representation was "obviously of such a nature as to be likely to induce" (*Nicholas v Thompson* [1924] VLR 554, McArthur J at 577).

In the latter connection, proof that the misrepresentation was material gives rise to an inference that the representor intended to induce the contract. In cases of fraud, it will rarely (if ever) be necessary to establish materiality for this purpose. Proof that the statement was dishonestly made and that the representee was in fact induced by it will itself be sufficient to support the inference that the statement was intended to induce.[45] In the case of innocent misrepresentation, there is a distinction to be drawn between an intention to deceive and an intention to induce the contract. Proof of the first is, clearly, never required but proof of the second always is. The requirement may be satisfied by showing that a reasonable person would have been induced to

40 *Hynes v Byrne* (1889) 9 QLJ 154. Cf *Wilson v Brisbane City Council* [1931] QSR 360.

41 Heydon J D, Gummow W M C and Austin R P, *Cases and Materials on Equity and Trusts* (5th ed, Butterworths, Sydney, 1997), para [13.1.2].

42 For example, *Nicholas v Thompson* [1924] VR 554.

43 For example, *Smith v Chadwick* (1982) 20 Ch D 27; *Simos v National Bank of Australasia Ltd* (1976) 45 FLR 97; *Gould v Vaggelas* (1984) 157 CLR 215, Wilson J at 236.

44 *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30, Holland J at 36; *Gould v Vaggelas* (1984) 157 CLR 215, Wilson J at 236.

45 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), para [11.39].

enter into the contract. However, it does not follow that, in cases where actual intention can be established by other means, materiality must be demonstrated as well.[46]

There is another line of cases suggesting that materiality goes to the issue of inducement.[47] Proof that a reasonable person would have been induced to enter into the contract and that the representee did in fact enter into the contract gives rise to the inference that the representee was induced. However, if proof of inducement can be established by other means, there is no need also to demonstrate materiality.[48]

It follows that there is no independent requirement for proof of materiality. Materiality is simply an aspect of inducement in either or both of the senses just identified. Holland J's statement is tautological in this respect.

[616] Mere puffs are not actionable. A puff is promotional sales talk which is obviously exaggerated or not meant to be taken seriously. Examples include the description of land as "fertile and improvable"[49] or "uncommonly rich water-meadow",[50] and of a house as "a desirable residence for a family of distinction".[51] Claims of superiority such as "best", "perfect" or "unique" will often be classified as puffs. The puffing exception might be explained either on the basis that a puff is not a representation of fact, or that it is not a material representation. It might be thought that promotional statements must always be material because they are invariably made with the intention of inducing contracts. The argument implicit in the exception is that the factual content of puffing statements does not matter; their tendency to induce contracts does not turn on whether the representee believes the message, but on other factors, such as the mood that such statements create, or the images they convey.

46 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), para [11.40].

47 For example, *Smith v Chadwick* (1982) 20 Ch D 27; *Simos v National Bank of Australasia Ltd* (1976) 45 FLR 97; *Gould v Vaggelas* (1984) 157 CLR 215, Wilson J at 236.

48 See cases cited above, n 47.

49 *Dimmock v Hallett* (1866) 2 Ch App 21.

50 *Scott v Hanson* (1829) 1 Russ & M 128; 39 ER 49.

51 *Magennis v Fallon* (1828) 2 Mol 561.

RESCISSION FOR INNOCENT MISREPRESENTATION

The meaning of rescission

[617] Rescission is a term that is used in the law with a number of distinct meanings (*Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 at 708 (FC Fed Ct)). In the context of misrepresentation, rescission means the cancellation of the contract from the outset and the restoration of the parties to their precontractual positions. Rescission in this sense is to be contrasted with the discharge of a contract for breach at the election of the non-breaching party. The discharge of a contract in these circumstances puts an end to future obligations without disturbing accrued rights and liabilities. This means that the non-breaching party will usually remain entitled to sue the party in breach for damages. By contrast, rescission for misrepresentation avoids the contract from the beginning, so that it is treated as if it never existed.

Rescission for misrepresentation is always the act of the complaining party. The function of the court is to adjudicate upon the validity of the rescission and, if it is valid, to make consequential orders necessary to achieve mutual restitution (*Alati v Kruger* (1955) 94 CLR 216 at 223-224). See further below, Chapter 25: "Rescission".

Sale of goods

[618] The view that equity never interfered in a contract for the sale of goods, and therefore that such contracts cannot be rescinded for innocent misrepresentation unless there is a total failure of consideration is probably now discredited: see further below, Chapter 25: "Rescission". This view was expressed in dicta in *Riddiford v Warren*[52] and *Watt v Westhoven*.[53] It has been ignored in a series of decisions by the English Court of Appeal,[54]

52 (1901) 20 NZLR 572, Denniston J at 577-582.

53 [1933] VLR 458, Lowe J at 465.

54 *Leaf v International Galleries* [1950] 2 KB 86; *Long v Lloyd* [1958] 1 WLR 753; *Goldsmith v Rodger* [1962] 2 Lloyds Rep 249. See also *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381.

criticised by commentators[55] and rejected by the Full Court of the South Australian Supreme Court (*Graham v Freer* (1980) 35 SASR 424). In *Graham v Freer*, Zelling J (at 436), with whom the other two members of the court agreed, after considering the authorities, concluded that:

> "[T]here is nothing inherent in the contract of sale of goods which takes such contracts outside the general rule that contracts obtained by innocent misrepresentation are voidable in equity and can be rescinded."

On the other hand, it was also held in *Watt v Westhoven*, following *Riddiford v Warren*, that the saving provision in the sale of goods legislation, in preserving "the rules of the common law" in relation to contracts for the sale of goods, must be taken to have excluded equitable jurisdiction, save in so far as special provision is made in the Act for specific performance.[56] *Watt v Westhoven* is binding authority in Victoria for the view that, statutory innovations aside, a contract for the sale of goods cannot be rescinded for innocent misrepresentation. However, in South Australia, following *Graham v Freer* (1980) 35 SASR 424, the position is different. There the court declined to follow the Victorian and New Zealand authorities, concluding that the words "the rules of the common law" in the saving provision of the sale of goods legislation include the rules of equity (King CJ at 424; Zelling J at 436). In *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381, Helsham CJ in Eq examined in some detail the limits of the remedy of rescission for innocent misrepresentation of a contract for the sale of goods, assuming throughout that the remedy was available in the first place. Since these cases were decided, there have been statutory developments affecting the position.[57]

Merger

[619] It has been said that the right to rescind a contract for innocent misrepresentation will be lost if the misrepresentation becomes incorporated in the contract (*Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167, Branson J). The reason is that the representee will then have a remedy at common law, so that the need for equity to intervene

55 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1304]; Sutton K C T, *Sales and Consumer Law in Australia and New Zealand* (4th ed, LBC Information Services, Sydney, 1995), pp 11-17.

56 See, for example, *Goods Act* 1958 (Vic), s 4(2). See also *Re Wait* [1927] 1 Ch 606, Atkin LJ at 635.

57 See further below, para [621]ff.

disappears; the representation merges in the higher contractual right (at 1171). However, the status of this so-called doctrine of merger is uncertain. It was held in *Alati v Kruger* (1955) 94 CLR 216[58] that the doctrine does not apply to a case of fraudulent misrepresentation. On the other hand, the judgment of Lord Evershed MR in *Leaf v International Galleries* [1950] 2 KB 86 at 95 lends some weight to the doctrine in cases not involving fraud. However, as Gillard J pointed out in *Mihaljevic v Eiffel Tower Motors Pty Ltd & General Credits Ltd* [1973] VR 545, the judgments of Denning and Jenkins LJJ in the same case (with both of whom the Master of the Rolls agreed) implicitly endorsed the opposite conclusion. They both treated the representation in issue as having become a condition of the contract. Therefore, if the doctrine of merger did apply, it would have determined the matter, and no discussion would have been required of the limits of the remedy of rescission. Gillard J regarded the observations of Lord Evershed MR in *Leaf v International Galleries* as being merely obiter.

In *Academy of Health and Fitness Pty Ltd v Power* [1973] VR 254, Crockett J refused to follow the *Pennsylvania Shipping Co* case. He also discounted the observations of the Master of the Rolls in *Leaf's* case concerning the doctrine of merger. However, in contrast to Gillard J in *Mihaljevic*, he appeared to regard Denning LJ's judgment as supporting, rather than negating, the existence of the doctrine. He concluded that *Leaf's* case was authority for the proposition that the doctrine applied where the representation becomes a condition of the contract, but not where, as in the present case, it was a mere warranty (at 264-266). The rationale for this distinction appears to be that, where the misrepresentation becomes a condition of the contract which is breached, the representee will normally be entitled at common law to discharge the contract, so that the remedy of rescission is not required. However, this mistakes the nature of the remedy.[59] Meagher, Gummow and Lehane[60] argue that the equitable remedy draws no distinction between conditions and warranties, provided that they have been inducing representations. Indirect support for this view is to be found in the judgment of Gillard J in *Mihaljevic*, and also in *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30 at 36, where Holland J declined to apply the merger doctrine, drawing no distinction between conditions and warranties.

58 See also *Kramer v McMahon* [1970] 1 NSWLR 194, Helsham J at 204.

59 See above, para [617].

60 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1304].

Executed contracts

[620] There is some doubt as to whether rescission is available for innocent misrepresentation where the contract has been executed. In *Seddon v North East Salt Co Ltd* [1905] 1 Ch 326, a case concerning a contract for the sale of shares, Joyce J held that the purchaser's right to rescind for innocent misrepresentation was lost once the shares had been transferred. *Angel v Jay* [1911] 1 KB 666 concerned an agreement for a lease. The tenant had been induced to enter into the contract by an innocent misrepresentation about the state of the drains. The truth was discovered only after the agreement had been executed and the tenant had gone into occupation. Rescission was disallowed. In *Svanosio v McNamara* (1956) 96 CLR 186,[61] the High Court appeared to endorse *Seddon's* case in its application to conveyancing transactions. However, the status of the rule remains in doubt, particularly in relation to contracts other than land dealings.

In *Leaf v International Galleries* [1950] 2 KB 86 at 90, Denning LJ refused to apply the rule in *Seddon's* case to a contract for the sale of goods, and Jenkins LJ was inclined to agree though he did not formally rule on the point (at 91). On the other hand, Lord Evershed MR was inclined to favour the rule on account of its long standing (at 95). The issue arose again before the English Court of Appeal in *Long v Lloyd* [1958] 1 WLR 753, but it was again left undecided. In *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381, Helsham CJ in Eq endorsed Denning LJ's position in *Leaf v International Galleries*, holding that, at least in the case of a contract for the sale of goods, the right to rescind for innocent misrepresentation is not lost merely because the contract has become executed. On the other hand, in *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1986) 9 NSWLR 731, Wood J (at 733-736) treated the rule as binding in relation to a contract for the sale of a business.

There is confusion in the cases over what is meant by an "executed" agreement. Sometimes it is assumed that an agreement is executed for the purpose of the rule upon completion of formalities at the time of its making. This was clearly the sense in which the rule was understood in *Angel v Jay*. However, the rule is generally understood as referring to an agreement which has been executed by performance on both

61 In the case of a conveyance under the Torrens system, execution occurs only upon registration of the transfer, not at settlement: *Montgomery v Continental Bags (NZ) Ltd* [1972] NZLR 884.

sides. Accordingly, in *Senayake v Cheng* [1966] AC 63, the Privy Council refused to apply the rule to a partnership agreement, on the basis that an agreement which gave rise to continuing obligations could not be described as "executed". In *Mihaljevic v Eiffel Tower Motors Pty Ltd & General Credits Ltd* [1973] VR 753, Gillard J, applying *Senayake v Cheng*, held that a hire-purchase agreement is an agreement of a continuing nature which remains executory until the exercise by the hirer of the option to purchase at the end of the period of hire.

There is no reason in principle for the rule.[62] One suggested justification is that the rule acts as an incentive for the representee to check the accuracy of pre-contractual statements.[63] However, this is inconsistent with the rationale for allowing rescission on the basis of innocent misrepresentation in the first place.[64] In Australia, the application of the rule has been limited by statutory developments (see below).

STATUTORY DEVELOPMENTS

Misrepresentation legislation

[621] The Australian Capital Territory and South Australia have enacted misrepresentation statutes based substantially on the *Misrepresentation Act* 1967 (UK).[65] The main reforms introduced by this legislation are first, to abolish the doctrine of merger and the rule in *Seddon v North East Salt Co Ltd* [1905] 1 Ch 326;[66] secondly, to introduce a statutory remedy of damages for non-fraudulent misrepresentation; thirdly, to invest the court with a discretion to disallow rescission and award damages instead; and, fourthly, to prevent reliance on exclusion clauses except to the extent that the court considers to be fair and reasonable.

The significance of this legislation has been diminished following the enactment of the *Trade Practices Act* 1974 (Cth) and State and Territory fair trading laws.[67] Nevertheless, it continues

62 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1316].

63 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), para [11.63].

64 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), para [11.63]; and see above, paras [605] and [606].

65 *Law Reform (Misrepresentation) Act* 1977 (ACT); *Misrepresentation Act* 1971 (SA).

66 See above, para [620].

67 See below, para [623]ff.

to have a role to play in private transactions, because the relevant provisions of the trade practices and fair trading laws are limited to conduct that is engaged in "in trade or commerce".

Sale of goods legislation

[622] Amendments to the *Sale of Goods Act* 1923 (NSW) in 1988 reformed the law by, first, avoiding the decision in *Watt v Westhoven* [1933] VLR 458[68] and, secondly, abrogating the doctrine of merger and the rule in *Seddon v North East Salt Co Ltd* [1905] 1 Ch 326[69] in relation to contracts for the sale of goods.[70]

Similar reforms have been made in the Australian Capital Territory.[71] Amendments to the Victorian *Goods Act* 1958 introduced a statutory right of rescission for non-fraudulent misrepresentation in the case of consumer sales and leases.[72] In the case of consumer transactions, these provisions have the effect of, first, abolishing the doctrine of merger and the rule in *Seddon v North East Salt Co Ltd* and, secondly, (probably) avoiding the effect of the decision in *Watt v Westhoven*.

The latter reform is only "probably" achieved because, although this appears to have been the intention, it may be doubted whether the statutory words are apt for the purpose. The legislation gives a representee the same right of rescission as if the misrepresentation had been fraudulent. Apart from statute, a contract that is induced by fraudulent misrepresentation may be rescinded either at common law or in equity. However, the common law remedy will not be available if precise restitution is not possible and there is no total failure of consideration, while the availability of the equitable remedy is subject to the same doubts as affect rescission for innocent misrepresentation.

68 See above, para [618].

69 See above, para [620].

70 *Sale of Goods Act* 1923 (NSW), s 4(2A).

71 As to the first issue, see *Sale of Goods Act* 1954 (ACT), s 62(1A); as to the second issue, see *Law Reform (Misrepresentation) Act* 1977 (ACT).

72 *Goods Act* 1958 (Vic), ss 100 and 111.

Trade practices and fair trading legislation[73]

Overview

[623] Part V of the *Trade Practices Act* 1974 (Cth) is headed "Consumer Protection", while the heading of Div 1 is "Unfair Practices". Section 52(1) provides that:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Most of the succeeding provisions in Div 1 of Pt V prohibit particular kinds of misleading conduct. Section 52(2) provides that nothing in the succeeding provisions of the Division is to be taken by implication as limiting the generality of s 52(2).

Part VI of the Act deals with enforcement and remedies. Contravention of a provision of Pt V, other than s 52, is an offence subject to substantial monetary penalties (s 79). Contravention of any of the provisions of Div 1 of Pt V, including s 52, may be restrained by injunction (s 80). Section 80A of the Act empowers the court, on application by the Minister or the Australian Competition and Consumer Commission, to make certain publicity orders and orders requiring the disclosure of information against a person who is found to have contravened a provision of Pt V. Section 163A provides for the making of declarations and other orders in relation to matters arising under the Act.

Section 82(1) provides that a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Pt V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

73 The following discussion focuses on *Trade Practices Act* 1974 (Cth), s 52 and the corresponding provisions in the State and Territory fair trading laws. There is a cognate provision in the *Corporations Act*, s 995 which covers misleading conduct in connection with dealing in securities. The purpose of the following discussion is not to give a comprehensive account of the legislation, but to demonstrate how the legislation has changed the law governing precontractual misrepresentation. For a detailed account of the legislation and cases decided in relation to it, see Heydon J D, *Trade Practices Law* (Law Book Co., Sydney, looseleaf). The text below, paras [625]-[629] and the first part of para [633] is drawn from Duggan A J, "Consumer Protection" in *Halsbury's Laws of Australia* (Butterworths, Sydney), Vol 5. The text of para [632] is drawn from Duggan A J, "Silence as Misleading Conduct: An Economic Analysis" in Richardson M and Williams P L (eds), *The Law and the Market* (Federation Press, Sydney, 1995), pp 196-203.

Section 87(1) provides that, where in a proceeding instituted under, or for an offence against, Pt VI of the Act, the court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by the conduct of another person who was engaged in contravention of a provision of Pt V, it may, whether or not it grants an injunction under s 80 or makes an order under s 80A or s 82, make such order or orders as it thinks appropriate. Such order or orders may be made against the person who engaged in the conduct or a person who was involved in the contravention, if the court considers that the order or orders concerned will compensate the first-mentioned person in whole or part for the loss or damage, or will prevent or reduce the loss or damage.

Section 87(1A) provides for the making of similar orders on an application by a person who has suffered, or is likely to suffer, loss or damage by conduct of another person which is in contravention of a provision of Pt V. Section 87(1A) also provides for the bringing of representative actions by the Australian Competition and Consumer Commission on behalf of affected persons. An application under s 87(1A) must be brought within three years after the day on which the cause of action accrued (s 87(1CA)). The orders a court may make pursuant to s 87(1) and (1A) include, but are not limited to, those listed in s 87(2):

- an order declaring a contract to be void either ab initio or from a specified time;
- an order varying a contract;
- an order refusing to enforce any or all of a contract;
- an order directing a refund of money or the return of property to the person who suffered the loss or damage;
- an order for the payment of compensation;
- an order for the repair of, or supply of parts for, goods;
- an order for the provision of specified services; and
- in relation to land dealings, a reconveyancing order.

Section 52 of the Act, read in conjunction with ss 82 and 87, makes sweeping changes to the law of misrepresentation. The most important aspects of the provisions in this connection are outlined below.

Conduct

[624] The reference in s 52 to "conduct" is clearly broad enough to cover misrepresentation. In fact it has been held that conduct

cannot, for the purposes of s 52, be categorised as misleading or deceptive unless it conveys a misrepresentation.[74] Whether such conduct amounts to a misrepresentation is a question of fact to be decided in the light of what is said and done against the background of all the surrounding circumstances.[75]

Trade or commerce

[625] Section 52 is limited to conduct that is engaged in "in trade or commerce".[76] The expression "trade or commerce" has been given a broad interpretation in line with decisions on the trade and commerce power in s 51(i) of the Australian Constitution. However, the word "in" is limiting. It has been interpreted as meaning that the conduct in question must be part of the corporation's trade or commercial activities, and not merely incidental to them. Accordingly, acts of an employee, for which it is sought to make a corporation liable, do not necessarily amount to conduct engaged in by the corporation "in" trade or commerce simply because they happen to have been done in the course of employment. It follows that the section has a restricted application in the industrial context; for example, instructions given by a foreman to a labourer in relation to the labourer's duties will normally not constitute conduct in trade or commerce (*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594). Private, as opposed to business, dealings are not in trade or commerce and are therefore not subject to the section (*O'Brien v Smolonogov* (1983) 53 ALR 107 (FC Fed Ct)). On the other hand, the sale by a corporation of a capital asset may be in trade or commerce, even though the corporation is not in the business of selling the kind of asset in question (*Bevanere v Lubidineuse* (1985) 55 ALR 273 (FC Fed Ct)).

Scope

[626] Section 52 appears under the heading "Consumer Protection", but it is not limited in its application to consumer dealings. The words of the section are clear and unambiguous, so there is no

74 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, Deane and Fitzgerald JJ at 202 (FC Fed Ct).

75 *Taco Co of Australia Inc v Taco Bell Pty Ltd*, Deane and Fitzgerald JJ at 202 (FC Fed Ct). Section 4(2) of the Act provides that a reference in the Act to engaging in conduct is to be read as a reference to doing or refusing to do any act, and that a reference to doing or refusing to do any act includes a reference to refraining (otherwise than inadvertently) from doing that act or making it known that the act will not be done.

76 "Trade or commerce" means trade or commerce within Australia or between Australia and places outside Australia: s 4(1).

call for resort to the heading as an aid to interpretation.[77] Accordingly, the relief that is available in the case of a contravention is not limited to consumers. For example, a trader may obtain an injunction to restrain a competitor from engaging in conduct that is misleading in contravention of the section.[78] Furthermore, s 52 is probably not limited in its application to conduct that is misleading to consumers, whether in the statutory sense,[79] or otherwise.[80] Therefore, the section may apply to misleading statements made in the course of pre-contractual negotiations between commercial enterprises.[81]

Misleading or deceptive

[627] The words "misleading or deceptive" refer to a tendency to mislead or deceive. Therefore, proof of actual deception is not necessary to establish a contravention (*Parkdale Custom Built Furniture Pty Ltd v Puxu* (1982) 149 CLR 191).[82] Nor is it sufficient to do so, because the test of what amounts to misleading conduct is an objective one. The starting point is to identify the

77 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, Mason CJ and Deane, Dawson and Gaudron JJ at 601-602.

78 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216.

79 *Trade Practices Act* 1974 (Cth), s 4B.

80 *Menhaden v Citibank NA* (1984) 55 ALR 709 (Fed Ct); *Bevanere Pty Ltd v Lubidineuse* (1985) 59 ALR 334 (FC Fed Ct). Cf *Westham Dredging Co Pty Ltd v Woodside Petroleum Development Pty Ltd* (1983) 46 ALR 287 (Fed Ct); *Wright v TNT Australia Pty Ltd* (1988) 15 NSWLR 662 (affd on other grounds: (1989) 15 NSWLR 679). In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, the majority (Mason CJ, Deane, Dawson and Gaudron JJ) held that s 52 is not to be read down, by reference to the heading, so as to be limited in its application to conduct that is misleading to consumers. However, the majority joint judgment went on to say that the heading was relevant in determining the meaning of the expression "in trade or commerce", there being sufficient uncertainty about the meaning of these words to warrant resort to the heading as an aid to construction. Brennan, McHugh and Toohey JJ, in separate dissenting judgments, took the view that s 52 should be read down. (Contrast the views expressed by McHugh JA (as he then was) on this issue in *Wright v TNT Management Services Pty Ltd* (1988) 15 NSWLR 679.) *Nelson's* case probably cannot be regarded as having resolved the issue, given the indeterminacy of the majority joint judgment. However, a relevant consideration is that the corresponding provisions to s 52 in the State Fair Trading Acts appear under various headings, none of which refers to "consumer protection". Accordingly, the kind of argument that was relied on in the dissenting judgments in *Nelson's* case would not be open in relation to the Fair Trading Acts. It is unlikely that the courts will end up concluding that s 52 is to be interpreted differently from its Fair Trading Act counterparts.

81 For example, *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79 (Fed Ct); *Mr Figgins Pty Ltd v Centrepoint Freehold Pty Ltd* (1981) 36 ALR 23 (Fed Ct) (shopping centre leases); *Bevanere Pty Ltd v Lubidineuse* (1985) 55 ALR 273 (FC Fed Ct); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83 (FC Fed Ct) (contracts for sale of a business); *Alliotta v Broadmeadows Bus Service Pty Ltd* (1988) ATPR ¶49-478 (Fed Ct); *Argy v Blunts* (1990) 94 ALR 719 (Fed Ct) (real estate dealings).

82 However, proof of actual deception will be necessary to establish a claim for damages or relief under s 87: see below, para [634].

characteristics of the person or group to whom the conduct is directed.[83] A heavier burden may be imposed on the respondent in a case where the audience is, for example, uneducated or unsophisticated, than where the conduct is directed to a more general audience.[84] Conversely, in the case of an expert audience, the respondent's burden may be lighter.[85] Once the relevant audience has been identified, it becomes necessary to ask what responsibility, if any, persons within that class have to look after their own interests. Three approaches to this secondary question are discernible in the cases.[86] The first approach is to say that there is no such responsibility, and, on this view, "once the relevant section of the public is established, the matter is to be considered by reference to all who come within it".[87] The second approach entails a slightly higher standard, in that it would exclude from consideration the effect of the conduct on an unusually stupid person within the class.[88] Subject to this qualification, however, the second approach is the same as the first. The third approach focuses on reasonable members of the class. On this basis, people are required to take reasonable care of their own interests, and conduct will only contravene the section if it has a tendency to mislead a person who is wary in this sense.[89] In *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, the High Court endorsed the third approach.

83 *Annand Thompson Pty Ltd v Trade Practices Commission* (1979) 25 ALR 91, Franki J at 102 (FC Fed Ct); *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, Deane and Fitzgerald JJ at 202 (FC Fed Ct); *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Gibbs CJ at 199.

84 For example, *Parish v World Series Cricket Pty Ltd* (1977) 16 ALR 172 (Fed Ct); 16 ALR 181 (FC Fed Ct); *Henderson v Pioneer Homes Pty Ltd* (1980) 29 ALR 597 (FC Fed Ct); *Fraser and Talbot v NRMA Holdings Ltd* (1995) 127 ALR 543 (FC Fed Ct).

85 For example, *Parkview (Kepple) Pty Ltd v Mytarc Pty Ltd* (1984) 6 ATPR ¶40-486 (FC Fed Ct).

86 *Siddons Pty Ltd v Stanley Works Pty Ltd* (1991) 99 ALR 497, Wilcox and Heerey JJ at 500-501 (FC Fed Ct), quoting with approval Heydon J D, *Trade Practices Law* (Law Book Co., Sydney, looseleaf), para [11.420].

87 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, Deane and Fitzgerald JJ at 202 (FC Fed Ct). The approach looks to the effect of the conduct on all who come within the relevant section of the public, "including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated" (at 202). See also *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Murphy J at 214-215.

88 *Annand Thompson Pty Ltd v Trade Practices Commission* (1979) 25 ALR 91, Franki J at 102 (FC Fed Ct). The approach looks to the effect of the conduct on "a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge [but not] unusually stupid" (at 102).

89 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Gibbs CJ at 199: "Consideration must be given to the class of consumers likely to be affected by the conduct ... The section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class."

Strict liability

[628] As a general rule, intention to mislead or deceive is not an ingredient of the prohibition.[90] Nor is it relevant that the defendant took reasonable steps to avoid the contravention.[91]

Statements of opinion and promises

[629] One exception to the strict liability rule arises in cases involving statements of opinion or future facts. Such statements may be misleading if they convey a false impression as to the representor's real belief.[92] They therefore necessarily entail an inquiry into the representor's state of mind.[93]

Section 51A is relevant where a representation is made with respect to a future matter. It provides that such a representation will be misleading unless the representor had reasonable grounds for making it, and places the onus on the representor of establishing reasonable grounds.

Section 51A is limited to representations with respect to future matters. It clearly applies to predictions and forecasts. However, its application to statements of opinion is less certain, because a statement of opinion will not necessarily relate to a "future matter". Why the section should discriminate in this way is unclear. The evidentiary problem confronting the representee in establishing the representor's state of knowledge is precisely the same, whether the opinion relates to present or future fact.

[630] The application of the section to false promises is also uncertain. A promise may amount to a pledge of future performance. For example, in the case of a sale, the seller may promise to deliver or the buyer to pay by the end of the month. A false promise of this kind can be said to relate to a future matter, namely the promisor's performance. However, it is inappropriate to speak in terms of the promisor having "reasonable grounds" for making the promise. A representor might have reasonable grounds for making a prediction or forecast, but, in the case of a promise, the representor either intends to perform or not. Reasonable grounds

90 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, Stephen J at 223; *Yorke v Lucas* (1985) 158 CLR 661, Mason ACJ and Wilson, Deane and Dawson JJ at 666.

91 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Gibbs CJ at 197; *Yorke v Lucas* (1985) 158 CLR 661.

92 See above, paras [608]-[609].

93 *Bill Acceptance Corp Ltd v GWA Ltd* (1983) 50 ALR 242 (Fed Ct); *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 55 ALR 25 (FC Fed Ct).

do not enter into the matter. Alternatively, a promise may amount to an assurance that certain facts are true. For example, a seller may warrant that goods are of a particular quality. In this case, while it might be relevant to know whether the seller had reasonable grounds for making the assurance, it is hard to see how s 51A can apply because the statement does not relate to a future matter. In *Futuretronics Pty Ltd v Gadzhis* (1990) ATPR ¶41-049 (Vic SC),[94] Ormiston J was prepared, despite misgivings, to assume that the corresponding provision in the Victorian *Fair Trading Act* 1985 did apply to false promises concerning future performance. If false promises are subject to the section, the startling consequence results that the making of a promise itself prima facie amounts to misleading conduct. In conceptual terms, this is pure nonsense.

In *Wheeler Grace v Pierucci Pty Ltd* (1989) ATPR ¶40-940, Lee J at 50-251 (FC Fed Ct),[95] Lee J suggested that a promise or prediction might be held misleading without the need to rely on s 51A if the circumstances show the need for some qualification to be attached to the statement. In that case, the misleading character of the conduct would derive from the failure to make the qualification so that the representor's state of mind is not relevant. In *Effem Foods Pty Ltd v Lake Cumberline Pty Ltd* (1999) 161 ALR 599 (HCA), it was held that the entry by a party into a genuine and binding commercial agreement does not normally involve making representations about the contract to third parties such as potential investors. It might be different if the contract is a sham. However, once it is concluded that the contract is genuine and binding, then a finding that a party was making representations to third parties about its own attitude towards performance of the contract or about the other party's capacity to perform it, "would require the existence of very unusual circumstances" (at 606).

Statements of law

[631] In *Inn Leisure Industries Pty Ltd (Provisional Liquidator Appointed) v D F McCloy Pty Ltd (No 1)* (1991) 28 FCR 151 at 166 (Fed Ct), French J held that: "The generality of s 52 does not support any

94 See also *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 114 ALR 335, Lockhart and Gummow JJ at 389 (promises amounting to a contractual affirmation of an existing state of affairs contrasted with promises implying a representation concerning some future matter).

95 The representee would need to point to relevant circumstances showing the need for the qualification, however the non-fulfilment of the prediction or promise itself may be evidence that raises an inference that such a risk of non-performance existed or that some qualification to the statement was required (at 50-251).

implied limitation that would exclude from its operation conduct inducing error of law." He went on to distinguish between "untutored" and expert legal advice. Statements of law made by non-experts will often amount to no more than an expression of opinion. If the opinion is honestly held, there will be no contravention of s 52. On the other hand, if the representor did not actually hold the opinion, the statement would amount to a representation of fact (as to the representor's state of mind) and it would be actionable on that basis. Expert legal advice may convey the representation that it is based upon an underlying body of knowledge, experience or expertise. That is a representation of fact and, if it is untrue, it may be actionable under s 52.[96] The *Inn Leisure Industries* case concerned a contract for the purchase of a boat in connection with which the purchaser had incorrectly represented to the vendor that there was no sales tax payable. The purchaser's opinion was an untutored one. It was held not to amount to misleading conduct, because the opinion was honestly held. This result is consistent with the policy analysis, above.[97] The offering of a legal opinion which is plainly untutored is equivalent to making a representation coupled with a disclaimer. The disclaimer — whether express or implied functions as a signal to the representee that the accuracy of the information is not guaranteed.

Silence

[632] The question of liability for non-disclosure under s 52 has arisen in a variety of factual contexts, including:

- the sale of a business (failure by vendor to disclose information relevant to profitability);[98]
- the sale of an aircraft for commercial use (failure to disclose that it had been damaged in an accident and was under repair);[99]
- the sale of a motor vehicle at auction (failure to disclose that there had been a body swap);[100] and
- real estate dealings (failure by vendor to disclose restrictions on access to property for sale).[101]

96 See also *SWF Hoists & Industrial Equipment Pty Ltd v State Government Insurance Commission* (1990) ATPR ¶41-045 (Fed Ct).

97 See above, para [606].

98 *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) ATPR ¶46-020 (Fed Ct); affd (1988) 79 ALR 83 (FC Fed Ct).

99 *Collier v Electrum Acceptance Pty Ltd* (1986) 66 ALR 633 (Fed Ct).

100 *Treloar v Ivory* (1991) ASC 56-076 (WA).

101 *Demagogue Pty Ltd v Nicholas Ramensky* (1992) 110 ALR 608 (FC Fed Ct).

It might be thought that the key to such cases lay in s 4(2) of the Act, which provides that "conduct", within the meaning of s 52, includes refusing to do an act, and refusal to do an act includes "refraining (otherwise than inadvertently) from doing that act". However, as Gummow J pointed out in *Demagogue Pty Ltd v Nicholas Ramensky* (1992) 110 ALR 608 at 617 (FC Fed Ct), the critical issue is not so much whether the defendant's silence amounts to "conduct" within the meaning of the Act, as whether the defendant's conduct is misleading or deceptive.

Many of the cases involve half-truths, and here the analysis is relatively straightforward. The real basis for liability is what is actually said, rather than what is left unsaid. Looked at in this light, the cases are not really examples of misrepresentation by silence at all. They are cases of active misrepresentation. Half-truths are actionable at general law on the same footing.[102]

However, the decision of the Full Federal Court in *Demagogue* suggests that silence may be actionable under s 52 in a wider range of circumstances than at general law. In *Demagogue*, the vendor of a property for sale in Queensland failed to disclose that there were restrictions on access. Apart from statute, the purchaser would probably not have been entitled to relief.[103] However, the court held that the vendor's conduct amounted to a contravention of s 52 and set the contract aside on that basis. The vendor's conduct was held to be misleading because the circumstances gave rise to a reasonable expectation on the part of the purchaser that, if the relevant fact existed, it would be disclosed. Black CJ (at 609-610) described the governing consideration as follows:[104]

> "Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure. The question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of 'mere silence' or of a duty of disclosure can divert attention from that primary question. Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That

102 See above, para [611].

103 See above, para [611].

104 Gummow J expressed similar views, quoting with approval (at 618) from French J's judgment in *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) 11 ATPR (Digest) ¶46-054 at 53,195 (Fed Ct).

> context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."

The result in *Demagogue* is consistent with North American case law on concealed building defects.[105]

The reasonable expectations test has been applied in later cases. In *Warner v Elders Rural Finance* (1992) 113 ALR 517 (FC Fed Ct), it was used to justify a conclusion that a financier's failure to explain the borrowers' exposure to risk under a proposed loan did not amount to misleading conduct; a borrower's lack of knowledge of the Australian financial system does not give rise to a reasonable expectation that the lending institution will explain how the Australian financial system works, and how it will expose the borrower to risk of loss (Foster and Drummond JJ at 520). *Fraser v NRMA Holdings Ltd*[106] concerned a proposed company restructure, in connection with which a prospectus was issued to members. Gummow J held, applying the reasonable expectations test, that the non-disclosure of material information in the prospectus contravened s 52. Company members are entitled "to believe that such disclosures will be made to them in relation to proposals of directors which would significantly affect their interest as members".[107]

The trouble with the reasonable expectations test is that it begs the question. It turns entirely on the court's view of what it is reasonable for the plaintiff to expect, and the considerations driving this assessment are at large. Why should it be reasonable for a purchaser of real estate to expect that restrictions on access known to the vendor will be disclosed, but not reasonable for a borrower to expect that a financier will disclose financial risks associated with the loan? There may well be an answer to this question, but the judgments in *Demagogue* and *Warner* give no clues as to what it might be.[108] Take another example, this time hypothetical. A customer goes into a retail store and purchases a lounge suite for $5,000. The sales assistant does not reveal that a competing retailer has the same item on sale at a price of $4,000. The conventional view is that there is no duty of disclosure in these circumstances; it is not reasonable for a customer to expect

105 See above, para [612]. See also *Franich v Swannell* (1994) ATPR (Digest) ¶46-115 (FC WA).

106 (1994) 124 ALR 548; affd (1995) 127 ALR 543 (FC Fed Ct).

107 (1994) 124 ALR 548 at 564.

108 *Fraser v NRMA Holdings Ltd* (1994) 124 ALR 548 stands on a different footing. There, fiduciary obligations were involved, and these were identified as the basis for the members' reasonable expectations regarding disclosure. In most commercial transactions, this fiduciary element is lacking.

that a retailer would disclose its competitor's prices. But why not? Eisenberg, in a well-known article on unconscionability, argues the contrary case.[109] He says that "a merchant who offers homogeneous commodities at fixed prices impliedly represents that the offered price is not strikingly disproportionate to the prevailing price at other reasonably accessible market places". On the face of things, this assertion appears to be no less plausible than its opposite. In purely formal terms, therefore, there is no way of choosing between them. A meaningful choice requires identification of the underlying policy concerns, but in the case law these are nearly always left unstated.[110]

Exclusion of liability

[633] The Act itself does not prohibit the use of disclaimers in relation to s 52. However, the courts have held that liability under s 52 cannot be excluded or limited by agreement. The suggested reasons are twofold. First, the *Trade Practices Act* 1974 (Cth) is a public policy statute, and it would be contrary to public policy to allow a statutory remedy to be excluded by private agreement.[111] Secondly, an exclusion clause in a contract purporting to protect the defendant from liability for pre-contractual statements cannot be effective by way of agreement because the misleading conduct will already have occurred by the time the contract is signed, so that the terms of the contract are irrelevant.[112]

There are cases where a contractual disclaimer has been held to be effective to exclude liability for misrepresentation at general law, but ineffective to protect the representor from liability under s 52.[113]

Nevertheless, there are at least two ways in which a disclaimer may be relevant to the determination of liability under s 52. First, in assessing whether there has been a contravention, the whole of the defendant's conduct must be taken into account and the effect of a disclaimer, looked at on this basis, may be to

109 Eisenberg M A, "The Bargain Principle and its Limits" (1982) 95 *Harvard Law Review* 741 at 779.

110 See Duggan A J, Bryan M and Hanks F, *Contractual Non-Disclosure: An Applied Study in Modern Contract Theory* (Longman Professional, Melbourne, 1994), pp 36-37. For an explanation of the case law based on economic considerations, see pp 157-161.

111 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, Lockhart J at 99 (FC Fed Ct).

112 *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 (FC Fed Ct); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83 (FC Fed Ct); *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375; *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715 (Fed Ct).

113 For example, *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715 (Fed Ct).

negate the misleading tendency of other things said or done by the defendant.[114] In each case, it is a matter of assessing the likely effect of the disclaimer on the persons to whom it is addressed, and this is primarily a question of fact.[115] A disclaimer need not be expressly made, but may arise by implication from the defendant's conduct and the surrounding circumstances. So, for example, where an agent acting for a vendor passes on to a prospective purchaser information obtained from the vendor in circumstances where it is clear that the agent has no knowledge of the truth or falsity of the information, but is merely passing it on for what it is worth, the agent may not be liable if the information turns out to be incorrect (*Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 (FC Fed Ct)).

Secondly, a disclaimer may have the effect of breaking the chain of causation between the defendant's misleading conduct and the loss suffered by the plaintiff. In other words, if it can be established that the plaintiff's attention was drawn to the disclaimer before the contract was made, this may be enough to support an inference that the plaintiff did not rely on the statement and was not induced by it to enter into the contract.[116] This consideration may be relevant in a case where the plaintiff is claiming relief under s 82 or s 87, where proof of loss or damage is the gist of the action.

In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) 16 ATPR ¶41-249 (FC Fed Ct), a purchaser purchased a commercial property on the strength of a representation by a real estate agent concerning the net lettable area of the building. The information turned out to be false and the respondent sued for damages, alleging a contravention of s 52. The misrepresentation was contained in a brochure which the agent gave to the purchaser in the course of negotiations. The brochure included the following statement:

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.

114 *Yorke v Lucas* (1985) 158 CLR 661, Mason ACJ, Deane and Dawson JJ at 666; *Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 (FC Fed Ct); *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

115 *Abundant Earth Pty Ltd v R & C Products Pty Ltd* (1985) 59 ALR 211 (Fed Ct); *Hutchence v South Sea Bubble Co Pty Ltd* (1986) 64 ALR 330 (Fed Ct).

116 *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR (Digest) ¶46-048 (FC Fed Ct).

> However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own inquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

The purchaser's managing director read the brochure as soon as it was given to him. The agent argued that the disclaimer was effective to exclude liability because it amounted to a statement that the agent was not the source of information contained in the brochure but was merely passing it on for what it was worth. The Full Federal Court rejected this argument. It held that the message conveyed by the disclaimer was negated by the way in which the agent had promoted the sale, and that the agent had in fact adopted the information in question as its own.

It was suggested earlier that disclaimers serve a useful purpose in cases where it is not economical for information providers to guarantee the accuracy of their statements.[117] The decision in the *John G Glass* case can be justified on the basis that reliance on the disclaimer was not warranted in the circumstances. The cost to the agent of verifying the information in question is unlikely to have been high. It would almost certainly have been cheaper for the agent to make the inquiry than the purchaser, because of the agent's readier access both to the vendor and the property. More significantly, if the agent makes the inquiry, costs will be incurred only once, whereas, if prospective purchasers are left to make their own inquiries, there will be a duplication of effort and costs may be incurred many times over.[118]

Inducement and materiality

[634] In order to establish a contravention of s 52, it is not necessary for the plaintiff to show that anyone was actually misled.[119] However, it is necessary to show a tendency for the defendant's conduct to mislead, and the question of materiality is relevant in that connection. In *Fraser v NRMA Holdings Ltd* (1995) 127 ALR 543 (FC Fed Ct), the applicants sought an injunction to restrain

117 See above, para [606].

118 If this analysis is correct, it needs to be asked why the purchaser agreed to the disclaimer. The answer is that it did not. The court found that the message conveyed by the disclaimer was contradicted by other things said and done by the agent. Consequently, the purchaser contracted on the footing that the disclaimer would not be relied on.

119 See above, para [627].

distribution of a company prospectus on the ground that it contained errors and omissions in contravention of s 52. In the course of its judgment, the court (Black CJ, von Doussa and Cooper JJ at 556) stated that:

> "[T]he applicant carries the onus of establishing how or in what manner that which was said involved error or how that which was left unsaid had the potential to mislead or deceive. Errors and omissions to have that potential must be relevant to the topic about which it is said that the respondents' conduct is likely to mislead or deceive. The need for an applicant to establish materiality is of particular importance in a case like the present one where the proposal is complex, and involves difficult questions of commercial judgment and matters of degree and conjecture as to the future about which there is room for a range of honestly and reasonably held opinions. If every possible formulation of the commercial objective of the proposal, and arguments for and against every theoretical possibility, were set forth the total package of information to members would be likely to confuse rather than to illuminate the issue for decision, even for people having a familiarity with corporate law and commerce. The need to make full and fair disclosure must be tempered by the need to present a document that is intelligible to reasonable members of the class to whom it is directed, and is likely to assist rather than to confuse … In complex cases it may be necessary to be selective in the information provided, confining it to that which is realistically useful.
>
> It is important that the adequacy of the information provided by the prospectus and supporting documents be assessed in a practical, realistic way having regard to the complexity of the proposal. In the circumstances the Court should not be quick to conclude that a contravention of s 52 has occurred because other information could have been provided that was not. The need for the applicants to establish the materiality of errors and omissions is an important step in the proof of their claims."

Proof of actual inducement will be necessary in a case where the plaintiff claims relief under s 82 or s 87 because both sections require a causal connection between the contravention and the applicant's loss or damage. The causal connection most commonly alleged is reliance by the applicant on the respondent's misleading conduct. An inference of reliance will arise if the misleading conduct is of such a nature as to be likely to induce a representee to rely on it, but this may be rebutted.[120]

120 For example, *Jones v Ackfold Investments Pty Ltd* (1985) 59 ALR 613 (FC Fed Ct).

The respondent's conduct need not be the sole cause of the applicant's loss.[121] However, the "relative importance" of contributing causes will be taken into account,[122] and if the "real, essential, substantial, direct, appreciable or effective cause lies elsewhere, then recovery will be denied".[123]

[635] Mere puffs do not give rise to liability under s 52.[124] In *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 53 FLR 307 at 311 (Fed Ct), Lockhart J said in relation to a television commercial comparing the prices of rival brands of instant coffee:

> "I think a robust approach is called for when determining whether television commercials of this kind are false, misleading or deceptive. The public is accustomed to the puffing of products in advertising. Although the class of persons likely to see this advertisement is wide, it is inappropriate to make distinctions that are too fine and precise."

On the other hand, there are numerous cases where the puffing defence has been rejected. For example, in *Makita (Australia) Pty Ltd v Black & Decker (Australia) Pty Ltd* (1990) ATPR ¶41-030, it was held that a reference in a television commercial to a product demonstration as "amazing" was not a mere puff because the demonstration had been rigged to produce the result the advertiser wanted. In the circumstances, it could not be said that the demonstration result was "amazing" at all.

Damages

[636] In the case of a claim based on s 52, where the applicant is the representee, the most likely remedy will be either damages under s 82 or an order under s 87.

Section 82, read in conjunction with s 52, creates a novel right of action for damages based on misrepresentation. At common law, damages may be awarded for misrepresentation only if the statement was dishonest, promissory in character or negligent in the sense that it breached a duty of care owed by the representor to the representee. A damages claim under the statute is subject to none of these limitations. The provisions establish a strict liability regime.

121 *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 (Fed Ct); *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd* (1987) 75 ALR 271 (Fed Ct).

122 *Myers v Trans Pacific Pastoral Co Pty Ltd* (1986) ATPR ¶40-673, Pincus J at 47,423 (Fed Ct).

123 *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, Gummow J at 243 (Fed Ct).

124 See also above, para [616].

There is no formal provision for a contributory negligence defence. However, the applicant must prove that the loss was suffered by reason of the respondent's conduct and the applicant's carelessness may be relevant in this connection. "There may come a point where the applicant's own conduct is so dominant in the causal chain as to constitute a novus actus interveniens."[125] However, whether there can be room for apportionment of loss on this basis is doubtful.[126] The same reasoning supports the conclusion that the applicant is under a duty to mitigate losses flowing from the respondent's conduct.[127]

Recovery under s 82 is limited to the "amount of the loss or damage". The function of the provision is compensatory. One consequence is that exemplary damages cannot be awarded. [128] The same is true of s 87. However, aggravated damages (for anxiety, distress, vexation and the like) can be awarded. Aggravated damages are compensatory, not punitive.[129]

Section 82 requires proof of actual loss, but it gives the claimant a remedy as of right. Section 87 provides for the granting of relief in favour of a person "who has suffered, or is likely to suffer, loss or damage". In other words, it covers both actual and potential loss. However, the remedy is discretionary (*Marks v GIO Holdings Ltd* (1998) 196 CLR 494 at 513 per McHugh, Hayne and Callinan JJ). In both s 82 and s 87 cases, the claimant has to establish a causal connection between the alleged loss or damage and the conduct complained of. Beyond this, neither provision says anything about the measure of damages. Before *Marks v GIO Holdings Ltd* (1998) 196 CLR 494, courts filled the gap by importing tort, contract or equitable principles. In *Marks'* case it was held that the remedies were not to be limited in this way (Cf *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1). Common law analogies can be appealed to for guidance, but not to determine the outcome of the case. McHugh, Hayne and Callinan JJ ((1998) 196 CLR 494 at 512) said:

125 *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700, Fisher, Gummow and Lee JJ at 712 (FC Fed Ct), quoting *Pavich v Bobra Nominees Pty Ltd* (1988) ATPR (Digest) ¶46-039, French J at 53,124.

126 *Tefbao Pty Ltd v Stannic Securities Pty Ltd* (1994) ATPR (Digest) ¶46-114, Hodgson J at 53,533 (NSW SC). Cf *S & U Constructions Pty Ltd v Westworld Property Holdings Pty Ltd* (1988) ATPR ¶40-854 (Fed Ct).

127 *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79 (Fed Ct); *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 (FC Fed Ct); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 89 ALR 539 (FC Fed Ct).

128 *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 at 713 (FC Fed Ct), citing *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251 at 262-263.

129 *Collings v Australian Competition and Consumer Commission* (1998) 152 ALR 510 at 532-533 per Cole JA (CA (NSW)).

> "Very often, the amount of the loss or damage caused by a contravention of s 52 will coincide with what would have been allowed in an action for deceit. But that is because the inquiry in both cases is to find out what damage flowed (in the sense of being caused by) the deceit or contravention — [Typically] the damages for deceit will be the sum representing the loss suffered by the plaintiff *because* the plaintiff altered its position in reliance on the defendant's misrepresentation. But the analogy cannot be pressed too far. It should not be pressed to the point of concluding that the only damages that may be allowed under s82 are those that would be allowed in an action for deceit. The question presented by s82 is not what would be allowed in deceit, it is what loss or damage has been caused by the conduct contravening the Act."

In *Marks'* case, borrowers entered into loan facility agreements with a financier in reliance on representations that interest would be at a specified base rate plus a margin set at 1.25 per cent per annum. They drew down funds under the facilities. Contrary to the representations, the loan contract allowed the financier to vary the margin on giving 90 days' notice. The financier exercised this right and changed the margin to 2.25 per cent per annum. The borrowers brought an action for misleading conduct. They sought an order under s 87 varying the facilities to make good the representations or, alternatively, damages under s 82. They failed in the High Court because they had not established loss or damage. It was held that a person does not suffer loss or damage just because they enter into a contract on terms that are different from what the other party represented. In order to recover, the claimants would have to show that they could have acted in some other way "which would have been of greater benefit or less detriment" to them than the course they in fact adopted (at 514 per McHugh, Hayne and Callinan JJ). In the present case, there was no evidence to show that if the borrowers had known the true terms they would: (1) not have borrowed at all; or (2) have entered into alternative, more beneficial, arrangements with another lender. This was fatal to the borrowers' s 82 claim, because s 82 depends on proof of actual loss. It was also fatal to their s 87 claim because, although the s 87 remedies are discretionary, they depend on proof of at least potential loss or damage.[130]

130 (1998) 196 CLR 494 at 513 per McHugh, Hayne and Callinan JJ. *Cf Akron Securities Ltd v Iliffe* (1997) 143 ALR 457 (CA (NSW)).

Damages may be awarded against the person who contravenes s 52 or any person involved in the contravention.[131] So, for example, where the contravention is committed by a corporation, damages may be awarded against a director, an employee or an agent.[132] However, a "close rather than a remote involvement" with the contravention is required,[133] and there must be a positive act by which the respondent becomes associated with the primary contravention (*Sent v Jet Corp of Australia Pty Ltd* (1984) 54 ALR 237, Smithers J at 245 (FC Fed Ct)). Furthermore, proof of intention is required in the sense that it must be shown that the respondent was aware of the facts which constituted the primary contravention (*Yorke v Lucas* (1985) 158 CLR 661).

The ancillary liability provisions can sometimes be used to circumvent limitations on the scope of s 52. Assume, for example, the sale of a private house by an individual (A). A makes a misrepresentation which induces B to purchase the house. In these circumstances, s 52 will not apply because A is not a corporation and there is no other basis revealed by the facts on which the Act might apply, and A's conduct is not engaged in "in trade or commerce" (*O'Brien v Smolonogov* (1983) 53 ALR 107 (FC Fed Ct)). However, assume now that A employs an agent, X Pty Ltd, and A's statement is repeated by X. B may have a right of action against X,[134] and an action also against A on the basis that A was a person involved in X's contravention.[135]

Rescission

[637] Section 87, read in conjunction with s 52, creates "new remedies which have an affinity to the equitable remedies of rescission and rectification" (*Marks v GIO Holdings Ltd* (1998) 196 CLR 494, Gummow J at 535). "The principles regulating the administration of equitable remedies afford guidance for, but do not dictate, the exercise of the statutory discretion conferred by s.87" (Gummow J at 535). The main differences between the statutory remedies and equitable rescission are as follows.[136]

131 That is, a person who, according to s 75B(1) of the *Trade Practices Act* 1974 (Cth): "(a) has aided, abetted, counselled or procured the contravention; (b) has induced, whether by threats or promises or otherwise, the contravention; (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or (d) has conspired with others to effect the contravention".

132 For example, *Yorke v Lucas* (1985) 158 CLR 661.

133 *Fencott v Muller* (1983) 152 CLR 570, Gibbs CJ at 584.

134 *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) 16 ATPR ¶41-249 (FC Fed Ct), discussed above, para [633].

135 For example, *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) 77 ALR 615 (Fed Ct).

136 See generally *Akron Securities Ltd v Iliffe* (1997) 143 ALR 457, Mason P at 467-470 (CA(NSW)).

- In equity, rescission is the act of the party complaining, and the function of the court is simply to rule on the validity of the rescission and make consequential orders as appropriate. By contrast, the statutory remedy lies in the discretion of the court and depends upon an appropriate order being made (*Duralla Pty Ltd v Plant* (1984) 54 ALR 29, Smithers J at 33-34 (FC Fed Ct)).
- Affirmation is not necessarily a bar to relief under s 87.[137] However, in exercising its discretion under the section, the court will consider the conduct of the parties after they had knowledge of the misleading quality of the conduct.[138]
- By the same token, the impossibility of restitution, the intervention of third party rights and delay by the representee in making application will not necessarily preclude the granting of relief under s 87. However, they are all factors that are likely to weigh heavily in the exercise of the court's discretion.[139]
- The statutory remedy is unaffected by the rule in *Watt v Westhoven* [1933] VLR 458,[140] the doctrine of merger[141] and the rule in *Seddon v North East Salt Co* [1905] 1 Ch 326.[142]
- The statutory remedy is available only if the court considers that it is necessary to prevent or reduce the representee's loss or damage. In equity, rescission is available without the need for the representee to prove that the contract was financially disadvantageous. However, it was held in *Demagogue Pty Ltd v Nicholas Ramensky* (1992) 110 ALR 608 (FC Fed Ct) that the reference in s 87 to "loss or damage" covers more than pecuniary loss. Loss or damage in the required sense includes the detriment suffered by being bound to a contract induced by misleading conduct that contravenes s 52.

Fair Trading legislation

[638] The *Trade Practices Act* 1974 (Cth), s 52 is for constitutional reasons limited mainly to conduct engaged in by corporations.

137 Strictly speaking, the issue of affirmation should not arise because affirmation is the exercise of an election which in turn depends upon a right to rescind. Under the statute, relief by way of rescission lies in the discretion of the court, and there is no right of rescission as such: Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 19972), para [11.47].

138 *Mr Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23, Northrop J at 60 (Fed Ct); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, Lockhart J at 102 (FC Fed Ct); *Creative's Landscape Design Centre Pty Ltd v Platz* (1989) ATPR ¶40-980{CE} at 50,967 (FC Fed Ct).

139 See cases cited above, n 138.

140 See above, para [618].

141 See above, para [619].

142 See above, para [620].

Fair Trading legislation has been enacted in all the States and Territories.[143] The legislation reproduces, with local modifications, the provisions of Div 1 of Pt V and Pt VI of the *Trade Practices Act*. The main difference is that the fair trading legislation is not limited in its application to corporations. The purpose in enacting the legislation was to fill gaps in the coverage of the federal law. Save that in Queensland the statutory remedies are expressly limited to consumer transactions,[144] the discussion above of the *Trade Practices Act* is relevant to the fair trading laws.

143 *Fair Trading Act* 1992 (ACT); *Fair Trading Act* 1987 (NSW); *Consumer Affairs and Fair Trading Act* 1990 (NT); *Fair Trading Act* 1989 (Qld); *Fair Trading Act* 1987 (SA); *Fair Trading Act* 1990 (Tas); *Fair Trading Act* 1985 (Vic); *Fair Trading Act* 1987 (WA).

144 *Fair Trading Act* 1989 (Qld), s 99(3) (damages); s 100(6) (other orders). Also, there are express provisions against contracting out in *Fair Trading Act* 1987 (SA), s 96; *Fair Trading Act* 1989 (Qld), s 107; *Fair Trading Act* 1990 (Tas), s 50.

CHAPTER SEVEN

ESTOPPEL

Patrick Parkinson

INTRODUCTION

[701] Estoppel is a substantive principle of law which operates to preclude a party to legal proceedings from asserting against another party either facts, legal rights, or the absence of legal obligations, to the extent that it would be unconscionable to do so. The object of estoppel is to preclude the unconscientious departure by a party from an assumption for which he or she bears some responsibility, and which has been adopted by another party as the basis of a course of conduct, an act or an omission which would operate to that other party's detriment if the assumption were not adhered to.[1]

Generally, estoppel has a preclusionary operation. It precludes departure by the party to be estopped from the assumption adopted by the other. When it acts in this preclusionary way, the estoppel establishes the state of affairs by which the rights of the parties are to be determined.[2] In that capacity, it may provide a defence to a cause of action or it may defeat a defence to a cause of action.[3] At common law, estoppel was regarded as having only

1 This definition is drawn from the various statements of the principles of estoppel in *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 674-677; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at 404; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 412-413, Deane J at 443-446.

2 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 414: "The effect of an estoppel in pais is not to create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is ascertained." See also *Henderson v Williams* [1895] 1 QB 521, Smith J at 535; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, Brandon LJ at 131-132.

3 These have been termed the "minelayer" and "minesweeper" roles of estoppel in pais: Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 7-8, 13. For discussion of the role of estoppel in defeating a defence to a cause of action in the light of the developments in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394, see *Commonwealth v Clark* (1994) 2 VR 333, Marks J at 337-341 (App Div Vic).

an evidentiary operation.[4] However, it has been given a larger ambit in equity,[5] in which it may be a cause of action in its own right.[6] When it operates in this way in equity, it is said that estoppel acts not merely as a shield,[7] but as a sword.[8] When the doctrine of estoppel acts as a source of rights, it is not estoppel in the strict sense, for it does not operate merely as a ground for preclusion but as a basis of obligation. Acting as a source of rights, it is sometimes called a "quasi-estoppel"[9] or "an equity created by estoppel"[10] to distinguish it from estoppel in the strict sense. Sometimes, reference is made specifically to the manner by which the equity may be satisfied. For example, the terminology of a "constructive trust arising from estoppel"[11] is sometimes employed. Frequently, the courts refer simply to an "equity".[12]

[702] The justification for estoppel is to be found in the concern of the courts with unconscionability.[13] Early writers, such as Sir Edward Coke, said that the purpose of estoppel was to exclude the truth,[14] for which reason estoppels were regarded as

4 For a critique of the notion that, even at common law, estoppel could only be evidentiary, see Atiyah P, *Essays on Contract* (Clarendon, Oxford, 1986 with 1990 addition), p 307: "it is perfectly plain that the cause of action in a case of estoppel by representation is in fact the representation, and that what is conventionally stated to be the cause of action is merely the damage."

5 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. All members of the High Court, except Deane J, acknowledged that an equitable estoppel could be a cause of action. See also *Burrowes v Lock* (1805) 10 Ves Jun 470; 32 ER 927; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1713]-[1714].

6 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Deane J contra; *Silovi v Barbaro* (1988) 13 NSWLR 467 (CA)*; News Corporation v Lenfest Communications Inc* (1996) 21 ACSR 553; *W v G* (1996) 20 Fam LR 49 (lesbian co-parent required to pay maintenance for child born into their relationship with her encouragement and support).

7 *Combe v Combe* [1951] 2 KB 215 (CA).

8 See Jackson D, "Estoppel as a Sword" (1965) 81 *Law Quarterly Review* 223.

9 *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, Lord Diplock at 884; Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977).

10 *Cameron v Murdoch* [1983] WAR 321, Brinsden J at 360 (affd *Cameron v Murdoch* (1986) 60 ALJR 280 (PC)); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 416; *Ward v Kirkland* [1967] Ch 194; *Crabb v Arun District Council* [1976] Ch 179 (CA), Scarman LJ at 193.

11 *Re Basham* [1987] 1 All ER 405 (Ch), E Nugee QC at 415. Australian and English cases finding a constructive trust on the basis of common intention have also noted the similarity with the principles of estoppel: *Higgins v Wingfield* [1987] VR 689 (FC), McGarvie J at 695-696; *Grant v Edwards* [1986] Ch 638 (CA). See below, para [750].

12 *Ramsden v Dyson* (1866) LR 1 HL 129; *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC); *Crabb v Arun District Council* [1976] Ch 179 (CA); *Morris v Morris* [1982] 1 NSWLR 61; *Vinden v Vinden* [1982] 1 NSWLR 618; *Beaton v McDivitt* (1987) 13 NSWLR 162 (CA).

13 See above, Chapter 2: "The Conscience of Equity".

14 Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 352a: estoppel "cometh of the French word 'estoupe,' from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own acts or acceptance stoppeth or closeth up his mouth to allege or plead the truth".

"odious".[15] Coke's definition has often been cited, and other definitions are in similar terms,[16] but inasmuch as they suggest that an estoppel is designed to exclude the truth, they do not accurately reflect the modern purpose of the doctrine.[17] Rather, estoppel "concludes the truth in order to prevent fraud and falsehood, and imposes silence on the party only where in conscience and honesty he should not be allowed to speak" (*Van Rensselaer v Kearney* 11 How 297, Nelson J at 326; 13 L Ed 703 (1850) at 715 (for the US SC)).[18] As such, the principle is no longer considered as odious and therefore as one which ought to be restricted. To the contrary, the doctrine is now seen to be "founded upon good conscience"[19] and has been described also as a principle based on "common sense" which is "essential to the conduct of business between the members of every well-ordered community" (*London Joint Stock Bank v Macmillan* (1918) AC 777, Viscount Haldane at 817-818).[20]

[703] Estoppel has traditionally been classified according to numerous categories. There are categories based on the nature of the estoppel, such as whether it is promissory or related to property.[21] There are categories which describe the manner by which the estoppel is created, such as by record, by deed, by representation, by conduct, by convention or by acquiescence.

15 Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 365b. The courts showed a particular reluctance to apply the doctrine of estoppel to statements in deeds: *Skipworth v Green* (1724) 8 Mod 311; 88 ER 222 (KB); 11 Mod 388; 88 ER 1106 (KB); *General Finance Mortgage & Discount Co v Liberator Permanent Building Society* (1878) 10 Ch D 15.

16 *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 (CA), Bramwell LJ at 202: "An estoppel may be said to exist where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth"; in *Horn v Cole* 51 NH 287; 12 Am Rep 111 (1868), Perley CJ (at 290-292) drew a distinction between legal and equitable estoppel. He said that legal estoppels shut out the truth, and are therefore construed strictly, but that equitable estoppels promote justice, and are applied liberally. See also *De Lisle v Union Bank of Scotland* [1914] 1 Ch 22, Cozens Hardy MR at 28.

17 It has been said that "estoppel would hardly have needed a justification but for the authority of a definition by Sir Edward Coke": Bigelow M, *A Treatise on the Law of Estoppel and its Application in Practice* (Little Brown, Boston, 1872), p 6.

18 See also *Edwards v Rogers* (1640) Sir W Jones Rep 456 at 459; 82 ER 239.

19 *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 440. In *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241 at 287, Santow J said that "it is an essential element of the principle of estoppel, that the conduct of the parties sought to be estopped must properly be characterised as 'unconscionable'". For a discussion of the various factors which might make departure from a representation unconscionable, see Spence M, *Protecting Reliance* (Hart, Oxford, 1999), pp 59-66.

20 See also *Burkinshaw v Nicholls* (1878) 3 App Cas 1004, Lord Blackburn at 1026, (referring to estoppel by convention); *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 (CA), Bramwell LJ at 202 ("I do not wish to speak against the principle of estoppels, for I do not know how the business of life could go on, unless the law recognised their existence"); *George Whitechurch Ltd v Cavanagh* [1902] AC 117, Lord Macnaghten at 130.

21 The term "proprietary estoppel" is sometimes used for this category. See below, para [712].

Estoppel may also be defined according to whether it operates at common law or in equity.

Thus the historical development of estoppel has been marked by a process of differentiation. The judicial task has at times been interpreted as requiring precise definitions of the various situations in which an estoppel would be found,[22] and detailed requisites in order to establish particular forms of estoppel (*Willmott v Barber* (1880) 15 Ch D 96). This process of differentiation reached its height in the late 19th century. At the present time, writers identify as many as 12 overlapping categories into which estoppel may be subdivided.[23]

However, one coherent doctrine of estoppel is now emerging as a result of a modern trend to bring together the various forms of estoppel. In recent years, courts both in Australia and England have been endeavouring to harmonise the various forms of estoppel into a unified doctrine.[24] Mason CJ said in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 410-411 that "the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules".

As a result of this process, the modern doctrine of estoppel is developing as one of considerable reach which has been "shorn of limitations".[25] It follows that expositions of the scope and limits of particular forms of estoppel in the older case law[26] should not be seen as delimiting the scope of estoppel in the law

22 *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598, Jordan CJ at 602-603; *Carr v London & North Western Rail Co* (1875) LR 10 CP 307.

23 Leopold A, "Estoppel: A Practical Appraisal of Recent Developments" (1991) 7 *Australian Bar Review* 47 at 71-73 lists common law estoppel, equitable estoppel, estoppel by acquiescence, estoppel by conduct, estoppel by convention, estoppel by deed, estoppel by encouragement, estoppel by representation, estoppel in pais, evidentiary estoppel, promissory estoppel and proprietary estoppel. Perhaps there are even more. In addition to estoppel by record, and the terms identified by Leopold, there might be added estoppel by negligence and estoppel by silence.

24 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 430-437; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 385; *Commonwealth v Verwayen* (1990) 170 CLR 394; *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 (CA), Lord Denning MR at 241-243; *Crabb v Arun District Council* [1976] Ch 179 (CA); *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch); *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (CA); *Pacol Ltd v Trade Lines Ltd and R/I Sif IV (The Henrik Sif)* [1982] 1 Lloyd's Rep 456. See also Baker J, "From Sanctity of Contract to Reasonable Expectation?" (1979) 32 *Current Legal Problems* 17.

25 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, Lord Denning MR at 122.

26 For example the five requisites given by Fry J in expounding the doctrine of estoppel by acquiescence in *Willmott v Barber* (1880) 15 Ch D 96 at 105-106: see below, para [762]. See also *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] QB 133 (Ch), Oliver J at 145-155.

of Australia today.[27] The older cases must be read in the light of recent developments in Australian law, notably as a result of the decision of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, and the statements of principle on estoppel in *Commonwealth v Verwayen* (1990) 170 CLR 394.

The process of unification, however, is not complete. It remains to be authoritatively determined whether estoppel can be expounded as just one doctrine, or whether it remains necessary to distinguish common law estoppel from equitable estoppel. This issue was considered in *Commonwealth v Verwayen*, but no consensus has yet emerged and the matter remains to be finally determined.[28] Among members of the High Court who have supported the exposition of estoppel as a unified doctrine, there is some disagreement on the basis on which relief for an estoppel should be awarded.[29]

It is premature therefore, to state that all the various forms of estoppel have merged into one unified doctrine.[30] Nonetheless, the principles of estoppel may substantially be expounded without reference to the distinction between common law estoppel and equitable estoppel, subject to remaining questions about the principles concerning the award of relief.

CATEGORISATIONS OF ESTOPPEL

[704] Reference to particular forms of estoppel is still likely to be made where the facts of a given case fall clearly within a well-established category. Indeed, certain courts may insist upon a correct identification of the kind of estoppel relied upon, so that

27 See also *Amalgamated Investment & Property Co v Texas Bank* [1982] QB 84 (CA), Robert Goff J at 103: "Of all doctrines, equitable estoppel is surely one of the most flexible. True, from time to time distinguished judges have enunciated statements of principle concerning aspects of the doctrine … But all of these have been statements of aspects of a wider doctrine; none has sought to be exclusive. It is no doubt helpful to establish, in broad terms, the criteria which in certain situations, must be fulfilled before an equitable estoppel can be established; but it cannot be right to restrict equitable estoppel to certain defined categories."

28 In *Giumelli v Giumelli* (1999) 196 CLR 101 at 112-113, the High Court noted the issue but decided that there was no occasion to settle the question of whether estoppel can be brought under a single overarching doctrine.

29 See below, para [714].

30 See *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd* [1989] ASC 55-714, Young J at 58,456; *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251 (CA), Priestley JA at 277; *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, Neaves, Gummow and Higgins JJ at 653. See also *Roebuck v Mungovin* [1994] 1 All ER 568, Lord Browne-Wilkinson at 574-575.

all relevant issues of fact are dealt with at trial.[31] However, there is no uniform categorisation nor consistently used terminology. Some categories merely describe the method by which an assumption is induced. Others are generic categories for particular forms of estoppel.

Two types of classification have historically encompassed all forms of estoppel. The first is the classification of estoppels into estoppel by record, in writing and in pais. The second is the classification into common law estoppel and equitable estoppel. An understanding of these categories, both in their original meaning and in their present meaning, is required to understand the present law of estoppel. It was the distinction between common law and equitable estoppel which proved to be of the greatest significance in the late 20th century, and it is from the merger of common law and equitable estoppel that a unified doctrine of estoppel is emerging.

Estoppel by record, by writing and in pais

[705] This classification is derived from the writings of Sir Edward Coke, and has been used by writers as an essential mode of division ever since.[32] Coke's classification reflects the origins of estoppel in the rules of evidence.[33] A note to the eleventh edition of Coke's *Commentary on Littleton*[34] recorded that estoppels were justified because "it is reasonable that some evidence should be allowed to be of so high and conclusive a nature, as to admit of no contrary proof". A similar view is taken in the note to the *Duchess of Kingston's* case.[35] Estoppel was there defined as "an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature — so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it".

31 See, for example, *Lorimer v State Bank of New South Wales* (unreported, New South Wales Court of Appeal, 5 July 1991), in which the plaintiff might have been more successful if he had pleaded estoppel by negligence or silence, so that the matter could have been considered fully at trial.

32 Bigelow M, *A Treatise on the Law of Estoppel and its Application in Practice* (Little Brown, Boston, 1872); Everest L F and Strode E, *Law of Estoppel* (3rd ed, Stevens, London, 1923); *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 430. *Halsbury's Laws of England* (4th ed, Butterworths, London, 1976), Vol 5, para [1502] describes four categories: estoppel by matter of record or quasi of record, estoppel by deed, estoppel in pais, and promissory estoppel.

33 See also Cababé M, *The Principles of Estoppel* (Maxwell, London, 1888), pp 1-4.

34 Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 352a.

35 In Smith J W, *A Selection of Leading Cases on Various Branches of the Law* (4th ed by Willes and Keating, Maxwell, London, 1856), Vol 2, p 607.

The terms estoppel by record, by writing and in pais continue in modern usage. However, they bear quite a different meaning from those which they bore in Coke's time.[36]

[706] In Coke's original usage, "estoppel by record" was a term to describe various forms of record which were regarded as being conclusive evidence. One of the most important of these was the determination of a court, since such a determination was the highest form of proof.[37]

The term "estoppel by record" has a much more limited meaning now. It is a generic term used sometimes in modern terminology to refer to those forms of estoppel which prevent people from denying the binding and conclusive effect of a judicial determination,[38] either in relation to a cause of action (known as estoppel per rem judicatam)[39] or in relation to a particular issue (known as issue estoppel). The term "estoppel by record" is now misleading, since it is not the record which is binding, but the decision, and it is immaterial whether the tribunal concerned is a court of record or not (*Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853, Lord Guest at 933).

Estoppel per rem judicatam and issue estoppel continue to be of great importance in the modern law. However, they depend on principles which are quite distinct from all other forms of estoppel, being concerned with the administration of justice. They prescribe a limit to the litigious process, and, in particular, endeavour to prevent hardship to a litigant in being vexed twice for the same cause.[40]

36 Expositors of the subject have consequently abandoned Coke's classifications in the light of this historical development. Cababé M, *The Principles of Estoppel* (Maxwell, London, 1888); Bower G S and Turner A, *Estoppel by Representation* (3rd ed, Butterworths, London, 1977); Cross R, *Evidence* (Butterworths, London, 1958), p 159. The abandonment has, however been made reluctantly. Sir Alexander Turner endeavoured to retain it in his second edition of Spencer Bower's work (Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (2nd ed, Butterworths, London, 1965)).

37 In Coke's exposition, judgments were not given as an example of estoppel by record. However it is clear from his definition of the word "record" that he included the memorials and remembrances of courts of record in this category of estoppel. Coke wrote (Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 260a) that the records of judges of courts of record "import in them such incontrollable credit and veritie, as they admit no averment, plea or proofe to the contrarie". Ever since, judicial determinations have been regarded as the primary application of estoppel by record.

38 *Jackson v Goldsmith* (1950) 81 CLR 446, Fullagar J at 466.

39 Or the doctrine of res judicata. This form of estoppel may also be called "cause of action estoppel".

40 *Lockyer v Ferryman* (1877) 2 App Cas 519; *Jackson v Goldsmith* (1950) 81 CLR 446; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Arnold v National Westminster Bank plc* [1991] AC 93.

[707] Estoppel by writing is otherwise known as estoppel by deed. It "prevents a party to it from disputing any distinct allegation of fact which he has made in it" in any action on the deed (*Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598, Jordan CJ at 602). The justification for estoppel by deed in Coke's time was that it was a form of evidence of such a solemn and important character, that facts which were asserted in a deed should be regarded as true as between the parties to the deed. The facts were irrefutably presumed to be true from the solemnity of the form in which they were recorded.

Coke considered that the words in a recital to a deed were merely a prefatory record of the assumptions of the parties in entering into binding obligations, and therefore not themselves binding.[41] However, exactly the opposite conclusion was reached by the 19th century. It was precisely because the recital recorded the assumptions of the parties that it could be binding. Indeed, it is usually in the recital that the words giving rise to the estoppel are to be found, since the operative terms of the deed require no doctrine of estoppel to give them binding force.[42]

Thus estoppel by deed is no longer confined to the operative part of a deed as it was in Coke's day.[43] Indeed, nor is the doctrine confined to deeds, as the doctrine was subsequently extended beyond deeds to other forms of writing (*Carpenter v Buller* (1841) 8 M & W 209; 151 ER 1013). The true basis for estoppel by deed is seen today to be that stated by Pollock CB in *Asphitel v Bryan* (1864) 5 B & S 723 at 727; 122 ER 999, that "for the purposes of the transaction in question, the parties agreed that certain facts should be admitted to be facts as the basis on which they would contract, and they cannot recede from that".

In the modern law, it is more appropriate to classify estoppel by deed as a form of estoppel by convention.[44] The basis of the

41 Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 352b: "Thirdly, every estoppell ought to be a precise affirmation of that which maketh the estoppell, and not a rehearsal. Therefore a recital concludes not, because it is no direct affirmation."

42 Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 157-177. See also *Re Patrick Corp Ltd and the Companies Act* [1981] 2 NSWLR 328.

43 *Carpenter v Buller* (1841) 8 M & W 209, Parke B at 212; 151 ER 1013:"If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 352b; and a recital in instruments not under seal may be such as to be conclusive to the same extent."

44 *Offshore Oil NL v Southern Cross Exploration NL* (1985) 3 NSWLR 337, Clarke J at 341; but see *Caboche v Ramsay* (1993) 27 ATR 479 at 499 (FC Fed Ct), in which Gummow J said that the doctrines are distinct.

estoppel in relation to a deed or other instrument,[45] is that no one should be allowed to dispute facts which lie at the foundation of a transaction. This is apparent from the judgment of Isaacs J in *Dabbs v Seaman* (1925) 36 CLR 538 at 548-549, who said that this form of estoppel

> "simply means that the conveyance or lease or other instrument is based upon a conventional state of facts, and therefore to dispute that conventional state of facts in order to set up another state of facts is an attempt to destroy the very basis of the transaction."[46]

Estoppel by convention arises where a party has entered into contractual or other mutual relations with another party where a certain fact is assumed, and it would, therefore, be unconscionable to deny the assumption.[47] This principle is not confined to instruments. The facts, or state of affairs, may be agreed verbally. Wherever an assumption forms the conventional basis on which the parties have entered into legal relations, an estoppel may arise to preclude an unconscionable departure from that assumption (*Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 674-677). Whether or not a recorded state of facts forms the conventional basis of the relationship as evidenced by the deed or other writing is a matter of construction of the document (*Oriental Hotel Co Ltd v Thompson* (1879) 5 VLR (L) 485 (FC); *Dabbs v Seaman* (1925) 36 CLR 538, Isaacs J at 549).[48]

[708] The term "estoppel in pais"[49] has been used, generally, to refer to estoppels arising from conduct, rather than from record or form. They have also been called "informal" estoppels. Estoppels in pais arose from those formal actions of the parties which were regarded as being equally as solemn as the sealing of a deed.

45 For an estoppel arising from contract, see *Colchester Borough Council v Smith* [1991] 2 All ER 29 (Ch).

46 The estoppel was referred to as the estoppel established by the doctrine of *Roberts v Karr* (1809) 1 Taunt 495; 127 ER 926.

47 See further below, paras [752]-[758].

48 On the construction of the instrument, it may appear that a given assertion of fact was intended to be the statement of one of the parties only, in which case the estoppel is confined to that one party (and there is an estoppel by representation in the instrument, rather than by convention). See *Stroughill v Buck* (1850) 14 QB 781, approved in *Greer v Kettle* [1938] AC 156. This qualifies the proposition that the estoppel on a deed must be mutual. Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628), p 352a; *Thomas v Nicholson* (1890) 16 VLR 861 (FC). It must only be mutual if, on the true construction of the deed, it was meant to be binding on both parties.

49 The origins of the expression "in pais" are obscure. It means literally "in the country", and signified that the matter was "between persons" and made without writing or record.

As Parke B explained in *Lyon v Reed* (1844) 13 M & W 285 at 309; 153 ER 118:

> "The acts in pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke, [*The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628)] 352a. They are all acts which anciently really were, and in contemplation of law have actually continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate and the like."

Again, the main emphasis in the law of estoppel at this time was on the fact that these acts were clear evidence of an intention to enter into a legal transaction or relation in the same way as estoppels by record and by deed also provided clear evidence of the matter alleged. As the principles of estoppel evolved, representations other than these "acts of notoriety" came to be recognised. In Chancery, parties who made verbal representations on which others had relied were compelled to make those representations good.[50]

Estoppel by representation, conduct, convention, encouragement and acquiescence have all come to be recognised as such informal estoppels, arising from the conduct of persons as distinct from by record or by deed, and, to this extent, could be called forms of estoppel in pais.[51] In *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ said (at 430):

> "It is customary to recognise three general classes of estoppel, namely, of record, of writing and in pais (see, eg, [Coke E, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628)] 352a). Estoppel in pais includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement."

However, the term is not used consistently in the modern authorities and, depending on its usage, is given a broad or

50 *Hunt v Carew* (1649) Nels 46; 21 ER 786; *Dyer v Dyer* (1682) 2 Ch Cas 108; 22 ER 869; *Hobbs v Norton* (1682) 1 Vern 136; 23 ER 370.

51 See also the classic expositions of the doctrine by Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 and *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

narrow scope. Some writers include promissory estoppel in equity as a form of estoppel in pais as it is founded on the same underlying principles.[52] The term may also be used in a more limited sense, however, as being synonymous with estoppel at common law, as opposed to estoppel in equity.[53] The relevant distinction for these purposes is that common law estoppel is confined to representations of fact and not intention. It is better therefore, at this stage of the law's development, to abandon a term which is both ambiguous and obsolete. As one early writer on estoppel put it, estoppel in pais "has very largely changed its character and ought to change its name".[54]

The significant question for the law at the present time is not about the scope of estoppel in pais, but whether there are important distinctions to be drawn between the operation of estoppel at common law and in equity.

Estoppel at common law and in equity

Common law estoppel

[709] Common law estoppel describes an estoppel founded upon an assumption of fact, arising out of words or conduct. It is generally used[55] as a generic term to describe all forms of estoppel in pais which were recognised at common law.[56] The key element in common law estoppel is that it does not extend to expressions of intention (*Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 409). The elements of the doctrine were identified by Jordan CJ in *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76. He said that in order for such an estoppel to arise it is necessary that

52 Mason and Deane JJ left this matter open in *Legione v Hateley* (1983) 152 CLR 406. See also Lindgren K, "Estoppel in Contract" (1989) 12 *University of New South Wales Law Journal* 153 at 154, 177.

53 This is the meaning of the term as used in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 413.

54 Ewart J S, *An Exposition of the Principles of Estoppel by Misrepresentation* (Carswell, Toronto, 1900), p 1. Mason CJ and Deane J have now adopted the generic term "estoppel by conduct" to describe all forms of estoppel other than estoppel by record: see *Commonwealth v Verwayen* (1990) 170 CLR 394.

55 It was thus distinguished from estoppel by representation, which was historically recognised both in common law and equity: *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76, Jordan CJ at 81-82. However, in *Byron Shire Council v Vaughan* [2002] NSWCA 158, the term estoppel by representation was used by Giles JA in the New South Wales Court of Appeal in contradistinction to equitable estoppel. It was thus equated with common law estoppel.

56 *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 409; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, Priestley JA at 472 (CA).

> "(1) by word or conduct, (2) reasonably likely to be understood as a representation of fact, (3) a representation of fact, as contrasted with a mere expression of intention, should be made to another person, either innocently or fraudulently, (4) in such circumstances that a reasonable man would regard himself as invited to act upon it in a particular way, (5) and that the representation should have been material in inducing the person to whom it was made to act in that way (6) so that his position would be altered to his detriment if the fact were otherwise than as represented" (*Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76 at 82).

Estoppel at common law has a preclusionary operation. It is not a cause of action. As Dixon J said in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674:

> "The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations ... the basal purpose of the doctrine ... is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it."

The principle was once seen as merely a rule of evidence,[57] but it is better seen now as a substantive rule of law.[58]

[710] Paradoxically, the origins of common law estoppel are not exclusively, or even originally, within the common law. Estoppel by convention had its origins in the common law,[59] but the origins of estoppel by representation are in equity.[60] The doctrine was later introduced into the common law,[61] and thus equity had a concurrent jurisdiction with the common law in relation to estoppels by representation (*Walton Stores (Interstate) Ltd v*

57 *Low v Bouverie* (1891) 3 Ch 82; *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598.

58 *Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, Lord Wright (for the PC) at 56.

59 The term "common law estoppel" is thus sometimes used in a narrow sense to refer in particular to estoppel by convention: *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 430.

60 *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76 at 80; *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 430.

61 *Montefiori v Montefiori* (1762) 1 Black W 363; 96 ER 203. See also Sheridan L, "Equitable Estoppel Today" (1952) 15 *Modern Law Review* 325.

Maher (1988) 164 CLR 387, Deane J at 447ff).[62] An influential statement of estoppel at common law was given by Denman CJ in *Pickard v Sears* (1837) 6 Ad & El 469, Lord Denman CJ, at 474; 112 ER 179.[63] He stated the principle as being

> "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time".

There were numerous cases, particularly in equity, in which the law of estoppel by representation was applied to statements of intention as well as statements of fact,[64] and it was clear that estoppel could operate as a cause of action.[65]

However the scope of estoppel by representation came to be restricted by the House of Lords in *Jorden v Money* (1854) 5 HLC 185; 10 ER 868,[66] a case brought in Chancery. Against the dissent of Lord St Leonards, Lords Cranworth and Brougham held that the relevant representation which gave rise to an estoppel must be one of fact and not of intention. Any representation of intention could only be effectuated if it was contractual. The position became established that estoppel was a rule of evidence which could not found a cause of action,[67] and cases to the contrary were assigned a contractual explanation (*Maddison v Alderson* (1883) 8 App Cas 467). The jurisdiction to enforce representations was "colonised by the law of contract",[68] and this brought apparently to an end the idea that people would be required to make good their representations in the absence of a contract or covenant.

62 Lord Cranworth LC, in *Jorden v Money* (1854) 5 HLC 185 at 210; 10 ER 868, reflected this view when he described estoppel as "a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other."

63 This test was explained further in *Freeman v Cooke* (1848) 2 Exch 654, Parke B at 663; 154 ER 652. See also *Heane v Rogers* (1829) 9 B & C 577 at 584; 109 ER 215.

64 See for example, *Hammersley v De Biel* (1845) 12 Cl & Fin 45; 8 ER 1312. See also Lunney M, "Jorden v Money — A Time for Reappraisal?" (1994) 68 *Australian Law Journal* 559.

65 *Hunsden v Cheyney* (1690) 2 Vern 150; 23 ER 703; *Burrowes v Lock* (1805) 10 Ves Jun 470; 32 ER 927.

66 For discussion of this case, see Lunney M, "Jorden v Money — A Time for Reappraisal?" (1994) 68 *Australian Law Journal* 559. See also Kirk L, "Confronting the Forms of Action: The Emergence of Substantive Estoppel" (1991) 13 *Adelaide Law Review* 241.

67 *Seton, Laing Co v Lafone* (1887) 19 QBD 68; *Low v Bouverie* [1891] 3 Ch 82; *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 414.

68 Finn P, "Equitable Estoppel" in Finn P (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 65.

Nonetheless, as will be seen below, the restriction of estoppel by representation to statements of fact did not prevent the development of doctrines in equity which came to be seen as forms of estoppel and which were capable of effectuating non-contractual promises.[69] Therefore, the restriction of estoppel to assumptions of fact following *Jorden v Money* came to be seen as a central feature of common law estoppel, not because this is how estoppel developed originally, but rather because it was only at common law that the doctrine of estoppel became so confined.[70]

Equitable estoppel

[711] Equitable estoppel encompasses the doctrines variously known in overlapping categories as promissory estoppel, estoppel by encouragement and by acquiescence, and proprietary estoppel. The origins of what is now known as equitable estoppel may be traced in particular to certain 19th century authorities decided after *Jorden v Money* (1854) 5 HLC 185; 10 ER 868, which had the effect of allowing the enforcement of representations of intention without contract. These were not necessarily decided in terms of "estoppel", indeed it was usually only much later that they came to be seen as cases which illustrated the operation of the law of estoppel. In the cases themselves, a variety of doctrinal explanations were proffered; they turned to some extent on their own facts, and no attempt was made to link these cases into a grand doctrinal scheme in the way that the 19th century textbook writers often sought to do. However, they were not idiosyncratic decisions. They reflected principles of the law dating back many years; they were decided in equity, and they drew upon the vitality of equitable principle prior to the constricting effect of decisions such as *Jorden v Money* and its sequels.[71] These cases were united by the fact that, in the circumstances which had occurred, it would be unconscionable for the defendant to insist upon her or his strict legal rights.

The cases fell into two broad categories. The first category was of cases in which one party encouraged another to rely to her or his detriment on an assumption that was inconsistent with the strict legal position. For example, in *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285, a father, wishing that his son would live

69 *Hughes v Metropolitan Railway* (1877) 2 App Cas 439; *Plimmer v Wellington Corp* (1884) 9 App Cas 699.

70 For further discussion of the 19th-century doctrine of estoppel by representation, see Davidson I, "The Equitable Remedy of Compensation" (1982) 13 *Melbourne University Law Review* 349 at 356; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1706]-[1708], [1711]-[1714].

71 *Maddison v Alderson* (1883) 8 App Cas 467; *Low v Bouverie* [1891] 3 Ch 82.

nearby, offered him a small farm on which he could build a house. A memorandum was drawn up and signed, in which the land was presented to the son. However, no conveyance was made, and the memorandum was ineffective to transfer title to the property. With the encouragement of the father, the son expended a large sum of money in building a house on the land. Following the father's death, it was held that the son was entitled to a conveyance of the fee simple. Lord Westbury said that, while equity will not perfect an imperfect gift in favour of a volunteer, the subsequent acts of the donor may give the donee that right or ground a claim which he did not acquire from the original gift (at 521). This case was not decided on the law of estoppel. Indeed it utilises contractual reasoning.[72] However, it came later to be interpreted as being based upon estoppel principles.[73]

Another leading 19th century authority in which one party was encouraged by the legal titleholder to act to his detriment was *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699. In this case, the government of New Zealand had first permitted the appellant to erect a wharf on government land, and then encouraged him to expend a large sum on extending a jetty and warehouse to assist in the disembarkation of immigrants. The Privy Council held that, by this encouragement of expenditure, a revocable licence was converted into an irrevocable one, and the appellant's successors in title had thereby an "estate or interest" which entitled them to compensation when the land was vested in the respondents under the provisions of a statute. It was made clear that "the equity arising from expenditure on the land need not fail merely on the ground that the interest to be secured has not been expressly indicated" (*Plimmer v Mayor of Wellington* (1884) 9 App Cas 699, Sir Arthur Hobhouse (for the Privy Council) at 713).[74]

Courts of equity also precluded the unconscionable insistence upon strict contractual rights. An influential 19th century authority on this point was *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439. In this case, a landlord gave his tenant

72 In *Raffaele v Raffaele* [1962] WAR 29, this contractual reasoning was adopted. See also *Beaton v McDivitt* (1985) 13 NSWLR 134, reasoning disapproved on appeal: (1987) 13 NSWLR 162.

73 *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699, Sir Arthur Hobhouse (for the Privy Council) at 713; *Inwards v Baker* [1965] 2 QB 29; *Beaton v McDivitt* (1987) 13 NSWLR 162. *Dillwyn v Llewelyn* was applied in *Brogden v Brogden* (1920) 53 DLR 362 (Alta SC, App Div); *Campbell v Campbell* [1932] 3 DLR 501 (NS SC); *Raffaele v Raffaele* [1962] WAR 29. See also Kitto J's commentary on this case in *Olsson v Dyson* (1970) 120 CLR 365 at 378-379; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1717].

74 Applied in *Inwards v Baker* [1965] 2 QB 29 (CA); *Vinden v Vinden* [1982] 1 NSWLR 618. See also the dissenting judgment of Priestley JA in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA) and the cases cited therein.

notice to complete repairs to certain properties within six months. They then entered into negotiations for the surrender of the leases. The tenant assumed that, while those negotiations were continuing, it would not be required to complete the repairs. The negotiations broke down and the landlord sought to evict the tenant for breach of its obligations in the lease. The House of Lords held that the landlord would be restrained in equity from evicting the tenant.[75] Lord Cairns LC stated[76] that it is

> "the first principle upon which all courts of equity proceed that if parties who have entered into definite and distinct terms involving legal results … certain penalties or legal forfeiture … afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties".

The other group of 19th century cases concerned situations in which the legal owner of property acquiesced in another person's mistaken assumption that the property belonged to her or him. Equity's jurisdiction to grant relief in this kind of situation had a long history.[77] Typically, one party built upon land which was not her or his own, on the mistaken assumption that it did belong to that party, and the legal owner stood by and allowed such building to continue. Such cases were less amenable to a contractual explanation. They represented a distinct body of case law based upon equity's general concern with the fraudulent insistence upon rights of land ownership.

[712] The modern law of equitable estoppel derives from the recognition that, in this disparate range of cases, a common principle could be discerned. This recognition did not occur immediately. Rather, the law of estoppel in equity came to be represented by two distinct categories of estoppel: "promissory estoppel" and "proprietary estoppel".

75 See also *Birmingham & District Land Co v London & North Western Railway Co* (1888) 40 Ch D 268. *Hughes'* case was applied, without reference to the doctrine of estoppel, by the High Court of Australia in *Barns v Queensland National Bank Ltd* [1906] 3 CLR 925. The principle of *Hughes'* case was identified as one of estoppel by Starke J in *Mulcahy v Hoyne* (1925) 36 CLR 41, although it was not applied by his Honour in this case.

76 *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at 448.

77 *Savage v Foster* (1723) 9 Mod 35; 88 ER 299; *East India Co v Vincent* (1740) 2 Atk 83; 26 ER 451.

Promissory estoppel has been defined as a principle "that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party" (*Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, Lord Hodson at 559 (PC)). The equity arises where the other party has altered her or his position in reliance upon the promise.[78] The doctrine traces its modern development to the decision of Denning J in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130, but was based upon 19th century authorities such as *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439. It was accepted as part of Australian law by the High Court of Australia in *Legione v Hateley* (1983) 152 CLR 406 at 434-435 as applicable where the parties are in a pre-existing contractual relationship.

Proprietary estoppel operates where the owner of property by words or conduct induces another to believe that he or she either has, or will be granted, an interest in that property. Such a belief might be induced by an encouragement to build upon land[79] or by acquiescence of the owner in mistaken building on the land,[80] or acting detrimentally in relation to one's own land in the belief, induced by a neighbouring landowner, that a right of way over the other's land will be granted.[81] "Proprietary estoppel"[82] thus became a generic term for the body of case law in which landowners were not permitted to insist upon their strict legal rights either because they had encouraged the other party to rely to her or his detriment, or had acquiesced in her or his mistake, combining the doctrines of estoppel by encouragement and estoppel by acquiescence in relation to land.

An important difference between promissory estoppel and proprietary estoppel was that, while promissory estoppel was, essentially, a defensive equity invoked by a defendant against a plaintiff who was seeking to enforce her or his strict contractual rights,[83] proprietary estoppel could be a cause of action. Indeed

78 This is subject to the qualifications that the promisor can resile from the promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming her or his position, and that the promise only becomes final and irrevocable if the promisee cannot resume that position: *Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, Lord Hodson at 559 (PC).

79 *Dillwyn v Llewellyn* (1862) 4 De GF & J 517; 45 ER 1285.

80 *Hamilton v Geraghty* (1901) SR Eq (NSW) 81.

81 *Crabb v Arun District Council* [1976] Ch 179. *Hill v A W J Moore & Co Pty Ltd* (unreported, Supreme Court of New South Wales, Needham J, 31 August 1990).

82 This terminology has been criticised: Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), p 306. Robert Goff J has said that it "may perhaps be regarded as an amalgam of doubtful utility": *Amalgamated Investment & Property Co v Texas Bank* [1982] QB 84 at 103.

83 *Combe v Combe* [1951] 2 KB 215 (CA).

it might result in the transfer of a proprietary right from the defendant to the plaintiff.[84] To the extent that some proprietary estoppel cases arose from non-contractual promises, it could be said that these were cases in which promises were enforced without consideration or writing. However, the potential of these proprietary estoppel cases to provide the basis of a broad doctrine of estoppel which would allow promises to be enforced without consideration was not often perceived. Promissory estoppel, restricted to promises about the enforcement of existing rights, tended to be taught and written about as an aspect of contract law, while the proprietary estoppel cases were included in books on real property. They were doctrines which survived within the margins of orthodoxy, addenda which did not fit comfortably within the doctrinal systems of either body of law.

It was almost inevitable that both promissory estoppel and proprietary estoppel should be seen as manifestations of a broader principle. This occurred, in Australia, in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, in which the two streams of doctrine were brought together into a single river. However, each had begun to burst its banks before then. Promissory estoppel, it was said, was not confined to pre-existing contractual relationships, but was applicable to any legal relationship.[85] Conversely, proprietary estoppel was not confined to real property. It was said that the doctrine was equally capable of application to choses in action.[86] If each line of authority had this amount of room for expansion, they were sure to overlap, and indeed, there were cases before *Waltons Stores (Interstate) Ltd v Maher* which could have been analysed in accordance with the principles of either promissory estoppel or proprietary estoppel.[87]

[713] In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387,[88] the High Court put forward a single doctrine of equitable estoppel.[89]

84 *Pascoe v Turner* [1979] 2 All ER 945 (fee simple); *Crabb v Arun District Council* [1976] Ch 179 (right of way).

85 *Robertson v Minister of Pensions* [1949] 1 KB 227; *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839. See also *Commonwealth v Verwayen* (1990) 170 CLR 394, Dawson J at 451ff.

86 *Olsson v Dyson* (1970) 120 CLR 365, Kitto J at 377-379 (debt); *Norris v Perpetual Executors, Trustees & Agency Co (WA) Ltd* (1941) 44 WALR 21 (life insurance policy).

87 *Crabb v Arun District Council* [1976] Ch 179 (CA); *Riches v Hogben* [1986] 1 Qd R 315.

88 See further below, paras [727] and [760]. For an argument that the result in this case is economically efficient, see Duggan, A, "Is Equity Efficient?" (1997) 113 *Law Quarterly Review* 601 at 616-619. Contrast the view of Robertson A, in "The Failure of Economic Analysis of Promissory Estoppel" (1999) 15 *Journal of Contract Law* 69 at 72: "The law in this area is not a tool for promoting efficient behaviour, but a means of providing protection against a particular kind of harm."

89 For the historical background to equitable estoppel in Australian law prior to this case, see Priestley L J, "Estoppel: Liability and Remedy?" in Waters D (ed), *Equity, Fiduciaries and Trusts* 1993 (Carswell, Toronto, 1993), p 273.

In that case, the High Court awarded damages in lieu of specific performance of a draft agreement, on the basis of an equitable estoppel. Waltons Stores had made it clear, in the course of negotiations, that, on the basis of an agreement for a lease, the Mahers should begin demolishing a building and erecting a new department store as a matter of great urgency. When the terms of the agreement had been settled between solicitors, the solicitor for Waltons indicated that he would let the Mahers' solicitor know the following day if any of the amendments were not agreed to by his clients. Nothing further was heard from Waltons, and the Mahers' solicitor sent the counterpart deed by way of exchange, assuming that Waltons intended to proceed. In fact, Waltons had changed its plans without communicating this fact to the Mahers and allowed the demolition and building work to continue after Waltons' officers had actual knowledge that the work had begun.

In holding that it would be unconscionable to allow Waltons to resile from the assumption of a concluded agreement which its conduct had induced, the High Court identified a broad principle of estoppel in equity.[90] Mason CJ and Wilson J defined equitable estoppel as[91]

> "the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it':

90 The major principles of the case have been summarised by the New South Wales Court of Appeal. Priestley JA first identified these principles with the concurrence of the other members of the court in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472 (CA), but had cause to modify the fifth of his propositions in the light of the discussion in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA). In the latter case, Kirby P, at 585, expressly agreed with this modification. The principles, as revised, are as follows: 1. Common law and equitable estoppel are separate categories, although they have many ideas in common. 2. Common law estoppel operates upon a representation of existing fact, and, when certain conditions are fulfilled, establishes a state of affairs by reference to which the legal relation between the parties is to be decided. This estoppel does not itself create a right against the party estopped. The right flows from the court's decision on the state of affairs established by the estoppel. 3. Equitable estoppel operates upon representations or promises as to future conduct, including promises about legal relations. When certain conditions are fulfilled, this kind of estoppel is itself an equity, a source of legal obligation. 4. Cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel. 5. For equitable estoppel to operate, there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant; and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable. 6. Equitable estoppel may lead to the plaintiff acquiring an estate or interest in land; that is, in the common metaphor, it may be a sword. 7. The remedy granted to satisfy the equity (which either is the estoppel or created by it) will be what is necessary to prevent detriment resulting from the unconscionable conduct.

91 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at 104.

per Dixon J in *Grundt*;[92] see also *Thompson*.[93] Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption."

Brennan J expressed a similar view. He identified an equitable estoppel as arising if the following criteria are satisfied (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-429):[94]

"(1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and in the latter case, that the defendant would not be free to withdraw from the expected legal relationship;

(2) the defendant has induced the plaintiff to adopt that assumption or expectation;

(3) the plaintiff acts or abstained from acting in reliance on the assumption or expectation;

(4) the defendant knew or intended him to do so;

(5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled;

(6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise."

Equitable estoppel, as it thus became established from the majority judgments in *Waltons Stores (Interstate) Ltd v Maher*, precludes the strict enforcement of a person's legal rights due to another's detrimental reliance on assumptions created by the party against whom the equity is raised. Unlike estoppel at common law, this principle is not confined to representations of existing fact, and it can be a cause of action, rather than merely a defence to a cause of action. The majority made it clear however, that the relief for an estoppel is in the discretion of the court, and that its purpose is to reverse the detriment, not necessarily to fulfil the expectation. Mason CJ and Wilson J said that "holding the representor to his representation is only one way of doing justice between the parties" (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 405). Brennan J said (at 419):

92 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 675.

93 *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547.

94 For a commentary on these six factors, see *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637.

> "Sometimes it is necessary to decree that a party's expectation be specifically fulfilled by the party bound by the equity; sometimes it is necessary to grant an injunction to restrain the exercise of legal rights either absolutely or on condition; sometimes it is necessary to give an equitable lien on property for the expenditure which a party has made on it ... However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct."

Deane J, who agreed with the majority of the High Court in the result in *Waltons*, expressed a more radical view concerning the law of estoppel (at 446-455). He thought that the principles of estoppel should be regarded as the same both at common law and in equity, and expressed the view that *Jorden v Money* (1854) 5 HLC 185; 10 ER 868 was no longer good law in Australia (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 452).

The fusion of common law and equitable estoppel

[714] The fusion of common law and equitable estoppel is now possible in the light of developments since *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Although Deane J was alone in *Waltons* in suggesting that common law and equitable estoppel should be fused, his view subsequently attracted wider support. In *Foran v Wight* (1989) 168 CLR 385, both Mason CJ and Deane J expressed the view that the distinction should be abandoned. They reiterated this view in *Commonwealth v Verwayen* (1990) 170 CLR 394, with some limited support from Dawson and Gaudron JJ.[95] In this case, the plaintiff was injured while serving in the Navy in 1964 in an incident which became known as the Voyager disaster. For many years, the state of the law appeared to be that the survivors had no legal recourse against the Commonwealth, but a decision in 1982 indicated otherwise,[96] and the plaintiff was among a number of survivors who began proceedings. He alleged negligence against the Commonwealth. The claim would have been barred by the relevant *Statute of Limitations*,[97] but the Minister gave written assurances that the Statute would not be pleaded. The original defence of the Commonwealth admitted negligence and did not

95 Dawson J noted that the basic considerations underlying common law and equitable estoppel are the same, but did not find it necessary to resolve the issue of whether they have divergent remedial consequences: at 454-455. Gaudron J, at 487, referred to "the substantive doctrine of estoppel", echoing the words of Mason CJ.

96 *Groves v Commonwealth* (1982) 150 CLR 113.

97 *Limitation of Actions Act* 1958 (Vic).

plead the limitation period, so that the only issues were proof of injury and quantum of damages. However, subsequently it amended its defence, denying the claim and pleading the Statute. In the High Court, it was held by a 4-3 majority that the Commonwealth was estopped from pleading the limitation period. Gaudron and Toohey JJ considered that the Commonwealth had waived its right to rely on the defences either of an absence of duty of care or of limitation. Deane and Dawson JJ concluded that the Commonwealth was estopped from doing so. Mason CJ, Brennan J and McHugh J dissented.

Mason CJ expressed the view that the evidential form of estoppel at common law had been displaced by a substantive form of estoppel (*Commonwealth v Verwayen* (1990) 170 CLR 394 at 413):

> "The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness."

Deane J also considered that the unified doctrine of estoppel operated consistently at common law and in equity. This view, that common law estoppel and equitable estoppel should be regarded as fused, was not, however, adopted by a majority of the court.[98]

Although Mason CJ and Deane J agreed that common law and equitable estoppel should be treated as fused, they expressed different views on the remedial consequences of an estoppel, and this difference of approach to the remedy meant that they disagreed on the result in the case. Mason CJ said that a central element of the doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid, and that it would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption (*Commonwealth v Verwayen* (1990) 170 CLR 394 at 413). In the result, this meant that Verwayen was only entitled to his costs, since this was essentially the detriment he had suffered in reliance upon the assumption that the

98 Brennan J and McHugh J proceeded on the basis that the issue was one of equitable estoppel. Dawson J saw the case at hand as an application of the limited doctrine of promissory estoppel. Toohey and Gaudron JJ, who decided the case on the basis of waiver, confined their comments on estoppel to the issue of remedy.

Commonwealth would not plead the *Statute of Limitations* or deny negligence. Brennan and McHugh JJ, who both based their judgments on the principles of equitable estoppel as laid down in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, reached a similar conclusion.

Deane J, by contrast, said that the normal relief where there is an estoppel by conduct is to preclude departure from an assumed state of affairs. However, there may be circumstances where no estoppel arises because the defendant agrees to reverse a minimal detriment by paying adequate compensation, and others where, although the estoppel is made out, the grant of unqualified relief would exceed any requirements of good conscience. Thus the prima facie entitlement to fulfilment of the expectation or assumption will be qualified if it appears that relief would exceed what could be satisfied by the requirements of conscientious conduct (*Commonwealth v Verwayen* (1990) 170 CLR 394 at 441-442).[99] In his view, the appropriate relief in this case was to preclude the Commonwealth from departing from the assumed position concerning the litigation.

Gaudron J, who decided the case in Verwayen's favour mainly in terms of the doctrine of waiver, also expressed some views on the remedial consequences of estoppel. While she indicated some agreement with Mason CJ that there had emerged a substantive doctrine of estoppel which "permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption",[100] she went on to state (at 487):

> "Even so, it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy. Where the nature or likely extent of the detriment cannot be accurately or adequately predicted it may be necessary in the interests of justice that the assumption be made good to avoid the possibility of detriment even though the detriment cannot be said to be inevitable or more probable than not."

While the difference between the views of Mason CJ and Deane J is primarily one of emphasis, the issue of remedy, if estoppel is to be treated as a fused doctrine, remains to be clarified. The

99 This approach is similar to s 90(1) of the *Restatement (Second) of Contracts* (American Law Institute, 1979), which provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

100 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 487.

difficulty arises because of the difference between the remedial consequences of an estoppel at common law and in equity. At common law, the relief lies in holding the person to the assumption which he or she has induced (*Thompson v Palmer* (1933) 49 CLR 507 at 547). This follows from the fact that estoppel at common law operates as an exclusionary rule. It prevents the party who plays a material part in the adoption of an assumption of fact from introducing evidence which would reveal that the facts were otherwise than the parties had assumed them to be.[101] In this way, the party may be held to a representation. By contrast, the view adopted by the High Court in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 was that the remedy for an equitable estoppel is to reverse the detriment rather than to fulfil the expectation. This difference was explained by McHugh J in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 501:

> "The purpose of both the common law and equitable doctrines is 'to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting': (*Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674). But because the common law doctrine of estoppel in pais is a rule of evidence, it operates to preclude the party estopped from denying the assumption of fact whenever it is necessary to do so for the purpose of determining the rights of the parties. On the other hand, because the equitable doctrines create rights, they preclude the party estopped from denying the assumption of fact (or law) only as long as the equitable right exists. Once the detriment has ceased or been paid for, there is nothing unconscionable in a party insisting on reverting to his or her former relationship with the other party and enforcing his or her strict legal rights."

The High Court's view on the remedy in equitable estoppel in *Waltons* reflects the law as laid down in certain English cases. In *Crabb v Arun District Council* [1976] Ch 179, for example, Scarman LJ said that the remedy was the "minimum equity to do justice" (Scarman LJ at 198).[102] Where the effect of an estoppel is to

101 *Thompson v Palmer* (1933) 49 CLR 507 at 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641. See also *Avon County Council v Howlett* [1983] 1 All ER 1073 (employer estopped from claiming any money overpaid under a mistake of fact). In cases of unjust enrichment, the defence of change of position may be preferred by the court to the argument in estoppel, since on the authority of *Avon County Council v Howlett*, common law estoppel acts in this context as an all or nothing defence: see *Derby v Scottish Equitable plc* [2001] 3 All ER 818.

102 See also *E R Ives Investment v High* [1967] 2 QB 379 Lord Denning MR, at 394-395; *Pascoe v Turner* [1979] 2 All ER 945 (CA), Cumming-Bruce LJ (for the court) at 950-951. The "minimum equity" approach was criticised by Marks J in *Commonwealth v Clark* (1994) 2 VR 333 at 342 (App Div Vic).

provide a plaintiff with a remedy for reliance upon a non-contractual promise, the intervention of equity to reverse the detriment suffered, rather than to fulfil the expectation, marks a point of differentiation between the law of estoppel and the law of contract.

Nonetheless, the approach in equity of reversing the detriment rather than fulfilling the expectation was actually applied in only a minority of equitable estoppel cases. In cases of proprietary estoppel generally, the remedy was to reverse the detriment only where there had not been a representation of a specific interest in the property.[103] There have been many more cases of proprietary estoppel in which the result was to fulfil the assumption,[104] and this has generally been the position also in relation to promissory estoppel.[105]

In support of Mason CJ's view that there must be a proportionality between the remedy and the detriment, it may be said that, in any conflict between the rules of common law and equity, the rules of equity should prevail. Mason CJ's approach may also be supported as a matter of principle. On this approach, where an estoppel arises as a result of a representation of intention, the role of equity is more analogous to the law of tort than the law of contract. It fulfils expectations only to the extent necessary to reverse a detriment, and its role is to compensate the plaintiff for a wrong rather than to hold the defendant to a promise. In this way, the demarcation lines between estoppel and contract are made clear.

What then is to be said in favour of Deane J's view? Deane J consistently held to the view that the role of estoppel is to preclude departure from an assumed state of affairs. He denied that even an equitable estoppel can be a cause of action (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 445).[106] Rather, it establishes the state of affairs by which the rights of the parties are to be determined. It follows from this view that the

103 See, for example, *Re Whitehead* (1948) NZLR 1066; *Raffaele v Raffaele* [1962] WAR 29; *Morris v Morris* [1982] 1 NSWLR 61.

104 For example, *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285; *E R Ives Investment v High* [1967] 2 QB 379; *Pascoe v Turner* [1979] 2 All ER 945 (CA); *Jackson v Crosby (No 2)* (1979) 21 SASR 280 at 291 (FC); *Riches v Hogben* [1986] 1 Qd R 315; *Kintominas v Secretary, Department of Social Security* (1991) 30 FCR 475; *Matharu v Matharu* (1994) 68 P & CR 93.

105 Promissory estoppel, as understood prior to *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, acted to preclude the enforcement of rights, either for a period, or entirely, depending on the nature of the representation and the justice of the case: Greig D and Davis J, *The Law of Contract* (Law Book Co, Sydney, 1987), pp 161-165.

106 In *Commonwealth v Verwayen* (1990) 170 CLR 394 at 439, he said that "estoppel does not of itself provide a cause of action either in law or in equity".

relief would normally be to hold the representor to the assumption which he or she has induced. The effect of the estoppel is to determine the rights of the parties by excluding the giving of evidence or the pleading of an entitlement to the contrary. Consequently, the case would be determined in accordance with the rights established by application of an estoppel, rather than by the estoppel itself, and the remedy would be determined as is appropriate to the rights of the parties in the given case. It follows that, in Deane J's view, the relief for an estoppel must necessarily be to preclude departure from the assumed state of affairs, whether that is an assumption about facts or intentions. However, he said that "it should be accepted that the prima facie entitlement to relief based on the assumed state of affairs must, under a doctrine which is of general application in a system where equity prevails, be qualified if it appears that that relief would exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party" (*Commonwealth v Verwayen* (1990) 170 CLR 394 at 442).[107]

Some support for Deane J's view can be seen in the High Court's decision in *Giumelli v Giumelli* (1999) 196 CLR 101. This was a case involving an equitable estoppel. Parents who owned a farming property in Western Australia had made promises to their son that he would be able to own a particular part of the property, on which he built a house. When disagreements occurred, that promise was not honoured. In a judgment which appeared to be more concerned with avoiding the broader doctrinal issues than with resolving them, Gleeson CJ, McHugh, Gummow and Callinan JJ indicated that in equitable estoppel, the remedy is not necessarily confined to reversing the detriment. Their Honours indicated that "the reasoning in the judgments in *Verwayen* does not foreclose, as a matter of doctrine" the fulfilment of the promise (at 125). Reflecting the language of Deane J in *Verwayen*, they went on to say that an order giving proprietary relief in fulfilment of the expectation was the "prima facie entitlement" of the son in this case. However, taking into account the need to avoid injustice to other members of the family, and to avoid relief which went beyond

107 Limited support for Deane J's approach is to be found in Brennan J's judgment in *Commonwealth v Verwayen* at 430 in relation to the effect of an estoppel where it operates as an answer to a defence put up by the representor. While affirming that equitable estoppel is normally a cause of action, he said that "when an equity by way of estoppel is raised as an answer to a plea in a defence which a defendant-promisor seeks to raise contrary to his promise, it may be appropriate to give effect to the defence on terms that the defendant-promisor satisfy the plaintiff's equity". See also *Commonwealth of Australia v Clark* (1994) 2 VR 333 Marks J at 338ff (App Div Vic).

what was required for conscientious conduct by the parents, the son should be confined to a monetary remedy (at 125).[108]

Only very limited weight can be placed upon this judgment as resolving the remedial issues in the law of estoppel. The High Court did not purport to offer any guidance in this case on the general issue of remedy; rather it chose to confine its remarks to the matters necessary to decide the case at hand. Lower courts must follow precedent. They need not read tea leaves. In any event there was not necessarily much difference in monetary outcome between fulfilling the expectation and reversing the detriment. While it is difficult to put a monetary value on all that the son did, it is likely that the expectation was a reasonable measure of the level of detriment involved. As a matter of practice, even before *Giumelli*, there appeared to be a tendency for courts to treat the expectation as prima facie the proper measure of relief.[109]

However it is clear that the remedy remains entirely in the discretion of the Court. In those forms of estoppel where there is a clear promise and therefore a definite expectation, it appears that the plaintiff's expectation will provide the starting point in considering the issue of remedy. This is often a matter of convenience. In many cases it may be very difficult to quantify the exact level of detrimental reliance given that various acts or omissions may have occurred over a significant period of time. Furthermore, it may be very difficult to disentangle those acts which were done in reliance upon an assumption and those which would have been done independently of any such assumption.[110] Whether or not the court gives effect to the expectation will depend on the proportionality between a remedy which fulfils the expectation and the detriment incurred.

It remains to be seen whether a majority of the High Court will agree that the law of estoppel should be treated as a fused doctrine without differentiating between its operation at common law and in equity. The current state of the law of

108 For analyses of the significance of *Giumelli v Giumelli*, see Burns F, "*Giumelli v Giumelli* Revisited: Equitable Estoppel, The Constructive Trust and Discretionary Remedialism" (2001) 22 *Adelaide Law Review* 123; Edelman J, "Remedial Certainty or Remedial Discretion in Estoppel after *Giumelli*?" (1999) 15 *Journal of Contract Law* 179; Wright D, "*Giumelli*, Estoppel and the New Law of Remedies" [1999] *Cambridge Law Journal* 476.

109 See the survey of reported cases after *Verwayen* in Robertson A, "Satisfying the Minimum Equity: Equtable Estoppel Remedies After *Verwayen*" (1996) 20 *Melbourne University Law Review* 805.

110 See, for example, *Public Trustee v Wadley* (1997) 7 Tas LR 35, in which a daughter was promised by her father that she would inherit the house on his death. She did a great deal of domestic work in looking after him in his old age. She would no doubt have done some such work anyway out of care and concern for him.

estoppel is thus uncertain.[111] Despite this, it is possible to consider the principles of estoppel in terms of a single doctrine, with similar operation at common law and in equity, subject to two qualifications.

First, differences of context may lead to differences of result.[112] Thus, a representation of intention in the midst of pre-contractual negotiations is unlikely to give rise to an estoppel.[113] In that context, the parties operate normally on an assumption that no legally binding arrangements will be effectuated before contract. Conversely, an assumption of intention in another context, where no such expectations prevail, may give rise to an estoppel.[114] Equally, reliance upon a representation by improving property may give rise to an equitable interest in relation to that property even in the absence of any intention to depart from the assumption because this is a well-established source of equitable proprietary rights,[115] while in other contexts, no estoppel can be established before there has been an unjust departure, or threat to depart, from the assumption.[116]

Secondly, the relief available may depend on whether the basis for the estoppel is at common law or in equity. The relief available for an estoppel arising from acquiescence, where, for example, the owner of land stands by and does not prevent another from building by mistake on it, may be to reverse the detriment. By way of contrast, the consequence of inducing

111 Estoppel by representation at common law was treated as distinct from equitable estoppel by the New South Wales Court of Appeal in *Byron Shire Council v Vaughan* [2002] NSWCA 158.

112 As Sir Anthony Mason has written: "Apart from history and the forces of precedent and tradition, there is no essential reason why we should not move towards one concept of estoppel common to, or straddling, common law and equity ... Such a unity should allow for the inevitable differences in the nature of some estoppel-based claims and defences.": Mason A, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 *Law Quarterly Review* 66 at 91.

113 See below, para [727].

114 See further Parkinson P, "Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher" (1990) 3 *Journal of Contract Law* 50 at 51-56; Dal Pont G & Chalmers D, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), pp 318-320.

115 See, for example, *Kintominas v Secretary, Department of Social Security* (1991) 30 FCR 475 in which a son's interest in a house owned by his mother arising from reliance upon an expectation that he could live in the house permanently and would receive the house as an inheritance was taken into account in assessing the value of the mother's property for the purposes of the asset test under social security law. This case is consistent with such long-standing decisions as *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 (Ch) in which the father did not seek to depart from the assumption induced. He was dead.

116 See, for example, *Ashton Mining Ltd v Commissioner of Taxation* (2000) 44 ATR 249. In this case it was claimed that a company was estopped from denying the forgiveness of a debt in the context of assessing income for tax purposes. Merkel J said (at 257) that "the rights created by an equitable estoppel cannot arise until there has been an unjust or unconscionable departure or threat to depart from the assumption adopted and acted upon by the party seeking to assert the estoppel." See also *Dixon Projects Pty Ltd v Masterton Homes Pty Ltd* (1996) 36 IPR 136.

another to make an assumption of fact may be that the person concerned is bound by the assumption which constitutes the basis of legal relations between the parties.

GENERAL PRINCIPLES OF ESTOPPEL

[715] The object of estoppel was identified by Dixon J in a passage in *Thompson v Palmer* (1933) 49 CLR 507 which has been adopted not only as the basis of common law estoppel but as an expression of the principle underlying equitable estoppel as well:[117]

> "The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other relations such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct …; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting on the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption is permitted" (*Thompson v Palmer* (1933) 49 CLR 507 at 547).

[716] The parties to the estoppel do not include only the parties to litigation, but may extend to their privies, whether by blood, by estate or by contract (*Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444). Generally, the claim of estoppel is made against the representor, but it may also be made against those who in law stand in the place of the representor, including

117 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 430-431.

executors, administrators and heirs.[118] An estoppel may bind a successor local authority following a restructuring of local government,[119] and is also available against successor trustees (*Thompson v Palmer* (1933) 49 CLR 507). Liquidators may however be in a special position, and will not be bound by representations made by the insolvent company to one creditor which would prejudice the interests of other creditors.[120]

[717] A principal may be estopped by the representations or actions of an agent within the agent's actual or ostensible authority.[121] However, this proposition does not apply necessarily to the representations of the officers of statutory authorities. A planning officer cannot do what is vested solely in the planning authority to do. The power may have been delegated. However, it has been said in England that a party is only entitled to rely on an assumption that the planning officer is making representations within her or his actual authority, if there is evidence (such as a widespread practice) which justifies that party in concluding that the officer's decision would bind the authority.[122] It remains to be established in Australia whether an estoppel could arise on the basis of such an ostensible authority to bind a statutory body where the representation was in fact not delegated to that officer, and vested only in the statutory authority (*Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (FC), Gummow J at 212-214).

[718] Persons claiming the benefit of an estoppel must show that the representation was made to them, or to a class of which they are members,[123] or that they are entitled to raise the estoppel in

118 *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 (Ch); *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Inwards v Baker* [1968] 2 QB 29; *Re Basham Decd* [1987] 1 All ER 405 (Ch).

119 *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & C R 179 (QB). See also *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC) (land vested in local authority by government).

120 See *Re Exchange Securities & Commodities Ltd (in liq)* [1988] Ch 46 and the cases discussed therein. See also Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 126-127.

121 *Hoare v McCarthy* (1916) 22 CLR 296; *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355; *Nippon Menkwa Kabushiki Kaisha v Dawson's Bank* (1935) 51 Lloyds LR 147 (PC). In contrast, see *Petersen v Maloney* [1951] 84 CLR 91 (agent did not have authority).

122 *Western Fish Products v Penwith District Council* (1981) 2 All ER 204 (CA), explaining *Lever (Finance) Ltd v Westminster Corp* [1971] 1 QB 222 (CA).

123 In the litigation concerning the Voyager disaster (see *Commonwealth v Verwayen* (1990) 170 CLR 394: above, para [714]), the Commonwealth through its Ministers and officials made representations which were applicable potentially to all survivors of the disaster who either had commenced litigation or were intending to do so: see *Commonwealth of Australia v Clark* (1994) 2 VR 333 Ormiston J at 363 (App Div Vic). For an example of a wife benefiting from a representation made to her husband see *Matharu v Matharu* (1994) 68 P & CR 93 (criticised by Milne P, "Proprietary Estoppel in a Procrustean Bed" (1995) 58 *Modern Law Review* 412).

right of the person to whom it was made, as for example where acting on behalf of an estate.[124] A trustee in bankruptcy or a liquidator may take the benefit of an estoppel arising in favour of the insolvent individual or company.[125] Where the estoppel gives to a person an equitable interest in certain property, the benefit of that estoppel is available to whoever receives the property by way of assignment, whether as security or otherwise.[126] Furthermore, an assignee, taking from a person to whom a representation has been made, may get the benefit of an estoppel where the representation was made not only to the initial representee but to all those to whom the property was transferred (*Burkinshaw v Nicolls* (1878) 3 App Cas 1004).

[719] For the purpose of the rules of priorities, a right in relation to property arising from an equitable estoppel should be regarded as, at best, a mere equity.[127] If the relief is in the discretion of the court, then until the court decrees that a proprietary remedy should be awarded, a party claiming the benefit of the estoppel cannot be said to have an equitable interest in the property. An equitable right arising from an estoppel will not take priority over a bona fide purchaser of the legal estate for value without notice,[128] and the right may also be defeated by application of the principles relating to priorities under the Torrens system.[129]

[720] Illegality is fatal to a claim of estoppel. If the party seeking to claim the benefit of an estoppel must set up an illegal act as a detriment, the claim will fail.[130] Furthermore, the assumption of powers by an individual, an officer or a corporation which are ultra vires cannot be validated by estoppel.[131] Estoppel cannot override the provisions of a statute, where to establish the estoppel would create an inconsistency with mandatory statutory

124 *Mackley v Nutting* [1949] 2 KB 55 (CA); *Whitmore v Lambert* [1955] 2 All ER 147 (CA).

125 *Stonard v Dunkin* (1810) 2 Camp 344; 170 ER 1178 (KB); *Re Central Klondyke Gold Mining & Trading Co Ltd, Savigny's Case* (1898) 5 Manson 336.

126 *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; 53 ER 563; *Hamilton v Geraghty* (1901) 1 SR Eq (NSW) 81.

127 See above, para [316].

128 *Duke of Beaufort v Patrick* (1853) 17 Beav 60; 51 ER 954; *E R Ives Investments v High* [1967] 2 QB 379 (CA); *Classic Communications Ltd v Lascar* (1985) 21 DLR (4th) 579; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 (CA).

129 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 shows that, in certain circumstances, a purchaser with notice of the proprietary right of another, may be bound by it despite the registration provisions.

130 *Mulcahy v Hoyne* (1925) 36 CLR 41 (lessee could not claim breach of licensing laws as reliance).

131 *Pratten v Warringah Shire Council* [1969] 2 NSWR 161; *British Mutual Banking Co Ltd v Charnwood Forest Railway Co* (1887) 18 QBD 714, Fry LJ at 719; *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148; *Rhyl Urban District Council v Rhyl Amusements Ltd* [1959] 1 All ER 257.

provisions.[132] However, where it is possible to frame relief in such a way that there is no inconsistency with the provisions of the statute, the estoppel may be established.[133]

[721] Estoppel cannot interfere with a statutory duty or discretion. Where a duty is vested in a person or body by statute, an estoppel cannot prevent the person or body from fulfilling that duty according to law.[134] The same principle holds where the person or body is vested with a discretion.[135] However, it has been said that an estoppel may arise where the representation which is made is that the duty has been performed or that the discretion has been exercised in circumstances where such a decision is intended by the legislature to be exercised once only and is not subject to revocation.[136]

The principle which precludes the interference in the exercise of a statutory discretion by estoppel is based in part on the presumed intention of the legislature that the proper exercise of a discretion in the public interest should not be hindered or circumvented by executive action (*Attorney-General (NSW) v Quin* (1990) 170 CLR 1, Mason CJ at 18). It follows that estoppel may be available where to hold the executive to the representation would not significantly hinder the exercise of the discretion in the public interest. Further, the public interest comprehends an element of justice to the individual. Hence it is possible that the courts may grant relief on the basis that to refuse it will cause greater harm to the public interest by denying justice to the individual than would granting relief pursuant to an estoppel (Mason CJ at 18).[137]

132 *Attorney-General (NSW) v Municipal Council of Sydney* (1919) 20 SR (NSW) 46; *Chalmers v Pardoe* [1963] 3 All ER 552 (PC); *Formosa v Secretary, Department of Social Security* (1988) 81 ALR 687 (FC Fed Ct); *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209.

133 *Pearce v Pearce* [1977] 1 NSWLR 170; *Maharaj v Chand* [1986] AC 898 (PC); *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 (CA).

134 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610; *Re Exchange Securities & Commodities Ltd (in liq)* [1988] Ch 46.

135 *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648, McHugh J at 678; *New South Wales Trotting Club Ltd v Municipality of Glebe* (1937) 37 SR (NSW) 288; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (FC); *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 QB 416; *Western Fish Products v Penwith District Council* [1981] 2 All ER 204 (CA). But see *Waverley Transit Pty Ltd v Metropolitan Transit Authority* (Vic) (1988) 16 ALD 253 (SC Vic), affd on appeal in *Metropolitan Transit Authority (Vic) v Waverley Transit Pty Ltd* [1991] VR 176 (FC).

136 *Brickworks Ltd v Warringah Corp* (1963) 108 CLR 568, Windeyer J at 577; *Rubrico v Minister for Immigration and Ethnic Affairs* (1989) 23 FCR 208, Lee J at 229. See also the discussion of these statements in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, Gummow J at 214-215 (FC).

137 See also *Laker Airways Ltd v Department of Trade* [1977] QB 643, Lord Denning MR at 707 (CA). But see *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (FC), Gummow J at 211-212, 220-221; *L'Huillier v Victoria* (unreported, Supreme Court of Victoria, Ashley J, 9 February 1994).

The position is different where the subject matter of the dealing is not subject to a statutory duty or discretion and would ordinarily be dealt with by private law. Where there is no difference of position between the statutory authority and a private individual or corporation, no bar exists to the operation of estoppel (*Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, Gummow J at 214-215 (FC)).

THE ELEMENTS OF ESTOPPEL

[722] The elements required to set up an estoppel are as follows:[138]

- The party claiming the estoppel must have adopted an assumption as the basis of an act or omission.[139]
- The claimant, upon the basis of the assumption, must have so acted or abstained from acting that a detriment will be suffered if the person against whom the estoppel is asserted is afterwards allowed to set up rights inconsistent with it.[140]
- The party against whom the estoppel is alleged must have played such a part in the adoption of, or persistence in, the assumption that freedom to act otherwise than in a manner consistent with it would be unfair or unjust.[141]

Making an assumption

[723] The party claiming the estoppel must show that he or she adopted an assumption as the basis of some act or omission. The focus of inquiry is on the beliefs and actions of the party claiming the estoppel, and not at this stage on the beliefs or intentions of the person against whom the estoppel is raised. As Deane J said in *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444:

138 For formulations of the requirements for an estoppel in England, see *Greenwood v Martins Bank* [1933] AC 51; *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, Browne LJ at 245 (CA).

139 *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, Gaudron J at 212; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 413; Deane J at 444.

140 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 674; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 413; Deane J at 444.

141 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 676; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at 404; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, Gaudron J at 212; *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444.

> "Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant beliefs, actions and position of that party."

The assumption may be of fact or law, present or future.[142] The evolution of the doctrine of estoppel has led to the abandonment of many of the theoretical constraints on its application. This does not mean however, that those theoretical constraints are of no enduring importance. The reasons why it was said in the past that estoppel applied only to statements of present fact and not to statements of law or representations as to the future may well lead the court to deny relief in a case brought under the modern, more flexible doctrine. For example, statements of intention which are alleged to found an estoppel may well be met by the defence that there is normally no obstacle to a change of mind or that the court should not enforce a gratuitous promise. Statements of law which are alleged to found an estoppel may be met by the defence that one person is supposed to know the law as well as another.[143] These objections however, can no longer be decisive of the issue of estoppel. There will be some statements of intention, or of law, which constitute grounds for the application of estoppel where it would be unconscionable, in all the circumstances, for the maker of a representation to resile from it. This is considered further below.

Assumptions of law

[724] Assumptions of law may in principle give rise to an estoppel.[144] An exception is where the statement on which the assumption is founded is merely a statement of opinion on what the law of the country is.[145] In *Commonwealth v Verwayen* (1990) 170 CLR 394,

142 *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 413; Deane J at 445; *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, Denning LJ at 250, 251 (CA); *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, Lord Denning MR at 242 (CA). In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J distinguished between estoppel in pais and promissory estoppel in this respect. He said that, in estoppel in pais, an assumption may include "the legal complexion of a fact" (at 415), and, in equitable estoppel, the assumption relates to the legal relationship between the parties (at 420-421).

143 *West London Commercial Bank v Kitson* (1884) 13 QBD 360, Bowen LJ at 362 (CA); *Commercial Bank of Australia Ltd v Skinner* (1895) 21 VLR 368; *Algar v Middlesex County Council* [1945] 2 All ER 243; *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175 (CA).

144 *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175; *Foran v Wight* (1989) 168 CLR 385 at 435-436; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason J at 413; Deane J at 445.

145 See below, para [725].

Mason CJ expressed the view that "the distinction between assumptions as to fact and assumptions as to law is artificial and elusive … So it would be productive only of confusion and arid technicality to restrict the operation of the doctrine so as to exclude from its scope an assumption as to a purely legal state of affairs." (at 413)[146]

There are many older judicial pronouncements to the effect that only representations of fact will found an estoppel and not representations of law.[147] However, these statements should no longer be accepted. It was generally acknowledged in any event that where the representation was a "mixed" one of fact and law, that could still found an estoppel.[148] Statements of law are in many cases inextricably bound up with statements of fact. As Sir George Jessel MR said in *Eaglesfield v Marquis of Londonderry* (1876) 4 Ch D 693 at 703:

> "It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law."

It follows that, where fact and law are inextricably bound together, it makes no sense to insist that a representation of law cannot found an estoppel. Even where the representation flows from a mistaken belief concerning the legal effect of a document, the statement can be interpreted as a statement of fact about the existing present rights of the parties. Thus where parties negotiated on the basis, as explicitly represented, that the purchaser of a lease had an option to renew it, an estoppel was established even though the option was void for lack of

146 As a further reason for stating that the assumption could be as to a purely legal state of affairs, Mason CJ said that the restriction to a factual state of affairs was at the time when the rules of estoppel by conduct were evidentiary (at 413). See also *Foran v Wight* (1989) 168 CLR 385, Deane J at 435, who noted that there was no valid reason why the general doctrine of estoppel by conduct "should be inapplicable to a case where the representation relates to the state of the law. In that regard, the distinction between a representation of fact and a representation of law is, in the context of the principles constituting the doctrine of estoppel by conduct, essentially illusory unless one subscribes … to the view that law has no factual existence at all".

147 *Rashdall v Ford* (1866) LR 2 Eq 750; *Beattie v Lord Ebury* (1872) 7 LR Ch App 777; *Territorial and Auxiliary Forces Association of the County of London v Nichols* [1949] 1 KB 35 (CA); *Kai Nam v Ma Kam Chan* [1956] AC 358 (PC).

148 *West London Commercial Bank v Kitson* (1884) 13 QBD 360 (CA); *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, Hodson LJ at 253; *Covell v Sweetland* [1968] 2 All ER 1016 (QB).

registration.[149] Similarly, the Privy Council has held on an appeal from India that an estoppel could arise to prevent a son from relying on a defect in the title of his mother when he had acted on her behalf in mortgaging property which was eventually sold by way of mortgage sale to purchasers who had notice of the invalidity.[150]

There is however, a lingering uncertainty concerning estoppel by convention.[151] It was said in the decision of the High Court in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 that an estoppel by convention can only be founded upon an assumed state of facts and not upon an assumption as to the legal effect of conduct. This authority sits uncomfortably with other authorities which allow for estoppel to operate on representations as to private rights or the "legal complexion of a fact"[152] and it was treated as obiter dicta by a majority of the New South Wales Court of Appeal in *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175 (Samuels JA and Kirby P; McHugh JA dissenting), which declined to follow it. It is doubtful that the proposition remains good law, given the development of the law of estoppel since the date of that decision.[153]

[725] Opinions on what the law of the country is will not found an estoppel if the matter is one about which the representor has no special expertise. As Spencer Bower and Turner[154] have written:

149 *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (heard together with *Old & Campbell Ltd v Liverpool Victoria Friendly Society*), as applied to the position of Old & Campbell Ltd at 157-159. At the time the option was given, it was understood to be the law that it did not need to be registered under the *Land Charges Act* 1925 (UK). Subsequently it was decided that such an option did have to be registered and was void against the purchasers of the reversion for lack of registration. The estoppel in this case nonetheless bound the purchasers of the reversion.

150 *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR Ind App 203. For other examples of representations which might be classified as being of law, see *Bank Negara Indonesia v Hoalim* [1973] 2 MLJ 3; *Spiro v Lintern* [1973] 3 All ER 319 (CA).

151 For estoppel by convention, see below, paras [752]-[758].

152 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 415; *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, Denning LJ at 540.

153 *Caboche v Ramsay* (1993) 119 ALR 215, Gummow J at 238; *Australian Consolidated Investments Ltd v England* (unreported, Supreme Court of South Australia, Doyle CJ, 1 November 1995). See also *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105, Lord Goff at 127 (estoppel by convention where common but mistaken assumption that service of a writ upon a duly authorised agent would constitute effective service); *Colchester Borough Council v Smith* [1991] 2 All ER 29 (Ch).

154 Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), p 39.

> "He who expresses his views on law to another is in exactly the same position as one who expresses his view on any other question of science, art or business, and the inquiry as to whether, and to what extent, his statement is a representation is governed by the same considerations."

To similar effect is the statement of Deane J in *Foran v Wight* (1989) 168 CLR 385 at 435-436:

> "In the area of estoppel by conduct, the essential distinction which must be observed if the doctrine is to be kept confined within what is justified by the notions of good conscience which inspire it is not the distinction between present and future fact or between fact or law. It is the distinction between a representation of fact and a representation of opinion … a representation of future fact and a representation of law will often, upon analysis, involve no more for the purposes of the doctrine of estoppel by conduct, than a representation of present opinion. In a case where that is so, any estoppel founded upon the representation will ordinarily be of no use to the representee since it will extend no further than precluding a denial that the represented opinion was truly held."

A further distinction to be drawn is between statements or opinions about the general law which cannot give rise to an estoppel, and statements about private rights or the effects of documents which may found an estoppel (*Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175 at 188, Samuels JA, with whom Kirby P agreed (CA)).[155] Opinions as to the construction of contracts and the rights available on the basis of contracts may be the basis of an estoppel. In an appeal from Alberta, the Privy Council held that a surety company was estopped from pleading a breach of contract owed by the plaintiff to building contractors where the fulfilment of the plaintiff's obligations under the contract was a condition precedent to enforcing against the surety certain losses arising from the failure of the builders to complete the work (*Calgary Milling Co Ltd v American Surety Co of New York* [1919] 48 DLR 295 (PC)). The estoppel arose from the interpretation placed on the contract by the surety at the request of the plaintiff. The plaintiff complied with the contract on the interpretation given by the surety company, but not on the interpretation as found by the Privy Council. Nonetheless, the surety company could not plead this breach to its advantage. Similarly, where a party to a contract acquiesced in a statement in a company's prospectus which indicated a particular conclusion as to the legal effect of

155 See also *Cooper v Phibbs* (1867) LR 2 HL 149, Lord Westbury at 170.

the contract, his executors were estopped from placing a different construction upon it.[156]

Assumptions about future conduct

[726] Assumptions about intentions may found an estoppel. This has been recognised in part because the distinction between a fact and an intention can be difficult to draw,[157] but more importantly because of the clear recognition that an equitable estoppel may arise from a promise as to future conduct.[158] However, the historic concerns about which promises will be enforced and which will not, remain of considerable importance. They may lead the court to conclude that no estoppel arises, or to provide a lesser remedy, out of concern not to give full effect to a gratuitous promise. The issue of the enforcement of promises outside of contract is particularly important in relation to pre-contractual negotiations.

[727] Pre-contractual negotiations will rarely give rise to an estoppel before the contract is finalised because the assumptions of the parties usually are that no legal obligations will arise prior to the contract formation. The leading case of *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 is perhaps the exception which proves the rule.[159] The assumption induced by Waltons Stores in this case was that Waltons would exchange contracts on a lease of the property as a matter of formality.[160] The particular reasons why the estoppel arose in these circumstances were said by Mason CJ and Wilson J to be twofold. First, Waltons Stores had been responsible for the sense of urgency in concluding an agreement and in ensuring that the Mahers constructed the new building in time for the new store to open soon after the expiry of Waltons' existing lease. Secondly, the Mahers had been told through their solicitor that the timetable for construction of the new building required that an agreement be concluded "within

156 *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330, Luxmoore J at 342: "If a person authorizes or permits another to make a representation for the purpose of it being acted upon, and it is acted upon, that person cannot afterwards be heard to say that the representation is not true. This applies even if the representation is as to the legal effect of the document, if there is no qualification in the representation suggesting that the document and not its effect as represented is to govern the relationship of the parties." See also *Algar v Middlesex County Council* [1945] 2 All ER 243; *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, Denning LJ at 540.

157 See *Foran v Wight* (1989) 168 CLR 385, Mason CJ at 410. See also *Craine v Colonial Mutual Fire Insurance Ltd* (1920) 28 CLR 305, Isaacs J (for the court) at 324; *Yorkshire Insurance Co Ltd v Craine* (1922) 31 CLR 27 at 38 (PC).

158 *Legione v Hateley* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

159 See also *Salvation Army Trustee Co v West Yorkshire Met County Council* (1980) 41 P & CR 179 (QB).

160 For the facts of this case, see above, para [713].

the next day or two" and consequently when the final details of the contract were apparently settled in that time period, the Mahers were entitled to assume that they had a binding agreement and that the completion of the exchange of contracts was a formality (*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 407).

Brennan J said that the retention by Waltons Stores of the counterpart deed which had been sent by way of exchange was tantamount to a promise by Waltons that it would complete the exchange. At that point, it was forced to an election either to terminate the negotiations or to allow Mr Maher to continue on the footing that Waltons was bound to enter into the proposed contract. Its silence induced Mr Maher to assume the latter and on that assumption he relied to his detriment (at 429-430).[161]

In negotiations between commercial enterprises it will be especially difficult to establish a claim of estoppel arising out of pre-contractual negotiations.[162] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 demonstrates the reluctance of the courts to protect well-advised commercial parties which act upon assumptions arising from pre-contractual negotiations. Franklins, a supermarket chain, had been negotiating with Austotel towards a lease of space for a supermarket within a new development. Austotel, as developer, was anxious to secure Franklins for the site, since with such an arrangement in place it could attract finance and it would also assist in drawing smaller retailers to take leases in the premises. At one stage, it persuaded Franklins to sign a letter for the benefit of Austotel's financiers, to the effect that it had agreed to take a lease and knew of no reasons which would lead it to withdraw. The parties were able to agree on the detailed terms for a contract to lease, but later it was agreed that Franklins would get an area 9 per cent greater than that originally envisaged in the negotiations. No extra consideration was agreed, nor did the parties enter into a formal contract for a lease at that stage. Subsequently, Austotel withdrew from the arrangement and granted a lease to another supermarket chain. It was held in the New South Wales Court of Appeal that they were not estopped from so doing, even though by this stage Franklins had relied to

161 See also below, para [760].

162 *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582; *Milchas Investments Pty Ltd v Larkin* (1989) 96 FLR 464. See also *Pat Wyatt & Associates Pty Ltd v Mobil Oil Australia Ltd* (unreported, Federal Court, Spender J, 7 December 1990); *Sydney Strata Securities Pty Ltd v Elders Finance Ltd* (unreported, Federal Court, Davies J, 20 December 1990); *Nepean District Tennis Assoc v Penrith City Council* (1988) 66 LGRA 440.

its detriment on the assumption that it would be taking a lease of the site. Kirby P and Rogers AJA held that there was no concluded agreement and for the same reasons there was no estoppel. Each party was retaining the liberty to withdraw.[163]

Kirby P emphasised in particular that the courts will treat well-advised commercial parties differently to those in other relationships (*Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 586):

> "The wellsprings of the conduct of commercial people are self-evidently important for the efficient operation of the economy. Their actions typically depend on self-interest and profit-making not conscience or fairness. In particular circumstances protection from unconscionable conduct will be entirely appropriate. But courts should, in my view, be wary less they distort the relationships of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges. Such consciences, as the cases show, will typically be refined and sharpened by circumstances arising in quite different relationships where it is more apt to talk of conscience and to provide relief against offence to it."

Similarly, the Privy Council held in *Attorney-General (Hong Kong) v Humphreys Estate Ltd* [1987] 1 AC 114, that a company which had reached an agreement in principle with the government was not estopped from withdrawing from it when the parties acted upon the agreement which was still subject to contract. In this case, a company agreed with the government in principle that it would take a Crown lease of property in exchange for 83 flats which it owned. The government emphasised that the agreement was subject to further negotiation and approval, and that no binding legal obligations were being entered into at that point. Both parties acted on the agreement. The government took possession of the flats and expended a substantial sum on them. The company entered onto the government land and demolished certain buildings; it also paid money pursuant to the agreement. Subsequently it withdrew, and the Privy Council held that no estoppel had converted the agreement in principle into a binding obligation. While holding out the possibility that an estoppel could arise to prevent a party from refusing to proceed with the transactions envisaged in a document expressed to be still subject to contract, the Privy Council held that, while the government had acted in the confident and not unreasonable hope that the

163 See further, Parkinson P, "Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher" (1990) 3 *Journal of Contract Law* 50.

company would not withdraw, the company did not encourage a belief or expectation to that effect. It was clear that the power to withdraw remained.

Another illustration is the decision of the Full Court of the Federal Court in *Mobil Oil Australia v Wellcome International Pty Ltd* (1998) 81 FCR 475. Mobil's leadership had given indications of an incentive scheme to improve the quality of service provision and performance by franchise holders. They made it clear that the proposals had not been finalised and that there were various difficulties to be overcome in developing the incentive scheme. Nonetheless, they intended that Mobil would "find a way" to implement a scheme which gave an extension of tenure as a reward for outstanding performance. Certain franchisees in Australia claimed reliance upon the representations made. The Full Court of the Federal Court held that no contract had been created. Similarly, the representations did not give rise to an equitable estoppel. The general commitment to "find a way" to implement a scheme was not certain enough to ground an estoppel, in a context in which it was clear that no firm commitment was being made.

[728] An assumption about the way contractual rights will be exercised arising in pre-contractual negotiations may also give rise to an estoppel. For example, in *Bank Negara Indonesia v Hoalim* [1973] 2 MLJ 3, the Privy Council held that a landlord was bound by assurances given to a tenant, whom it wished to persuade to move from a first floor room in the building to a third floor room, to the effect that he could stay there for as long as he remained practising his profession, and that he would continue to enjoy protection under rent restriction legislation. The assumption induced in negotiations for the new lease raised an estoppel preventing the landlord from exercising its legal rights under that new lease inconsistently with the assumption. Similarly, in *Brikom Investments Ltd v Carr* [1979] QB 467, a landlord was held bound by its promise made in negotiations for 99-year leases of certain flats in a block of flats that it would not enforce the terms of a covenant in the draft lease which allowed it to claim contribution from the tenants for the repair of the roof.[164] In *Whittet v State Bank of New South Wales* (1991) 24

164 The reasoning of Roskill and Cumming-Bruce LJJ differed from Lord Denning MR, who held in relation to assignees of the original leases that the benefit of the estoppel ran with the land. Their Honours preferred to see the case as an application of the principle of *Hughes v Metropolitan Railway* (1877) 2 App Cas 439 (see above, para [711]), or as a case of a collateral contract, and in relation to the assignees, as an application of the doctrine of waiver. The difference of viewpoint is not material for the purposes of the statement of the law in this paragraph.

NSWLR 146 an estoppel arose from an assumption by a wife, induced by representations from a bank, that a mortgage to secure the repayment of the husband's business debts would be limited to $100,000 plus interest. It was in fact an "all-moneys" mortgage. However, the normal position is that an estoppel concerning the application or enforcement of a written contract will not arise from pre-contractual negotiations in the face of a clause which indicates that the written contract expresses the entire agreement of the parties.[165] Even where the written agreement does not have such a clause, a party seeking to assert an estoppel in the face of a written contract which is silent on the issue or which contradicts the representation claimed, has a significant evidential burden, particularly if the written contract is negotiated at arm's length and both parties are represented by lawyers (*Overlook v Foxtel* [2002] NSWSC 17, Barrett J at [90]).

Assumptions about rights

[729] Estoppels often arise because of an assumption about a person's present rights. For example, this may occur because the party to be estopped acts inconsistently with the absence of a binding contract.[166] An estoppel has been found, on this basis where, following pre-contractual negotiations, one party has acted as if an agreement to grant the right claimed is already in force, even if it is still unformalised and its terms are not sufficiently agreed to create a contract.[167] In *Crabb v Arun District Council* [1976] Ch 179, a landowner subdivided his land and sold a part of it on the assumption that a right of way over some council land, for which he had been negotiating with the local council, would be given. The council had acted as if the right of way was available to the landowner by building a fence with a gate at the proposed access point. No price had been agreed for the grant of a right of access over the council's land. Subsequently, the council removed the gate and closed the gap, thus denying the landowner access to a road. Since the landowner relied to his detriment, to the knowledge of the council, by selling a part of his land without

165 *Skywest Aviation Pty Ltd v Commonwealth* (1995) 126 FLR 61, Miles CJ at 102-106; *Australian Co-operative Foods v Norco* (1999) 46 NSWLR 267, Bryson J at 279, doubting the correctness of Rolfe J's decision in *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146. But see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833, Allsop J at 444-447. See further below, para [758].

166 *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444 (contract voidable for lack of ministerial approval; estoppel arose from conduct of party indicating that it regarded itself as bound by the contract, despite initial refusal by Minister).

167 There is a fine line between the position stated here and that which arose in *Attorney-General (Hong Kong) v Humphreys Estate Ltd* [1987] 1 AC 114. The distinction lies in the representations of the parties. In the *Humphreys Estate* case, the parties acted as if the contract was already in force, and yet did so while still continuing to represent that no binding obligations arose.

reserving to himself a right of way over it, an equity arose which was satisfied by the grant of the easement.[168]

An assumption about future rights may also give rise to an estoppel. In *Riches v Hogben* [1986] 1 Qd R 315, a 64-year-old son, together with his family, was persuaded by his 88-year-old mother to leave his home in England and to move to Australia on the faith of a promise that she would buy a house for them there and place it in the son's name. The intention was that she should reside with them under the same roof in a "granny flat" until her death, and that they should look after her. After arriving in Australia, the mother did buy a house, but she placed it in her own name. After an argument which occurred just a few days after moving into the house, she expelled the son and his family. The Full Court of the Supreme Court of Queensland, while holding that the requirements of the doctrine of part performance were not satisfied, nonetheless held that an interest in the land arose by an equitable estoppel. It ordered that title to the property be transferred to the son, subject to the entitlement of the mother to reside in the "granny flat" as long as she wished.

It is no objection to the operation of estoppel in such a case that there was no property, which is the subject matter of the estoppel, at the time the promise was made. The estoppel may be "fed" by the subsequent acquisition of the interest, creating an equitable claim against the property so acquired.[169]

Reliance on the assumption

[730] Detrimental reliance on the assumption is essential for a claim of estoppel to succeed, for the prevention of an unconscionable result which would follow if the assumption were denied is at the heart of the doctrine of estoppel. Dixon J said in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674:

> "One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption."

168 See also *Laird v Birkenhead Railway Co* (1859) Johns 500; 70 ER 519 (Ch), where an agreement was given in principle that the plaintiff should be able to build a branch line to connect with the defendant company's railway. The terms were left to future arrangement. The branch line was built with the knowledge and acquiescence of the defendant, and Page Wood VC held that an enforceable agreement had been reached that the plaintiff should have the branch line on reasonable terms which could be settled by the court.

169 *Webb v Austin* (1844) 7 M & G 701; 135 ER 282; *Rajapakse v Fernando* [1920] AC 892 (PC).

A claim of estoppel will fail if the detriment cannot be demonstrated.[170] So, for example, there will be no detriment where, without the representation relied upon, a creditor would have no greater remedy than if the representation had not been made (*Donaldson v Freeson* (1934) 51 CLR 598). Similarly, there will be no detriment where it can be shown that a bank's mistaken representation as to the state of credit in a bank account did not lead the account-holder to incur any greater expenditure than he or she would otherwise have incurred. There will be no estoppel where, although one party made a representation, that party did so in a common purpose with the party claiming the benefit of the estoppel, when the latter party had more information to assess the truth of it than the first party did, and hence did not rely on the first party's statement (*Square v Square* [1935] P 120). A representation made to a person after he or she has acted detrimentally will not found an estoppel,[171] although where a bank made representations about the effect of a mortgage agreement after it had been signed by the plaintiff, an estoppel arose holding the bank to its representations because of other reliance which could be attributed to those representations (*Stevens v Standard Chartered Bank (Australia) Ltd* (1988) 53 SASR 323).

[731] The time at which detriment is assessed is the time when the other party seeks to act in a manner contrary to the assumption induced. In *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674-675, Dixon J explained:

> "[T]he real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted which led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong or an inconsistent state of affairs were accepted as the

170 Many claims of estoppel have failed because such detrimental reliance could not be shown: *Hocking v Western Australian Bank* (1909) 9 CLR 738; *Hoare v McCarthy* (1916) 22 CLR 296; *Thompson v Palmer* (1933) 49 CLR 507; *Donaldson v Freeson* (1934) 51 CLR 598; *Trenorden v Martin* [1934] SASR 340 (FC); *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723; *Fung Kai Sun v Chan Fui Hing* [1951] AC 489 (PC); *McCathie v McCathie* [1971] NZLR 58 Turner J at 72-73 (CA); *United Overseas Bank v Jiwani* [1977] 1 All ER 733 (QB); *Gollin & Co Pty Ltd v Consolidated Fertilizer Sales Pty Ltd* [1982] Qd R 435 (FC); *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (FC).

171 *Hocking v Western Australian Bank* (1909) 9 CLR 738.

> foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act as a source of prejudice."

The significance of the time at which detriment is assessed is illustrated by *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101. A landlord of commercial premises agreed with its tenants to accept a reduced rental for an indefinite period. Subsequently, it went back on its promise and sued for the full arrears of rent. One question which arose was where the detriment to the tenants lay. Assessing the detriment at the time when the claim for arrears was made, the majority of the court found the detriment lay in the requirement to pay a large lump sum, rather than paying the increased amount over the period of the lease in instalments. Looked at from the time of the adoption of the assumption, it is not clear that the tenants did either act, or omit to act, in detrimental reliance. However, the adoption of the assumption meant that they had ordered their affairs in such a way that they were now in a more disadvantageous position than if the concession as to rent had not been made.

A further illustration is *Commonwealth v Clark* (1994) 2 VR 333. In this case, the Appeal Division of the Supreme Court of Victoria considered the principles of estoppel in the light of *Verwayen's* case[172] in relation to another survivor of the Voyager disaster. It considered that the relevant detriment was not only the legal costs incurred but the psychological harm which would be likely to result if the Commonwealth were permitted to depart from the representation that the limitation period would not be pleaded. There was ample evidence from which the court could conclude that such psychological harm would be serious.[173] Ormiston J observed in this case that detriment in estoppel is essentially hypothetical, since only if the court permits the assumption to be departed from will the detriment be able to be assessed. Thus the requirement of detriment to establish an estoppel may most accurately be stated as being that there must be acts, facts or circumstances from which it can be inferred:

- that detriment to the party claiming estoppel is more likely than not to occur if the other party is permitted to depart from the assumption relied upon; and
- that detriment of that kind will derive from the first party's proven acts or inaction in reliance on the assumption.[174]

172 *Commonwealth v Verwayen* (1990) 170 CLR 394: see above, para [714].

173 *Commonwealth of Australia v Clark* (1994) 2 VR 333 Ormiston J at 356-360, 378-379 (App Div). See also Marks J at 343-344.

174 Ormiston J at 380.

[732] The reliance must involve a change of position of such a kind that material disadvantage would result if the assumption were not adhered to.[175] As Robert Walker LJ expressed the nature of the detriment in *Gillett v Holt* [2000] Ch 210 at 232,

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether the repudiation of an assurance is or is not unconscionable in all the circumstances."

The detriment may be considered in relation to any benefits received, so that it is the net detriment which is assessed.[176] In *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, Handley JA drew a distinction between consideration for the purposes of contract law, and the level of detriment which is sufficient to found an estoppel (at 307-308):

> "While a single peppercorn may constitute valuable consideration which can support a simple contract, it seems to me that the loss of such an item would not constitute a 'material detriment', 'material disadvantage' or a 'significant disadvantage' for the purposes of the law of estoppel. It may seem strange that there should be such a distinction. However, in the first case the consideration has been accepted as the price of the bargain which the law strives to uphold. Promissory estoppels and estoppels by representation lack this element of mutuality, and the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation or promise."

However, there are cases where the detriment appeared to be slight or speculative. Thus in *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, it lay in the requirement to pay a large lump sum of rent arrears, rather than being able to pay in

175 *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, Rich, Dixon and Evatt JJ at 734 ("material detriment"); *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444 ("significant disadvantage").

176 See, for example, *Sledmore v Dalby* (1996) 72 P & Cr 196 (benefit of occupation of house for 18 years rent-free offset the detriment of expenditure on improvements. In this case, the Court weighed up the needs of the representee with the needs of the plaintiff, in reaching the conclusion that it was no longer inequitable to depart from the assumption of a continuing licence to occupy the property.)

instalments.[177] In *Foran v Wight* (1989) 168 CLR 385 at 436-437, Deane J found the relevant detriment to raise an estoppel in the loss of "a real chance" to tender performance where purchasers under a contract for the sale of land, who were in financial difficulties, were told that performance on the due date for completion of the contract of sale would be nugatory.[178] Mason CJ dissented on the ground that the evidence showed that the purchasers would have been unable to complete on the due date (*Foran v Wight* (1989) 168 CLR 385 at 412-413).[179] It has been said nonetheless that the relevant detriment must be material and that "a speculative possibility of detriment" is insufficient.[180]

[733] The question of what detriment is necessary is closely linked with the remedy which is given as relief for the estoppel. If, as Mason CJ has indicated in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 413, the relief is in all cases meant to be proportionate to the detriment suffered, there will be most likely little focus on what detriment is sufficient to raise an estoppel. However, if the starting point in an assessment of relief is, as Deane J argued in the same case,[181] to preclude departure from the assumed state of affairs unless this would be "unduly oppressive" to the other party, then a much greater focus may be expected on what is, or is not, an adequate detriment to found an estoppel.[182]

[734] Proof of an opportunity foregone is a sufficient detriment. In many cases, the detriment can only be seen in a lost opportunity to take other action, for the nature of the representation is such as to promote inaction.[183] Thus, where the assumption is that a

177 In this case, White J was willing to engage in some speculation about the relevant detriment. He suggested it might be found in other choices that the tenant did not take, such as attempting to assign the lease or abandoning the shop and risking the chance of being sued for breach of contract. Similar reasoning on detriment is endorsed by Sir Alexander Turner in discussing *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130: see Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 391-394.

178 See also *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524, Handley JA at 540; *S & E Promotions v Tobin Bros* (1994) 122 ALR 637 at 654.

179 Dawson J at 454, who also adopted estoppel reasoning on this point, found the detriment in not tendering the balance of the purchase price and thus placing themselves at risk of non-performance if the vendors went back on their word.

180 *Territory Insurance Office v Adlington* (1992) 109 FLR 124 at 131 (NT CA); *Chin v Miller* (1981) 56 FLR 359.

181 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 442. See also *Commonwealth v Clark* (1994) 2 VR 333, Marks J at 341 (App Div).

182 See, for example, *Griffiths v Williams* (1978) 248 EG 947 (CA); *Pascoe v Turner* [1979] 2 All ER 945 discussed in Oughten R D, "Proprietary Estoppel: A Principled Remedy" (1979) 129 *New Law Journal* 1193.

183 See, for example, *Knights v Wiffen* (1870) LR 5 QB 660; *Dixon v Kennaway & Co* [1900] 1 Ch 833; *Thompson v Palmer* (1933) 49 CLR 507; *Trenorden v Martin* [1934] SASR 340; *Fung Kai Sun v Chan Fui Hing* [1951] AC 489; *S & E Promotions v Tobin Bros* (1994) 122 ALR 637; *Nigel Watts Fashion Agencies Pty Ltd v GIO General Ltd* (1995) 8 ANZ Ins Cas 61-235; *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Ins Cas 61-258.

person has certain legal rights in property, although there are circumstances, such as the fraud of another party, which make those rights void, the nature of the reliance will be in not taking action against the defrauder until it is too late to seek redress. The question will then arise as to whether the person claiming legal title contributed in any way to the assumption that the title of the other party was valid. In *Fung Kai Sun v Chan Fui Hing* [1951] AC 489, the Privy Council had to decide whether a culpable delay by some owners of real property in informing the appellant, to whom mortgages of the land had been given, that the mortgages had been made fraudulently, raised an estoppel preventing them from gaining a declaration that the mortgages were fraudulently obtained and thus null and void. The argument of the appellant was that the three-week delay between the discovery of the forgery by the owners and the conveyance of this information had deprived him of an opportunity to obtain restitution from the forger. The Privy Council held that the test was whether the chance of recovery must have been materially prejudiced by the delay. In applying this to the facts, they found that no such detriment was suffered.

[735] The burden of proof in showing detriment rests with the person claiming the benefit of the estoppel. This is the position in Australia, although the matter is not without doubt in the United Kingdom. The problem arises in particular where the detriment claimed is that which results from inaction, for example in cases where a person claims reliance on an induced assumption that title to property is valid. There has been some divergence in the English authorities about the burden of proof concerning the detriment once it has been shown that the party legally entitled played a part in adopting the assumption of validity. The question is whether it is for the party claiming the estoppel to show that, as a result of reliance on the validity of the title, an opportunity to seek redress against another was lost, or whether the burden shifts to the other party to show that no opportunity was in fact lost.

In *Fung Kai Sun v Chan Fui Hing* [1951] AC 489, the Privy Council appears to have assumed, without averting to the point, that the burden of proof remained with the person claiming the benefit of the estoppel (at 506). However, there is some specific authority to the contrary. In *Dixon v Kennaway & Co* [1900] 1 Ch 833, the plaintiff purchased shares through a broker who was also secretary of the relevant company. The person from whom the shares were transferred had no valid title to the shares. In fact, those shares were issued to the company chairman. A share certificate was issued to the plaintiff. The transaction was secured

through the misconduct of the broker, who subsequently went bankrupt. Farwell J held that the issuing of an apparently valid share certificate raised an estoppel against the company and that where a person against whom a claim may be made goes bankrupt, the onus of proof rests upon the party denying the estoppel to show that no detriment in fact occurred from the failure to pursue a claim before the bankruptcy.

This case was discussed, but disapproved, by Dixon J in *Thompson v Palmer* (1933) 49 CLR 506. In this case, the appellant sought to establish an estoppel against the respondent's claim for a vendor's lien to secure unpaid purchase moneys as a result of the fraud of a solicitor with whom both the appellant and the respondent's predecessors as trustees had been dealing. One reason for denying such relief was that the appellant had not relied to his detriment. Dixon J dealt with the argument that the detriment lay in the changed position which resulted from the bankruptcy of the solicitor, and cited *Dixon v Kennaway & Co* concerning the burden of proof. In disapproving of this case, his Honour stated ((1933) 49 CLR 506 at 549):

> "The very foundation of the estoppel is the change of position to the prejudice of the party relying upon it, and I think the burden of proving the issue must lie upon him."[184]

This is the same position as holds in the case of a fraudulent misrepresentation (*Gould v Vaggelas* (1985) 157 CLR 215).

[736] A causal connection between the assumption and the detriment must be shown. It is not sufficient that the party claiming the estoppel can show some form of detriment. The detriment must flow, at least in part, from reliance on the assumption. The burden of proof in showing this causal connection is normally on the person claiming the estoppel, but there is High Court and other authority for the proposition that in certain cases detrimental reliance will be presumed from inaction, and that the burden of proof to rebut this presumption will rest on the party against whom the estoppel is raised. In *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723,[185] a claim was made against a life assurance company that there had been a policy in favour of a deceased despite his failure to pay his premiums for a considerable period and despite letters which indicated that he

184 Applied in *Trenorden v Martin* [1934] SASR 340. To similar effect, in the context of the implied authority of an agent to bind a principal, the High Court has held that the burden of proof is with the person claiming reliance: *Hoare v McCarthy* (1916) 22 CLR 296.

185 For similar issues concening a belief about insurance cover, see also *Territory Insurance Office v Adlington* (1992) 109 FLR 124.

needed to apply for reinstatement. A claim of estoppel was made on the basis that the company had continued to send him bonus certificates until his death. Rich, Dixon and Evatt JJ said that even if he had believed that he had a valid life assurance policy, he had not relied to his detriment. They said (at 735):

> "In the present case complete inaction on his part is all that can be relied upon. He took no steps towards reviving his policy with the respondent society, and no steps towards obtaining any form of life assurance elsewhere. If it appeared that his supposed belief was a contributing cause of this inaction, sufficient connection between the assumption and the position of detriment would be established. Where inaction is the natural consequence of the assumption, the prima facie inference may be drawn in favour of the causal connection ... Any general presumptive connection between inaction and a belief in a state of facts must depend upon probabilities which arise from the common course of affairs, and accordingly must be governed by circumstances."

It follows from the above statement of the High Court that there are some circumstances where the causal connection between inaction which constitutes detrimental reliance and the assumption which was adopted, may be presumed. The party claiming the estoppel must still demonstrate, however, that the inaction would operate as a detriment if the assumption on which reliance is presumed were to be departed from.

[737] The causal connection between the assumption and the detriment may be presumed once a representation is calculated to influence the decisions of a reasonable person. In *Greasley v Cooke* [1980] 3 All ER 710 (CA), the appellant sought a declaration that she was entitled to remain in a house for the rest of her life since she acted to her detriment in reliance on the encouragement of family members that she would be allowed to remain. Initially she had entered the household as a maid, but eventually, she became the de facto spouse of one of the sons. The detriment which she claimed was that she had remained in the house caring for a mentally ill member of the family without pay in reliance on the assumption of her secure future. The trial judge took the view that she had to prove that she worked without payment because of her belief that she would be entitled to live in the house as long as she lived, and that since she had stayed in the house without pay before the representations were made, she failed to satisfy this burden of proof. The Court of Appeal rejected this approach. They held that, once it is shown that a representation was calculated to influence the judgment of

a reasonable person, the presumption is that he or she was so influenced.[186] The burden of proof rested on the representors to show that the appellant had not relied on the assumption in acting to her detriment.[187]

Responsibility for the assumption

[738] The person to be estopped must have induced the assumption. Dixon J said in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 675:

> "The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis for action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied."

The means by which an assumption may be induced in such a manner as to raise an estoppel are listed by Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 at 547. In his exposition of estoppel in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 444, Deane J grouped these into four main categories:

- where the party has induced the assumption by express or implied representation;
- where the party has entered into contractual or other mutual relations with the other party on the conventional basis of the assumption;

186 The court relied on the similar approach taken to representations made in the course of pre-contractual negotiations. In *Reynell v Sprye* (1852) 1 De GM & G 660 at 708; 42 ER 710, Cranworth LJ said: "Where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed, to adopt a particular line of conduct, it is impossible to say of any one such representation so made that, even if it had not been made, the same resolution would have been taken, or the same conduct followed." See also *Smith v Chadwick* (1882) 20 Ch D 27, Lord Jessel MR at 44-45. For a defence of this presumption see Spence M, *Protecting Reliance* (Hart, Oxford, 1999), pp 42-44.

187 Applied in *Habib Bank Ltd v Habib Bank AG* [1981] 2 All ER 650 (CA); *Re Basham* [1986] 1 All ER 405 (Ch). Compare the reasoning of Lord Denning MR in *Brikom Investments Ltd v Carr* [1979] QB 467 at 482-483. See also *Grant v Edwards* [1986] Ch 638, Browne-Wilkinson V-C at 657 (CA); *Austin v Keele* (1987) 10 NSWLR 283, Lord Oliver (for the Privy Council) at 291-292.

- where the party has exercised against the other party rights which would exist only if the assumption were correct;
- where the party knew that the other party laboured under the assumption and refrained from correcting the other party when it was her or his duty in conscience to do so.

These four categories may otherwise be termed estoppel by representation, estoppel by convention, estoppel by exercise of rights, and estoppel by silence. Within them, all the other various forms of estoppel may be included.

Estoppel by express or implied representation

[739] An estoppel occurs where a party induces an assumption in another by express or implied representation, which is relied on by that other to her or his detriment. Eight requirements must be proved in order to show that a person is to be held responsible for a representation:

1. There must be a representation by words or conduct.
2. The representation must be made by or on behalf of the person to be estopped.
3. The representation must come to the notice of the claimant.
4. The representation must be believed.
5. The representation must be voluntary.
6. The representation must be clear and unambiguous.
7. The representation must state that which the claimant relies on to found the estoppel.
8. The representation must be such that a reasonable person would believe that it was intended to be acted on.

[740] There must be some form of representation. This requires an element of communication, used in the broadest sense, from one person to another.[188] The representation may be implied from conduct or "by any of the means available for the expression and communication of thought".[189] An entry by a bank into its ledger will not constitute a representation to the customer, although an entry in the passbook would do so (*Akrorerri*

188 For example, in *Dionissis v R; The Laura* (1865) 3 Moo PCC NS 181; 16 ER 68 (PC), the action of a shipowner who was not entitled to British registration in obtaining that registration and sailing under a British flag estopped him from denying the Admiralty Court's jurisdiction.

189 Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), p 45.

(Ashanti) Mines Ltd v Economic Bank [1904] 2 KB 465, Bigham J at 470). A mutual assumption about a state of affairs in the absence of any representation by one to the other concerning it, will also not found an estoppel (*McCathie v McCathie* [1971] NZLR 58 (CA)). In one case, the theft of a blank bill of exchange from the defendant's desk was not a "representation" by the defendant (*Baxendale v Bennett* (1878) 3 QBD 525 (CA)).

[741] The representation must be made by or on behalf of the person to be estopped. In *Discount Finance Co Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598, the defendant sureties could not claim the benefit of a recital in the mortgage that the mortgage was made by the mortgagor as beneficial owner, since that statement was not made by the finance house but by the mortgagor.[190]

[742] The representation must come to the notice of the claimant. This follows from the necessity for the party claiming the estoppel to have relied on the alleged representation. Thus, the defendant was not estopped from denying that she was a partner in a real estate agency, despite being registered as such, since neither the plaintiff nor anyone on the plaintiff's behalf at any time saw a copy of the relevant registers (*Press v Mathers* [1927] VLR 326 (FC)). Similarly, a party could not claim the benefit of a provision in a company's articles of association where he was in fact ignorant of the term in question (*South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496).

[743] The representation must be believed.[191] Thus, where the proposer of a policy for fire insurance received a receipt for the amount of the premium, although he had not paid it, he could not rely on the receipt as founding an estoppel against the insurance company since he had not believed that he had a binding insurance contract. The company subsequently acted to make it clear that the amount was still owing (*Newis v General Accident, Fire & Insurance Corp* (1910) 11 CLR 620).[192]

[744] The representation must be voluntary. Thus, an estoppel by representation could not arise where the representation relied upon was coerced by armed robbers (*Debs v Sibec Developments*

190 In any event, the court held that the representation was not made, or reasonably to be interpreted, as a statement of fact.

191 "A person setting up the doctrine of estoppel has to show, not only that the representation has been made to him, but that he believed in its truth": *Thompson v Palmer* (1933) 49 CLR 506, Evatt J at 552. See also *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, Lord Wright at 56 (PC).

192 See also *Lowe v Lombank Ltd* [1960] 1 WLR 196.

Ltd [1990] RTR 91).[193] Similarly where a man was wrongfully arrested for non-payment of a debt under a mistake of identity and deposited money for the amount of the debt plus costs to secure his release, he was held not to be estopped from denying that he was in fact the debtor (*De Mesnil v Dakin* (1867) LR 3 QB 18).

[745] The representation must be clear and unambiguous.[194] This does not mean, however, that only one construction should be possible. Bowen LJ, in an oft-quoted passage in *Low v Bouverie* (1891) 3 Ch 82 at 106, stated

> "An estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."

In the same case, Kay LJ said that "it is essential to show that the statement was of such a nature that it would have misled any reasonable man" (at 113). These statements were cited with approval by Isaacs ACJ in *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355 at 375.[195]

The statements in *Low v Bouverie* were discussed extensively in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741,[196] in which promissory estoppel was in issue, and the requirement that the representation should be unambiguous was strictly applied. However, their Lordships acknowledged that the meaning adopted need not be the only possible meaning of the words used. Lord Hailsham understood Bowen LJ to mean that the language used must be sufficiently

193 See also Brown I, "Involuntary Estoppel and Transfer of Title in the Sale of Goods" [1990] 41 *Northern Ireland Law Quarterly* 257.

194 *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355; *Dabbs v Seaman* (1925) 36 CLR 538; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723; *Reed v Sheehan* (1982) 39 ALR 257 (FC Fed Ct); *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 435 ("it has long been recognised that a representation must be clear before it can found an estoppel in pais"); *Low v Bouverie* [1891] 3 Ch 82 (CA); *Nippon Menkwa Kabushiki Kaisha v Dawsons Bank Ltd* (1935) 51 Lloyds L Rep 147 (PC); *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741.

195 This statement was itself cited with approval by Mason and Deane JJ in *Legione v Hateley* (1983) 152 CLR 406 at 435-436. Isaacs J approved the same passages in *Dabbs v Seaman* (1925) 36 CLR 538 at 550, with regard to estoppel by convention.

196 Their Lordships were also discussing, and criticising, the dictum of McNair J in *Bute (Marquess) v Barclays Bank Ltd* [1955] 1 QB 202 at 213, that it is enough that the representation was "reasonably understood to be clear and unequivocal".

precise and free from ambiguity to ensure that the representation will be reasonably understood in the sense required, although there may be far-fetched and strained interpretations which could be placed upon the words (*Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 756). Lord Salmon said that the words need not be so unequivocal that it is impossible to extract from it some possible meaning other than the true meaning (at 771). Lord Cross said that the question to ask is whether the representee was justified in having no doubt that the words meant what he took them to mean, although whether this is or is not the case may depend on the relationship of the parties (at 768).[197]

It may be that the requirement that the words be clear and unequivocal is especially stringent in the case of promissory estoppel, and that this explains the desire of the House of Lords to interpret the statements of Bowen and Kay LJJ restrictively. In a case of promissory estoppel, the claimant has a particularly strong onus of proof to establish that the representation was intended to have promissory effect, since the assumption in the absence of consideration is that the statement was not intended to affect the legal relations of the parties.[198] Where the words of the alleged promise are to a certain extent ambiguous, the court may take this into account in reaching the conclusion that no promise was intended.[199]

A further distinction may perhaps be drawn between whether words or conduct are relied upon. Where the representation is said to arise from the text of a document as in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, a greater standard of clarity ought to be expected than where the alleged representation is based on conduct or a

197 Lord Cross cited the case of *Ireland v Livingston* (1872) LR 5 HL 395 to illustrate this proposition. In that case, a principal was held responsible for the construction which his commission agent placed on ambiguous instructions. However, as Lord Hailsham noted (at 757), this was not a true case of estoppel, and stands rather as authority concerning the liability of a principal where an agent reasonably misunderstands the principal's instructions. He noted also that Lord Westbury introduced his judgment in the case by saying that it turned on its own peculiar circumstances.

198 Other statements indicate that the representation must be at least as unequivocal as that which would give rise to a contract if there were consideration: *China-Pacific SA v Food Corp of India* [1981] QB 403, Megaw LJ at 429 (revd on other grounds [1982] AC 939); *Drexel Burnham Lambert International NV v El Nasr* [1986] 1 Lloyds Rep 356, Staughton J at 365.

199 This follows from the difference between a variation of a contract (or indeed a fresh contract) and a promissory estoppel, see *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23, Lord Denning MR at 60. Where there is clearly a promise intended (as shown by the existence of consideration), the only issue is what it means. Where both are uncertain, the court may infer from the uncertainty of the language used that no promise was intended, or alternatively, that the representee was not reasonably justified in believing that a promise was intended.

mixture of words and conduct. With conduct, necessarily there is a process of inference rather than construction which makes the dicta in *Woodhouse* inapplicable, and which makes it more realistic to ask how the conduct would have been interpreted by a reasonable person.[200]

[746] The representation must be construed as a whole to determine whether it is clear and unambiguous.[201] This principle applies whether one is interpreting a document, or oral representations[202] or representations implied from conduct.[203] A statement taken in isolation may appear to be clear and unequivocal, but it will not found an estoppel if there are other words in the document which amount to a qualification, even if those words are unclear and equivocal. In *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, the Privy Council affirmed the decision of the Supreme Court of Canada that shipowners were not estopped by a statement in the bill of lading that the cargo was received "in apparently good order and condition", because that was qualified by a stamped clause which read "signed under guarantee to produce ship's clean receipt". The ship's receipt was not "clean". Rather, it indicated that the cargo was received in a damaged state. The Privy Council rejected the argument of the appellants that a clear and unambiguous representation can be qualified only by terms which are equally clear and unambiguous. Lord Wright stated the document must be taken as a whole, and that a question of estoppel must now be "decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities".[204]

200 Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 83-84. The distinction is implied by Powell J in *Kurt Keller Pty Ltd v BMW Australia Ltd* [1984] 1 NSWLR 353 at 370-371 where he says that in order to rely upon a promissory estoppel "one must be able to point to, either, a statement which constitutes, or conduct from which a reasonable man would infer, a clear and unequivocal representation by the person having the particular legal power, or discretion either that, in the future, he would not exercise that power or discretion at all, or that, for a time, the power would be suspended". See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] QB 529, Robert Goff LJ at 534-535.

201 *Bourne v Freeth* (1829) 9 B & C 632; 109 ER 235 (KB); *Re Consort Gold Mines Ltd* [1897] 1 Ch 575 (CA); *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 (PC).

202 *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652.

203 *Firth & Sons v de las Rivas* [1893] 1 QB 768 (appearance in an action under protest as to jurisdiction).

204 *Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, Lord Wright (for PC) at 55. Difficult questions of construction may arise when claims of estoppel depend on the interrelationship of two or more documents; however here, too, normal common law principles of construction apply: *Hogarth Shipping Co Ltd v Blyth, Green, Jourdain & Co Ltd* [1917] 2 KB 534 (CA); *Territorial and Auxiliary Forces Association of the County of London v Nichols* [1949] 1 KB 35 (CA).

Nonetheless, while a representation must be clear, taking the document as a whole, it can be reduced to what is clear by discarding so much of its content as is equivocal or ambiguous (*Foran v Wight* (1989) 168 CLR 385, Deane J at 435-436). The court may find a representation where it discovers clearly the kernel of what was represented, even in the middle of other statements which are ambiguous.

[747] The representation must state that which the claimant relies on to found the estoppel. In *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, the House of Lords had to decide the effect of a representation by a central hire-purchase registry that a particular car which had been offered for sale to a dealer was not subject to a credit sales agreement. The dealer contended that it was a statement made on behalf of the finance company that the car was not so encumbered. On a close examination of the oral and written representations made by the registry however, the court construed the representation as one concerning the state of the company's records, and not that the finance company did not have a hire-purchase agreement in respect of the vehicle.[205]

[748] The representation must be such that a reasonable person would believe that it was intended to be acted upon.[206] This requirement is put in many ways in the cases on estoppel, but the underlying principle remains the same; responsibility only attaches to those statements which a reasonable person would consider were meant to be relied upon, on the basis of the language in which and the conduct by which, they were conveyed, and in all the circumstances of the relationship of the parties. In *Commonwealth v Verwayen* (1990) 170 CLR 394 at 445, Deane J expressed the requirement in this way:

> "Ultimately, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption … In cases [where the assumption has been induced by express or implied representation], a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to

205 See also *Bank of China v Standard Chartered Bank Australia Ltd* (unreported, New South Wales, 16 July 1991).

206 *Pierson v Altrincham Urban Council* (1917) 86 LJ KB 969, Lush J at 973: "It is vital to the creation of estoppel that the party to whom the representation is made should not only believe, but believe reasonably from the representation, that it was contemplated by the person who made it that the person to whom it was made would act upon it."

> have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption."

The requirement that the representee must be justified in relying upon the assumption cannot be satisfied if the representation is of such a nature that no one could reasonably believe that it was intended to be acted upon. Another reason why reliance may not reasonably be justified is because the representee should not reasonably expect that the agent making the representation was clothed with the authority to bind the principal in the circumstances of the case.[207] A third reason why it is unreasonable to rely upon an assumption is if the assumption concerns matters extending into the distant future. In *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182, the plaintiffs argued that they were led to take a 99-year lease over a property in a retirement village on the basis that their contributions to the weekly outgoings of the village would be affordable within the levels of their aged pension. The majority of the Full Court of the Federal Court[208] held that their assumption was unreasonable, given that new kinds of expenditure might arise over the life of a retirement village and increases in expenditure might arise from other unforseeable circumstances. Furthermore, a private company has no control over pension levels.

This focus on the reasonableness of the belief of the person relying on the assumption may appear to contradict the requirement, which is sometimes stated, that in order for an estoppel to arise, the representor must intend the statement to be acted upon.[209] The contradiction is only apparent however.[210] Whether or not there is found to be an intention that the representation be acted upon is a matter to be determined by examining the language and conduct of the party to be estopped. The issue is therefore not what the party subjectively intended, but what a reasonable person in the position of the representee would have understood the person to intend. If the statement is

207 *Legione v Hateley* (1983) 152 CLR 406; *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 (CA).

208 Branson and R D Nicholson JJ.

209 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 423; *Greenwood v Martins Bank* [1933] AC 51; *Nippon Menkwa Kabushiki Kaisha v Dawsons Bank Ltd* (1935) 51 Lloyds L Rep 147 (PC); *Combe v Combe* [1951] 2 KB 215 (CA); *James v Heim Gallery (London) Ltd* [1980] EG 184, Buckley LJ at 190: the representation is "one which the promisor intends to be binding; that is to say, it must have the qualities of a promise": *Goldsworthy v Brickell* [1987] Ch 378 (CA).

210 For a discussion of the theoretical debates on this issue see Pratt M, "Defeating Reasonable Reliance" (1999) 18 *University of Tasmania Law Review* 181; Robertson, A, "Reasonable Reliance in Estoppel by Conduct" (2000) 23 *University of New South Wales Law Journal* 87. See also Pratt M, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 *Adelaide Law Review* 209.

not of such a nature that one could reasonably expect it to be acted upon, then no intention that it should be acted upon will be attributed to its maker.[211]

This is made clear in a number of cases which have discussed the issue.[212] The leading authority is *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652, in which Parke B discussed the exposition of estoppel in *Pickard v Sears* (1837) 6 Ad & El 469 at 474; 112 ER 179, which refers to a person "wilfully" causing another to believe the existence of a certain state of things. In explaining this, Parke B said:

> "By the term 'wilfully' in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth".

The requirement for proof that the representation should reasonably be understood as being intended to be acted upon is particularly stringent in the case of promissory estoppel. This is because, in the absence of consideration, one would rarely be justified in concluding that the promise was meant to be binding. Indeed, the test is sometimes expressed in terms of an intention to affect the legal relations of the parties. In expounding the modern doctrine of promissory estoppel, Denning LJ referred in *Combe v Combe* [1951] 2 KB 215 at 220[213] to "a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly". In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387,

211 Courts may be especially reluctant to accept that a representation may be inferred that a party consented to an illegal act. In *Mulcahy v Hoyne* (1925) 36 CLR 41, a lessee of a hotel, with the knowledge and apparent acquiescence of the landlord, systematically engaged in trading in liquor during prohibited hours. A covenant in the lease provided that the tenant would not do anything which might lead the liqour licence to be forfeited. It was held that the landlord was not estopped from evicting the lessee for breach of covenant. One reason given by Knox CJ (at 50-51) was that, having regard to the serious consequences which might flow from the breach, the respondent could not reasonably have inferred that the landlord consented to the breach of this covenant.

212 *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652; *Seton, Laing & Co v Lafone* (1887) 19 QBD 68 (CA); *De Bussche v Alt* (1878) 8 Ch D 286 (CA), Thesiger LJ (for the court) at 315; *Pierson v Altrincham Urban Council* (1917) 86 LJ KB 969; *Spiro v Lintern* [1973] 3 All ER 319 (CA), Buckley LJ (for the court) at 328.

213 See also *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, Lord Diplock at 884; *Dewhirst v Edwards* [1983] 1 NSWLR 34, Powell J at 52-53.

Brennan J said (at 424): "A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise."

Where parties are in a particular legal relationship based on contract, or are maintaining the position that no legally binding obligations have yet arisen, the requirement of justified reliance on the representor's promissory intent is necessarily to be expressed in terms of an intention to affect the legal relations of the parties. Only this will convert negotiations which are stated to be subject to contract into legally binding agreements, or make binding a promise not to insist on one's strict legal rights.[214]

A further distinction may need to be drawn between cases where the alleged estoppel is said to arise prior to contract and cases where it is claimed a promise was made subsequently not to enforce contractual rights. The nature of ongoing contractual relationships is such that one might more readily infer a promissory intent to suspend or forgo strict contractual rights in the light of new circumstances which have arisen, than to infer a promissory intent when the parties are still undergoing the process of negotiation towards entry into an ongoing contractual relationship.

[749] Estoppel by express or implied representation is a category which may subsume certain other types of estoppel, including estoppel by encouragement. However, estoppel by encouragement has developed in a separate historical context and with particular rules.[215] It arises where one party creates in another a belief that

214 See the discussion by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 420-424.

215 Its historical development is closely associated with another form of estoppel, estoppel by acquiescence: see below, para [762]. The two doctrines are often expounded together and are treated as forms of proprietary estoppel. Lord Eldon LC said in *Dann v Spurrier* (1802) 7 Ves 231 at 235-236; 32 ER 94: "I fully subscribe to the doctrine of the cases, that have been cited; that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement." Many cases where a landowner has encouraged a belief that a party has or will have an interest in land may be interpreted as "mistaken belief" cases since the claimant is mistaken as to the true legal position, and the language of acquiescence is often used where a right arises from an informal agreement: see, for example, *Jackson v Cator* (1800) 5 Ves Jun 688; 31 ER 806 (Ch); *Ramsden v Dyson* (1866) LR 1 HL 129; *E R Ives Investment Ltd v High* [1967] 2 QB 379 (CA). Requisites which were developed in a case of estoppel by acquiescence (*Willmott v Barber* (1880) 15 Ch D 96) also came to be cited regularly by counsel in cases of estoppel arising from agreement or encouragement: *Hopgood v Brown* [1955] 1 All ER 550 (CA); *Ward v Kirkland* [1967] Ch 194; *Crabb v Arun District Council* [1976] Ch 179 (CA); *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch).

the person has, or an expectation that the person will have, an interest in property, and that person expends money or otherwise acts in detrimental reliance on the assumption. The principle is to be seen at work in many 19th century cases,[216] and has been applied and developed in numerous cases in the 20th century.[217] All of these cases concerned interests in property, but the detriment need not involve expenditure on the land in which an interest is claimed. In *Crabb v Arun District Council* [1976] Ch 179 (CA) a landowner subdivided his own land and sold a portion of it, leaving him without access to the road on an assumption induced by the conduct of the local council that he would be allowed to use another access point and be given a right of way over council land. The detriment lay in the sale of his own land without reserving for himself a right of way over that property.

The principle of estoppel by encouragement has been applied where a father paid for an extension to the house of his son and daughter-in-law in the expectation that he would be able to live there indefinitely;[218] where a family member relied to his detriment on the belief that he would be able to purchase family-owned land at a discounted value;[219] where a man, after leaving the house in which he had been living with his de facto spouse, told her that the house was hers and everything in it, and she incurred expenditure in improving the property;[220] where a man built a house belonging to a woman in the expectation that they would marry and that he would be a joint owner;[221] and where a father encouraged his son to build on the father's land and created an expectation that the son would be able to stay there as long as he wished.[222]

216 *Gregory v Mighell* (1811) 18 Ves Jun 328; 34 ER 341 (Ch); *Duke of Devonshire v Elgin* (1851) 14 Beav 530, 51 ER 389 (Rolls Ct); *Duke of Beaufort v Patrick* (1853) 17 Beav 60; 51 ER 954 (Rolls Ct); *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; 53 ER 563 (Rolls Ct); *Laird v Birkenhead Railway Co* (1859) Johns 500; 70 ER 519 (Ch).

217 *Whitehead v Whitehead* [1948] NZLR 1066 (CA); *Hopgood v Brown* [1955] 1 All ER 550 (CA); *Inwards v Baker* [1965] 2 QB 29 (CA); *Ward v Kirkland* [1967] Ch 194; *E R Ives Investment Ltd v High* [1967] 2 QB 379 (CA); *Siew Soon Wah v Yong Tong Hong* [1973] AC 836 (PC); *Jones v Jones* [1977] 2 All ER 231 (CA); *Griffiths v Williams* (1978) 248 EG 947 (CA); *Jackson v Crosby (No 2)* (1979) 21 SASR 280 at 291 (FC); *Pascoe v Turner* [1979] 2 All ER 945 (CA); *Greasley v Cooke* [1980] 3 All ER 710 (CA); *Morris v Morris* [1982] 1 NSWLR 61; *Vinden v Vinden* [1982] 1 NSWLR 618; *Cameron v Murdoch* (1986) 60 ALJR 280 (PC); *Maharaj v Chand* [1986] AC 898 (PC); *Riches v Hogben* [1986] 1 Qd R 315 (FC); *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 467 (CA).

218 *Morris v Morris* [1982] 1 NSWLR 61.

219 *Cameron v Murdoch* (1986) 60 ALJR 280 (PC).

220 *Pascoe v Turner* [1979] 2 All ER 945 (CA).

221 *Jackson v Crosby (No 2)* (1979) 21 SASR 280 at 291 (FC).

222 *Inwards v Baker* [1965] 2 QB 29.

As with all forms of equitable estoppel, it is for the court to decide in what way the equity should be satisfied.[223] In a situation where the benefits gained by occupation of the land equal or outweigh any detrimental reliance, relief may be refused entirely (*Beaton v McDivitt* (1987) 13 NSWLR 162 (CA)).

[750] Estoppel by encouragement has a close connection with the principles of the constructive trust based upon a common intention as expounded by Lord Diplock in *Gissing v Gissing* [1971] AC 886.[224] In Victoria, these principles were expounded afresh by O'Bryan J in *Hohol v Hohol* [1981] VR 221, O'Bryan J said that the elements required for such a constructive trust were that there was a common intention as to the ownership of the beneficial interest in the property, detrimental reliance on that common intention by the party claiming a beneficial interest, and that it would be a fraud on the claimant for the other party to deny the claimant's entitlement to a beneficial interest. The similarity between this approach and the principles of proprietary estoppel (which includes estoppel by encouragement) has been explicitly recognised both in Australia,[225] and in the United Kingdom,[226] and also by the Privy Council, on an appeal from New South Wales.[227] Indeed, in England, the terms "constructive trust" and "proprietary estoppel" are now being invoked interchangeably when *Gissing v Gissing* is applied (*Lloyds Bank plc v Rosset* [1990] 2 WLR 867 (HL)).

[751] Estoppel by negligence is another variety of estoppel which may be subsumed within the category of estoppel by representation. This form of estoppel is referred to in many authorities,[228] but it

223 *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699, Sir Arthur Hobhouse (for the Privy Council) at 714; *Inwards v Baker* [1965] 2 QB 29 (CA); *E R Ives Investment Ltd v High* [1967] 2 QB 379 (CA), Lord Denning MR at 394-395.

224 See further Parkinson P, "Doing Equity Between De Facto Spouses: From Calverley v Green to Baumgartner" (1988) 11 *Adelaide Law Review* 370 at 398-404. See also Davies J D, "Informal Arrangements Affecting Land" (1980) 8 *Sydney Law Review* 578.

225 *Higgins v Wingfield* [1987] VR 689, McGarvie J at 695-696.

226 In *Grant v Edwards* [1986] Ch 638, Browne-Wilkinson VC said at 656: "I suggest that in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing* [1971] AC 886. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will have an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such a belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions."

227 *Austin v Keele* (1987) 61 ALJR 605 at 609, where Lord Diplock's doctrine in *Gissing v Gissing* [1971] AC 886 was said to be, in essence, "an application of proprietary estoppel".

228 *Coventry, Sheppard & Co v Great Eastern Railway Co* (1883) 11 QBD 776 (CA); *Bell v Marsh* [1903] 1 Ch 528 (CA); *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890.

is a term of uncertain meaning and the term has been extensively criticised.[229] In its origins, it was used merely to indicate a representation which arose as a result of negligence, rather than fraudulently or innocently.[230] Used in this sense it is unexceptionable.[231] However, "estoppel in the normal sense of the word does not arise from negligence, it arises from a representation made by words or conduct" (*Saunders v Anglia Building Society* [1971] AC 1004, Lord Pearson at 1038). The significant factor is not whether the representation was made innocently, negligently or fraudulently, but that it was made at all.[232] Without such a representation, either in words or by conduct or implicit from silence, there can be no estoppel. Attempts to imply a representation of good title to defeat a claim for conversion only on the basis that the legal owner was negligent in allowing the property to be stolen have been rejected.[233]

The term estoppel by negligence is often used to refer to the position of a party who kept silence when there was a duty to

229 Cababé M, *The Principles of Estoppel* (Maxwell, London, 1888), pp 143-146; Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 72-79.

230 The origins of the doctrine may be traced to *Carr v London & North Western Railway Co* (1875) LR 10 CP 307, in which Brett J (at 317), sought to identify with particularity the different ways in which an estoppel might arise from a representation. He included statements which the representor knew to be false, representations which were intended to be acted upon, representations which a reasonable person would think were intended to be acted upon, and where "one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result". See further the commentary on this classification by the same judge (Lord Esher MR, as by then he had become) in *Seton, Laing & Co v Lafone* (1887) 19 QBD 68 at 70-72 (CA). Such precise classification was subsequently disavowed by Lord Macnaghten in *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 130.

231 It was used in this way in *Thompson v Palmer* (1933) 49 CLR 507 at 547. Dixon J included, as a reason why a person may be held responsible for an assumption, "because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption". This passage was considered by Gaudron J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, at 462-463, and by Kirby P (dissenting) in *Lorimer v State Bank of New South Wales* (unreported, New South Wales Court of Appeal, 5 July 1991). Kirby P (at 36, 37) considered that it is sufficient, for this ground of estoppel, that imprudence, where prudence was required, was merely a proximate cause of the assumption being adopted and acted upon. It need not be the only cause. In his view, therefore, it might be easier to satisfy this test than the test for the third ground of preclusion, which arises where a person fails to correct a mistaken assumption when duty-bound to do so.

232 See *Seton, Laing & Co v Lafone* (1887) 19 QBD 68, Fry LJ at 74, discussing the requirement of causation: "the inquiry whether the statement was the proximate cause does not depend on the intention of the party making it. In order to ascertain whether a statement by one person has brought about the action of the other, you must look at the condition of mind and circumstances of the person to whom the statement was made not of the person making the statement."

233 *Swan v North British Australasian Co* (1863) 2 H & C 175; 159 ER 73 (Ex Ch); *Farquharson Brothers & Co v King & Co* [1902] AC 325; *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890.

speak.[234] However it is not generally by reference to the law of negligence that this duty to speak is ascertained[235] (although sometimes such reasoning is used), and the ancillary requirements of the law of negligence such as proximity and foreseeability may be applied confusingly to this branch of the law without justification (*Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 903).

Estoppel by convention

[752] Estoppel by convention arises where a party has entered into contractual or other mutual relations with the other party, or otherwise operated in respect to those relations, on the basis of an agreed or assumed state of facts and it would therefore be unconscionable to resile from them.[236]

Rory Derham has described the elements of an estoppel by convention in the modern law as follows:[237]

> "Estoppel by convention may arise where the parties to a contract have admitted a particular fact or state of affairs as the basis of the contract, when that fact is incorrect. The admission commonly occurs in a recital, though it may appear elsewhere. If as a matter of construction it is intended to be a statement of both parties, and it relates to something particular and material and is not merely general or descriptive, so as to constitute a precise and unambiguous statement of the issue in question, and depending on the circumstances, if the truth does not appear elsewhere in the same instrument, it may estop them both in any action between them founded on the contract, as opposed to an action which is merely collateral to it."

234 *Freeman v Cooke* (1848) 2 Ex 654, Parke B at 663; 154 ER 652: "conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect" as a representation by express language or positive acts.

235 See further below, para [760].

236 See also above, para [707]; *Horton v Westminster Improvement Commisioners* (1852) 7 Ex 780; 155 ER 1165 (Ex); *M'Cance v London & North Western Railway Co* (1861) 7 H & N 477; 158 ER 559 (Ex) (affd in *M'Cance v London & North Western Railway Co* (1864) 3 H & C 343; 159 ER 563 (Ex Ch)); *Ashpitel v Bryan* (1863) 3 B & S 474; 122 ER 179 (QB); affd *Ashpitel v Bryan* (1864) 5 B & S 723; 122 ER 999 (Ex); *Ferrier v Stewart* (1912) 15 CLR 32; *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 674-677; *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444. This form of estoppel was described in *Burkinshaw v Nicholls* (1878) 3 App Cas 1004, by Lord Blackburn at 1026, as a "most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered".

237 Derham R, "Estoppel by Convention — Part I" (1997) 71 *Australian Law Journal* 860 at 861. See also "Estoppel by Convention — Part II" (1997) 71 *Australian Law Journal* 976.

Estoppel by convention is, however, not confined to statements made as recitals to contracts or in other instruments. An estoppel by convention may arise from a mutual understanding whether or not it is expressed in writing.[238]

The difference between this and estoppel by representation is explained by the High Court in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244:

> "Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted upon by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying."

The requisites of an estoppel by convention are that there must be an assumption which is mutually agreed by the parties to form the basis of their relations. The source of that assumption is immaterial. It need not have originated with a statement by the party against whom the estoppel is asserted (*The Amazonia* [1990] 1 Lloyd's Rep 236, Staughton LJ at 247).

However, it is not enough merely that the parties entered into a contract under a common, but mistaken, assumption. Lord Denning MR sought to argue for a wider principle for estoppel by convention. In his view, it was enough to establish an estoppel by convention that the parties to a contract "are both under a common mistake as to the meaning or effect of it … and thereafter embark on a course of dealing on the footing of that mistake" (*Amalgamated Investment & Property Co Ltd v Texas Bank* [1982] QB 84 at 121). However this proposition has been explicitly rejected both in England[239] and Australia.[240] In *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte (The August Leonhardt)* [1985] 2 Lloyd's Rep 28 at 34-35, the English Court of Appeal stated:

238 For an explanation of the requirements of estoppel by convention in New Zealand see *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548n, Tipping J at 550.

239 *Keen v Holland* [1984] 1 All ER 75 (CA); *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte (The August Leonhardt)* [1985] 2 Lloyd's Rep 28 (CA). But see *Kenneth Allison Ltd v A E Limehouse & Co* [1992] 2 AC 105, Lord Goff at 127 (estoppel by convention applicable "where both parties proceed on the basis of a common, but mistaken, assumption as to the legal effect of a certain transaction between them, and in consequence one party is so influenced by the conduct of the other that it would be unconscionable for the latter to take advantage of the former's error").

240 *Coghlan v S H Lock (Australia) Ltd* (1985) 4 NSWLR 158, McHugh JA at 177 (CA). See also *Bentham v Australia & New Zealand Banking Group Ltd* (unreported, Supreme Court of New South Wales, McLelland J, 26 June 1991) (unilateral mistake by bank could not found estoppel by convention without representation by customer).

> "All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct … in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption."[241]

Thus a common misapprehension for which neither party could be held responsible did not give rise to an estoppel in that case, and similarly in *Keen v Holland* [1984] 1 All ER 75, where a landlord let a farm to a tenant on the basis that it would not be a tenancy which attracted statutory protection, no estoppel arose to prevent the tenant relying on the statute when it was determined that the tenancy was in fact protected. The statute could not in any event be ousted by agreement, but furthermore the tenant had done nothing which would make him responsible for the assumption. The parties had merely entered into an agreement which they believed would produce a certain legal result. This could not found an estoppel by convention.

The parties need not actually believe the assumed facts to be true. Dixon J explained in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 676:

> "It is important to notice that belief in the correctness of the state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs. A tenant may know that his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him from relying on the defect. Parties to a deed sometimes deliberately set out an hypothetical state of affairs as the basis of their covenants in order to create mutual estoppel."

In *Amalgamated Investment & Property Co Ltd v Texas Bank* [1982] QB 84, the plaintiff arranged for a loan to be made by the defendant to a subsidiary company, and guaranteed the loan. For foreign exchange reasons, the money was actually lent by the defendant to its wholly owned subsidiary, and by the subsidiary

241 To similar effect, McPherson J said in *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40 at 46 that the "word 'conventional' in this context carries connotations of agreement, not necessarily express but to be inferred, or at least a demonstrable acceptance of a particular state of things, as the foundation for the dealings of the parties."

to the plaintiff's subsidiary. Subsequently, the plaintiff, through its liquidator, sought to deny that it had guaranteed the loan, since the money had not been lent by the defendant to its subsidiary directly, but through the defendant's subsidiary. The English Court of Appeal held that the plaintiff was estopped from denying that it was liable under the guarantee, since this was the agreed assumption upon which the parties had entered into the loan transaction. It did not matter that the mistaken assumption had originated with the defendant, since the parties had mutually agreed that the guarantee covered the liabilities of the plaintiff's subsidiary.[242]

[753] The language must be sufficiently unambiguous to give rise to an estoppel by convention,[243] and it is not sufficient to point to something in a deed or instrument from which the existence of the fact might be inferred.[244] This is true also where a representation is implicit from conduct. Thus in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J, with whom McTiernan J agreed, found that there was no conventional estoppel arising out of the conduct of the manager of a mine in continuing to receive and pay tributers for gold ore when it had been made clear that the manager considered that they were extracting the ore from an area outside of that covered by the tribute agreement. The manager did not lead the tributers to understand that the agreement extended to that lode. Where a course of dealing is explicable by reference to some assumption, which is just as plausible as the assumption on which the claim of conventional estoppel is based, then no estoppel will arise (*Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40).

[754] Only the parties to the transaction are bound by an estoppel by convention[245] and only in relation to that transaction.[246] This is

242 As explained in *Coghlan v S H Lock (Aust) Ltd* (1985) 4 NSWLR 158 (CA) (affd in *Coghlan v S H Lock (Australia) Ltd* (1987) 8 NSWLR 88 by the Privy Council on other grounds).

243 *Dabbs v Seaman* (1925) 36 CLR 538, Isaacs J at 549; *Greer v Kettle* [1938] AC 156, Lord Maugham at 170; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598, Jordan CJ at 603 (FC); *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40, McPherson J at 46 (FC) ("the acts or conduct relied upon must point plainly, if not unequivocally, to the assumption put forward as the conventional basis of relations").

244 *Onward Building Society v Smithson* [1893] 1 Ch 1 (CA); *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598, Jordan CJ at 603 (FC).

245 *Commissioner of Taxes (Queensland) v Ford Motor Co of Australia Pty Ltd* (1942) 66 CLR 261, Latham CJ and Rich J at 272.

246 *Carpenter v Buller* (1841) 8 M & W 209, Parke B at 213; 151 ER 1013: "There is no authority to shew that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence." See also *McCathie v McCathie* [1971] NZLR 58.

so because the object of the estoppel is to preclude departure from an assumption on which a particular transaction or legal relationship was founded. Necessarily, it will have no application therefore to legal relations with others or to other transactions between the parties which are not affected by the same mutual assumption.

[755] The facts which found an estoppel by convention may be stated in the recital to a deed, or other instrument.[247] It is said that "no man shall be allowed to dispute his own solemn deed";[248] however it is not every statement in a deed which will found an estoppel, but only those which form the basis on which the parties have entered into the transaction. A recital which states that money by way of consideration has been received will not usually found an estoppel,[249] either because such a statement is in equity capable of rectification[250] or because being merely an acknowledgment, it is not a representation which has formed the assumed state of affairs on which the transaction was founded or was not in any sense relied on.[251] However, the circumstances may be such that the recital of receipt of purchase moneys did in fact form the assumed basis of affairs on which the parties contracted (*Clark v Sheehan* [1967] NZLR 1038).

[756] A statement of fact will not be held to be adopted if it was not material to the transaction between the parties.[252] In *Skipworth v Green* (1724) 8 Mod Rep 311 at 313; 88 ER 222, Pratt CJ said in discussing an estoppel claimed on the basis of a deed:

> "It has been truly said at the bar that estoppels are odious in law; and it would be very hard that the defendant should be bound by this description; and though all the parties to an indenture are bound by the words thereof in point of law, because they agree to it; yet that must be intended of material words, and not to every minute and descriptive words and circumstances."[253]

247 *Carpenter v Buller* (1841) 8 M & W 209; 151 ER 1013 (Ex); *Young v Raincock* (1849) 7 CB 310; 137 ER 124 (CP); *Stroughill v Buck* (1850) 14 QB 781; 117 ER 301 (QB).

248 *Goodtitle d Edwards v Bailey* (1777) 2 Cowp 597, Lord Mansfield at 601; 98 ER 1260 (KB).

249 *Equitable Fire & Accident Office Ltd v Ching Wo Hong* [1907] AC 96 (PC); *Newis v General Accident Fire & Life Assurance Corp* (1910) 11 CLR 620; *Petersen v Maloney* (1951) 84 CLR 91.

250 *Burchell v Thompson* [1920] 2 KB 80, Lush J at 86 (CA).

251 *Newis v General Accident Fire & Life Assurance Corp* (1910) 11 CLR 620.

252 *Taylor v McCalmont* (1855) 26 LT (OS) 93; *Skipworth v Green* (1724) 8 Mod Rep 311 at 313; 88 ER 222.

253 For the requirement of materiality in relation to bills of lading see *Blanchet v Powell's Llantavit Collieries Co* (1874) LR 9 Exch 74; *Parsons v New Zealand Shipping Co* [1901] 1 KB 548 (CA). See also its use in fraudulent misrepresentation: *Smith v Chadwick* (1884) 9 App Cas 187.

[757] Where an estoppel is claimed on the basis of a deed or other instrument, it may be met by various defences. In equity, a party cannot set up an estoppel in reliance on a deed in relation to which the other party has an equitable right to recission or in reliance on an untrue statement or an untrue recital induced by her or his own representation, whether innocent or otherwise, to the other party (*Greer v Kettle* [1938] AC 156, Lord Maugham at 171). Legal and equitable relief may be available to the person against whom the estoppel is claimed if the form of the deed resulted from fraud[254] or if rectification is available in equity, due to a mistake of fact. To the extent of the rectification, there can be no estoppel based on the original form of the instrument (*Brooke v Haymes* (1868) LR 6 Eq 25).

[758] An estoppel by convention allegedly arising from pre-contractual negotiations will normally be excluded by the parol evidence rule if the contract has been reduced to writing.[255] The proper remedy, where the contract does not reflect the parties' mutual understanding, is rectification.[256] If there is an "entire contract" clause this in itself is likely to give rise to an estoppel by convention precluding reliance on any representations made in the course of pre-contractual negotiations (*Johnson Matthey Ltd v A C Rochester Overseas Corp* (1990) 23 NSWLR 190). However, it is possible nonetheless for an estoppel to arise from pre-contractual negotiations affecting the interpretation or application of the contract.[257]

Estoppel by exercise of rights

[759] An estoppel by exercise of rights arises where a party is held responsible for an assumption because that party has exercised against the other party rights which would exist only if the

254 *Norfolk's Case* (1667) Hard 464; 145 ER 549 (Ex); *Ruben v Great Fingall Consolidated* [1906] AC 439; *Greer v Kettle* [1938] AC 156, Lord Maugham at 171.

255 Whether an estoppel is always precluded by the parol evidence rule is a matter for debate. In *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146, an estoppel was held to arise to limit the scope of an "all-moneys" clause in a mortgage to the amount the wife thought she was guaranteeing. In *Liangis Investments Pty Ltd v Daplyn Pty Ltd* (1994) 117 FLR 28 at 34, Higgins J said that "it is at least arguable that pre-contractual assurances, even if involving the qualification of a subsequently written agreement, may found an equitable estoppel." The inconsistency between the alleged pre-contractual understanding and the written agreement may pose an evidential difficulty for the person asserting the estoppel, however.

256 *Johnson Matthey Ltd v A C Rochester Overseas Corp* (1990) 23 NSWLR 190; *Skywest Aviation Pty Ltd v Commonwealth* (1995) 126 FLR 61, Miles CJ at 102-106; *Australian Co-operative Foods v Norco* (1999) 46 NSWLR 267, Bryson J at 279. But see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833, Allsop J at 444-447. On rectification, see further below Chapter 27: "Rectification".

257 See above, para [728].

assumption were correct.[258] In *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305,[259] an insurance company was held bound by a claim for fire damage although the claim was submitted late in breach of a condition that the claim should be made within a certain period. The estoppel arose because they had subsequently acted as if they did have obligations under the contract of insurance, in particular, by taking possession of the premises for salvage purposes. Consequently, they were estopped by their conduct from relying on the breach of condition relating to time to defeat the plaintiff's claim.

Estoppel by exercise of rights may otherwise be known as the principle that a person may not both approbate and reprobate.[260] Thus stated, the principle is that:

> "A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purposes of securing some further advantage." (*Smith v Baker* (1873) LR 8 CP 350, Honyman J at 357).

Estoppel by silence

[760] An estoppel by silence or acquiescence arises where one party knows that the other party is labouring under a false assumption and refrains from correcting the person when it is her or his duty in conscience to do so. An estoppel will not normally arise from silence.[261] However, where there is a duty to disclose, deliberate silence may provide the basis of an estoppel (*Greenwood v Martins Bank* [1933] AC 51, Lord Tomlin at 57).

258 *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547; *Commonwealth v Verwayen* (1990) 170 CLR 394, Deane J at 444.

259 Affirmed in *Craine v Colonial Mutual Fire Insurance Co Ltd* (1922) 31 CLR 27 (PC).

260 See the examples of the principle cited in *Thompson v Palmer* (1933) 49 CLR 507, Dixon J at 547; *Cave v Mills* (1862) 7 H & N 913; Wilde B at 927-928; 158 ER 740 (Ex); *Smith v Baker* (1873) LR 8 CP 350, Honyman J at 357; *Verschures Creameries Ltd v Hull & Netherlands SS Co* [1921] 2 KB 608 Scrutton LJ at 612 (CA); *Ambu Nair v Kelu Nair* (1933) LR 60 Ind App 266 (PC), Sir George Lowndes at 271. See also *Bennett v Murray* (1940) 64 CLR 382, Dixon J at 404-405; *Edwards v Culcairn Shire Council* (1963) 64 SR (NSW) 62 at 70 (FC); *Randwick Municipal Council v Broten* [1964-1965] NSWR 1445, Else-Mitchell J at 1447. Other authorities treat the rule against approbating and reprobating as equivalent to election: *Lissenden v C A V Bosch Ltd* [1940] AC 412; *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112 (CA).

261 *Williams v Frayne* (1937) 58 CLR 710, Dixon J at 736: "Before there is an estoppel from failure to speak, there must be a duty to do so, a duty the sanction of which is preclusion, not liability"; *Chadwick v Manning* [1896] AC 231 (PC), Lord Macnaghten at 238: "Silence is innocent and safe where there is no duty to speak." See also *KMA Corporation Pty Ltd v G & F Productions* 38 IPR 243, Eames J at 249.

It has sometimes been said that the duty to disclose must be a legal duty, and not merely a moral or social one;[262] but it is not necessary for such a duty to arise that the parties are in some contractual or other legal relationship (*Fung Kai Sun v Chan Fui Hing* [1951] AC 489 (PC)). Sometimes, the test is seen to be one of a duty of care to the other party,[263] and the term "estoppel by negligence" may be used in this connection. However, the test of whether or not a duty arises is not based historically in the law of negligence.[264]

The duty to speak and not to remain silent is a duty which arises in a variety of contexts.[265] The test of whether, in a given case not covered by these established categories, a duty to speak arises is whether a reasonable person would expect the person against whom an estoppel is raised, if acting honestly and responsibly, to bring the true facts to the attention of the other party who is acting on a mistaken assumption.[266] In *Trenorden v Martin* [1934] SASR 340 at 344, the Full Court of the Supreme Court of South Australia cited with approval the test given by Cababé:[267]

> "Where a person perceives that, in a matter of interest to himself, another person is … about to act … in a mode in which, as a reasonable man, he would not act … if he knew the real facts, a duty arises on the part of the former to inform the latter of such real facts, if he is aware of them, and if the relative position in which the two parties stand towards one another is such that the latter might reasonably expect the former to tell him the real facts if the former were aware of them."

The test of reasonable expectations explains a number of the cases where a duty to speak has been found on the facts. In *Laws*

262 *Trenorden v Martin* [1934] SASR 340, Full Ct at 344; Bower G S and Turner A, *The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 48-49.

263 *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890.

264 There is no equation between a duty to speak giving rise to some form of liability, and a duty to speak which operates as a ground for precluding a party from asserting something contrary to the implicit message contained in her or his earlier silence. Dixon J said in *Williams v Frayne* (1937) 58 CLR 710 at 736: "Before there is an estoppel from failure to speak, there must be a duty to do so, a duty the sanction of which is preclusion, not liability."

265 See below, para [761].

266 A similar test is given in *Pacol Ltd v Trade Lines Ltd and R/I Sif IV (The Henrik Sif)* [1982] 1 Lloyds Rep 456, Webster J at 465: "The duty necessary to found an estoppel by silence or acquiescence arises where a 'reasonable man would expect' the person against whom the estoppel is raised 'acting honestly and responsibly' to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations" (adopting the language of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 903).

267 Cababé M, *The Principles of Estoppel* (Maxwell, London, 1888), p 86. To similar effect, Deane J, in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 444, referred to a failure to correct a mistaken assumption "when it was his duty in conscience to do so".

Holdings Pty Ltd v Short (1972) 46 ALJR 563, the High Court held that a firm of builders, which had subcontracted work to the plaintiffs for years, had a duty to correct the misapprehension of the plaintiffs who continued to invoice it for work done which had actually been ordered by an associated company of similar name and run by the same family. The firm was held liable for the debts when the associated company was unable to meet its obligations. Similarly, in *S & E Promotions v Tobin Bros* (1994) 122 ALR 637, the sublessor of property had a duty to inform the sublessees that they would need to exercise an option under the sublease, because, by the course of negotations for a new sublease, the sublessees had been led to assume that they had a lease for a further three years.

A duty to speak was also found in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, when the plaintiffs were led by the conduct of the defendants to believe that the completion of an exchange of contracts for a lease of property was a formality, and that they needed to proceed without delay in demolishing one building and erecting another in compliance with the terms of the agreement and in preparation for the lease of the land. The High Court held that, if the defendants were considering withdrawal at that stage, they had a duty to inform the plaintiffs within a reasonable time that they were not yet certain about proceeding, and the defendants' inaction at that stage constituted a clear encouragement to the plaintiffs to continue to act on the basis of the assumption.

[761] There are certain categories where there is a duty to speak. These are:

- where a property owner becomes aware that another is acting in detrimental reliance upon a mistaken assumption in relation to that property which is inconsistent with the property owner's rights;
- where a person becomes aware that another is holding and relying on a document which purports to be signed by her or him;
- where a principal knows that another is relying upon an erroneous assumption concerning the authority of her or his agent.

These three categories are considered below, paras [762]-[764].

[762] An estoppel by acquiescence in relation to property arises where a property owner stands by while another person acts detrimentally upon a mistaken assumption in relation to that property which is inconsistent with the property owner's rights

in relation to it.[268] Commonly, this occurs where a person builds on another's land mistaking it to be her or his own, or where a builder who contracts to build a house on the land of one person mistakenly builds on the adjacent land of another. If the property owner becomes aware of such a mistake, then there is a duty to speak and to correct the assumption. Lord Cranworth LC said in *Ramsden v Dyson* (1866) LR 1 HL 129 at 140:

> "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented."

Such a mistake occurred in *Hamilton v Geraghty* (1901) 1 SR Eq NSW 81, when a man employed builders to construct a house on land which he believed to be his own. The real owner, knowing of this mistake, stood by and allowed the builders to act on the mistaken assumption. The builders succeeded in gaining a charge over the land for the amount owing when the man was unable to pay the contract price.[269]

The principle is not confined to cases of mistaken building upon land, although this has been its most common application. It has been applied to a case of acquiescence in a mistaken breach of restrictive covenants,[270] and to personalty where a sheriff executing judgment against a third party mistakenly sold the plaintiff's goods, with the full knowledge of the plaintiff but

268 *Rochdale Canal Co v King (No 2)* (1853) 16 Beav 630; 51 ER 924 (Ch); *Attorney-General to the Prince of Wales v Collom* [1916] 2 KB 193; *Quach v Marrickville Municipal Council (No 2)* (1990) 22 NSWLR 55, Young J at 65. The requisites which must be fulfilled to establish an estoppel by acquiescence were set out in *Willmott v Barber* (1880) 15 Ch D 96: 1. The plaintiff must have made a mistake as to her or his legal rights. 2. The plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of this mistaken belief. 3. The defendant, the possessor of the legal right, must know of the existence of her or his own right which is inconsistent with the right claimed by the plaintiff. 4. The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of her or his own rights. 5. The defendant, the possessor of the legal right, must have encouraged the plaintiff in the expenditure of money or in the other acts either directly, or by abstaining from asserting the legal right.

269 Contrast *Brand v Chris Building Co Pty Ltd* [1957] VR 625 (owner unaware that building was taking place until substantially completed).

270 *Bohn v Miller Brothers Pty Ltd* [1953] VLR 354.

without his objection.[271] In *Svenson v Payne* (1945) 71 CLR 531, the High Court had to consider the application of the principle where a lessee spent considerable sums in improving a hotel property, believing that the lessor had an absolute title. In fact, he had only a life estate, and a power to grant leases only for a limited period. Thus the lease was void as against the daughter of the lessor who was entitled in remainder. It was held that she was not estopped by her conduct from seeking a declaration to this effect since, although she was aware that the lease would not be binding after her father's death, she thought that she could do nothing until her interest fell into possession.

[763] The awareness of a forgery of one's signature also creates a duty to speak. Most commonly, this duty arises between customer and banker, but the principle extends to any situation in which a person becomes aware that another is holding and relying on a document which purports to be signed by her or him. The justification for the rule is that, by failing to inform the bank promptly, the customer facilitates the successful negotiation of the forged instrument or enables the forger to escape with impunity and before the money can be recovered (*Muir's Executors v Craig's Trustees* (1913) SC 349). Where the position of the bank is not altered for the worse, there can be no estoppel,[272] but where for whatever reason, the bank loses its remedy against the perpetrator, either because the forger escapes from the jurisdiction,[273] or dies, an estoppel will arise.[274] It has been held, however, that a company is under no duty to warn a bank of the previous criminal record of an employee who handles accounts, when it had no reason to suspect the employee of present dishonesty.[275]

[764] Principals have a duty to speak where they become aware that another is relying upon an erroneous assumption concerning the authority of her or his agent. Thus, in *West v Commercial Bank of Australia* (1936) 55 CLR 315 a husband authorised a bank to pay cheques drawn on his account by his son as long as it was

271 *Pickard v Sears* (1837) 6 Ad & El 469; 112 ER 179 (KB); contrast *Jones Brothers (Holloway) Ltd v Woodhouse* (1923) 2 KB 117 (no representation).

272 *McKenzie v British Linen Co* (1881) 6 App Cas 82; *Fung Kai Sun v Chan Fui Hing* [1951] AC 489 (PC).

273 *Ogilvie v West Australian Mortgage & Agency Corp* [1896] AC 257 (PC) (where the bank's claim of estoppel was defeated because it had, through its agent, encouraged the customer to delay reporting the forgery).

274 *Greenwood v Martins Bank* [1933] AC 51 (forgery of husband's signature by wife who later committed suicide).

275 *Les Edwards & Son Pty Ltd v Commonwealth Bank of Australia Ltd* (unreported, Supreme Court of New South Wales, Giles J, 4 September 1990).

countersigned by his wife. Subsequently the son made an arrangement with the teller to honour cheques on his signature alone. It was held that the husband was estopped from denying authorisation when he became aware of this practice and raised no objection. Similarly, in *Spiro v Lintern* [1973] 3 All ER 319, a husband was held bound by the action of his wife in entering into a contract for sale of real property of which he was legal owner, where by his conduct subsequently he had acted towards the purchasers as if the wife had been his agent, and the purchasers had relied to their detriment by expending money on the faith of this assumption.

The principle here stated is an established rule of the law of agency, whether or not the terminology of estoppel is used. Usually, reference is made to the "ostensible authority" of the agent. Estoppel has however been identified as a possible basis for the rule.[276]

DEFENCES

[765] Where the assumption was procured by fraud, there is a defence to an estoppel, even though all the elements of the estoppel have otherwise been made out. The principle was stated by Lord Brampton in *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 145:

> "[No] representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel."

This principle was applied in *Official Trustee in Bankruptcy v Tooheys* (1993) 27 NSWLR 641. In this case, all the elements were established for an estoppel to prevent a brewery company from relying upon its strict legal rights under the terms of a lease to evict its tenants without compensating them for the value of

276 *Hoare v McCarthy* (1916) 22 CLR 296, and see the discussion in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, Dawson J at 200; Gaudron J at 211-213. See also *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA), Diplock LJ at 503; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 (FC), Gummow J at 113; *Lever Finance Ltd v Westminster London Borough Council* [1971] 1 QB 222 (CA), Lord Denning MR at 230.

goodwill. No estoppel arose however, because the brewery company had been induced to grant the lease by the fraudulent misrepresentations of the tenants. This defence is based on the maxim that "those who come to equity must come with clean hands".[277]

ESTOPPEL AND RELATED DOCTRINES

[766] Estoppel is closely related to other doctrines.[278] Indeed, estoppel may come to be seen as the underlying basis upon which a number of other doctrines rest.[279] The High Court has said that estoppel is the basis of the rule that, where one party indicates to another that the performance of a contractual condition is unnecessary, and this is relied on, the failure to perform that obligation cannot then be relied upon by that party.[280] Estoppel is one explanation for the "indoor management rule",[281] which permits parties contracting with a company, and dealing in good faith, to assume that acts within its constitution and powers have been properly and duly performed (*Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, Brennan J at 177-178; Gaudron J at 215-216). It may, similarly, be the basis of the doctrine that a principal is bound by the apparent and ostensible authority of an agent. Estoppel has also been advanced as an explanation for the doctrine of postponing conduct in relation to priorities between equitable interests.[282]

277 See further below, Chapter 29: "Equitable Defences".

278 For example, Wooten J argued, in *Wilson v Kingsgate Mining Industries Pty Ltd* [1973] 2 NSWLR 713 at 730-731 that, despite the historical distinctions between the doctrines of forbearance, estoppel in pais, promissory estoppel, waiver, election and some cases of approbation and reprobation, it may be "that the time is at hand when these various approaches to the same or similar problems should be rationalised under one subsuming principle". See also *Reed v Sheehan* (1982) 39 ALR 257 (FC Fed Ct), Fox J at 269: "The law of estoppel by conduct has become confused by its division into many categories, and many terms are now used with indifferent precision, if indeed it is possible to determine their correct use: estoppel at law, estoppel in equity, proprietary estoppel, promissory estoppel, waiver, election, forbearance, substituted performance, acquiescence, approbation and reprobation are some of the concepts badly in need of orderly and coherent arrangement".

279 In addition to the examples given in this paragraph, see also *Orr v Ford* (1989) 167 CLR 316, Deane J at 339 (estoppel may provide unifying theme for doctrines, such as laches where equity precludes relief because enforcement of rights would be unconscionable).

280 *Foran v Wight* (1989) 168 CLR 385, Brennan J at 420; Dawson J at 444; Deane J at 433-439.

281 *Royal British Bank v Turquand* (1856) 6 El & Bl 327; 119 ER 886.

282 *Heid v Reliance Finance Co* (1983) 154 CLR 326, Gibbs CJ at 335-336; *Rimmer v Webster* [1902] 2 Ch 163, Farwell J at 173. But see *Abigail v Lapin* (1934) 51 CLR 58 (PC), Lord Wright at 70; *Heid v Reliance Finance Co* (1983) 154 CLR 326, Mason and Deane JJ at 342.

The doctrine of part performance has a close relation, historically, to estoppel.[283] Given the restrictions imposed upon the operation of the doctrine of part performance in *Maddison v Alderson* (1883) 8 App Cas 467, it has become easier to argue such fact situations in estoppel.[284] Indeed, it is possible that the principles of estoppel could eventually displace the doctrine of part performance, although a possible difference in the approach to relief marks a point of distinction between them.[285]

[767] Other doctrines have a similar operation and effect to estoppel. The language of election, approbation and reprobation, estoppel and waiver are often used almost interchangeably. "Election, estoppel and waiver are cognate concepts: each relates to the sterilisation of a legal right otherwise than by contract" (*Commonwealth v Verwayen* (1990) 170 CLR 394, Brennan J at 421).[286]

Election and estoppel are distinct doctrines, although the facts of any given case might be open to the application of either doctrine.[287] Election is a doctrine which prevents a person from

283 See, for example, the language of part performance in *Gregory v Mighell* (1811) 18 Ves Jun 328; 34 ER 341 (Ch) and the analogy with part performance in *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 (Ch). Pollock thought that part performance was "akin to estoppel": Winfield P H, *Pollock's Principles of Contract* (13th ed, Stevens, London, 1950), p 521. See further Ridge P, "The Equitable Doctrine of Part Performance and Proprietary Estoppel" (1988) 16 *Melbourne University Law Review* 725.

284 Comparisons may be made between the following cases: *Maddison v Alderson* (1883) 8 App Cas 467 (relief denied to a woman who was induced by an intestate to serve him as his housekeeper without wages by a promise to leave her a life estate by will, as the requirements of the doctrine of part performance were not satisfied); *Greasley v Cooke* [1980] 3 All ER 710 (CA) (relief on the basis of proprietary estoppel granted to woman induced to provide unpaid services as a housekeeper to the owners of the house on the basis of assurances that she could remain in the house as long as she liked); and *Re Basham* [1987] 1 All ER 405 (Ch) (constructive trust of property on the basis of estoppel granted to woman who had continued to assist deceased to run business in reliance on a belief that she would inherit the deceased's property). Compare also *Steadman v Steadman* [1976] AC 536 (acting upon an agreement of compromise and paying arrears of maintenance was held to constitute sufficient acts of part performance of an oral settlement) with *Collin v Holden* [1989] VR 510 (defendant estopped from relying on absence of signed writing to defeat an agreement of compromise because plaintiff had consented to an adjournment on basis that it would be carried into effect). See also *Blazely v Whiley* (1995) 5 Tas LR 254 (vague oral agreement concerning sale of a house to a relative gave rise to an estoppel, but no contract);

285 See Parkinson P, "Equitable Estoppel: Developments after Waltons Stores (Intestate) Ltd v Maher" (1990) 3 *Journal of Contract Law* 50 at 64-66. See, for example, *Public Trustee v Wadley* (1997) 7 Tas LR 35 (promise by father that daughter would inherit the house on his death gave rise to an estoppel, but only for the reasonable value of the household services performed in reliance on the expectation).

286 See also Mason CJ at 406-407; Dawson J at 451; Toohey J at 467; Gaudron J at 481. Waiver, in particular, is a term of imprecise meaning: *Smyth & Co Ltd v Bailey & Co* [1940] 3 All ER 60 (HL). See further Greig D and Davis J, *The Law of Contract* (Law Book Co, Sydney, 1987), pp 120-136.

287 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, Isaacs J (for the court) at 326, 327 (Isaacs J used "waiver" in the sense of election).

asserting inconsistent rights,[288] and the focus of the inquiry is upon the conduct and position of the person who is said to have made an election.[289] Some distinct act must be done, It must be intentional, and done with knowledge of the choice being made between the inconsistent positions.[290] Detrimental reliance by the other party is not necessary.[291] In contrast, estoppel looks chiefly at the position of the person relying on the estoppel. The knowledge of the person sought to be estopped is immaterial. It is not essential that the person sought to be estopped should have acted with any intention to deceive, and conduct, short of positive acts, is insufficient.[292] Election and estoppel are thus distinct doctrines in point of principle.

Waiver and estoppel are related, since waiver is not a precise term in law.[293] "Waiver" is used in a number of senses. However, its primary meanings are in the sense of election[294] and estoppel (*Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 406). Other senses include the variation or rescission of a contract by release, abandonment and acquiescence. When it is said that a right has been "waived", this is often no more than the statement of a conclusion.[295] It says little about the reasoning which has led to that conclusion. Waiver thus cannot be distinguished from estoppel as such; rather "waiver", in some usages, may be synonymous with estoppel. What remains unsettled, especially after *Commonwealth v Verwayen*, is the extent

288 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, Lord Diplock at 883; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Mason J at 641-655. In *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, Isaacs J (for the court), at 326, referred to "taking up two inconsistent positions". See also *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723; *Bennett v Murray* (1940) 64 CLR 382; *J & H Manktelow Pty Ltd v Alloway Grazing Pty Ltd* [1975] 1 NSWLR 385 (CA).

289 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, Isaacs J (for the court) at 326; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, Mason, Brennan, Deane and Dawson JJ at 633-634.

290 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, Isaacs J (for the court) at 326; In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen and Mason JJ considered whether the knowledge need be of the party's legal rights or only of the facts which give rise to the choice.

291 *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, Mason, Brennan, Deane and Dawson JJ at 633; *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, Goff LJ at 399 (HL).

292 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, Isaacs J (for the court) at 327; *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL), Goff LJ at 399.

293 Lücke H, "Non-Contractual Agreements for the Modification of Performance: Forbearance, Waiver and Equitable Estoppel" (1991) 21 *University of Western Australia Law Review* 149. See further below, Chapter 29: "Equitable Defences".

294 Giving judgment for the court in *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, Isaacs J at 326-327, said that the facts of any given case may often be open to the application of either election (which he termed "waiver") or estoppel.

295 Carter J, "Waiver (of Contractual Rights) Distributed" (1991) 4 *Journal of Contract Law* 59 at 60.

to which waiver may have a distinct meaning independent of other doctrines.

[768] There are also similarities in underlying rationale between estoppel and the equitable doctrines of laches and acquiescence (*Orr v Ford* (1989) 167 CLR 316, Deane J at 339).[296] Acquiescence constitutes one means by which an estoppel arises. The term is however used in two senses. Where it involves standing by while an infringement of one's rights is occurring, it is estoppel by acquiescence. The term is also used to describe inaction after knowledge that an infringement has occurred,[297] and, in this sense, is related to the equitable doctrine of laches (*Orr v Ford* (1989) 167 CLR 316, Deane J at 338).

296 See below, Chapter 29: "Equitable Defences".

297 *De Bussche v Alt* (1878) 8 Ch D 286; *McCausland v Young* [1949] NI 49 (CA). See also *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 (CA), Oliver LJ at 665-667; *Goldsworthy v Brickell* [1987] Ch 378 (CA), Nourse LJ at 410. This latter doctrine is discussed below, Chapter 29: "Delay".

CHAPTER EIGHT

RELIEF AGAINST PENALTIES

Chris Rossiter

HISTORY AND DEVELOPMENT

Definition

[801] A penalty is an unenforceable or void sanction, usually in money terms, against breach of a legal obligation.[1] Penalties have been described as sanctions inflicted in terrorem to compel performance,[2] in circumstances where the amount of the penalty does not necessarily bear any resemblance to the amount of the loss suffered or likely to be suffered by the promisee. On the other hand, a valid liquidated or agreed damages provision is the product of an enforceable promise to pay to the promisee a sum of money or transfer property, conditioned upon breach of a legal obligation by the promisor. Valid liquidated or agreed

1 As to whether a penalty is unenforceable or void, the better view appears to be that the penalty is unenforceable rather than void. "[T]he strict legal position is not that such a clause is simply struck out of the contract, as though with a blue pencil, so that the contract takes effect as if it had never been included therein. Strictly the legal position is that the clause remains in the contract and can be sued on, but it will not be enforced by the court beyond the sum which represents, in the events which have happened, the actual loss of the party seeking payment": *Jobson v Johnson* [1989] 1 WLR 1026; 1 All ER 621, Nicholls LJ at 633. See also the dicta of Clarke JA in *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615 at 647. However, in *W & J Investments Pty Ltd v Bunting* [1984] 1 NSWLR 331, Lee J at 335 held that, if a liquidated damages provision were ruled penal, it was to be disregarded for all purposes leaving the promisee to recover unliquidated damages which might be more or less than the penalty. In *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, Mason and Wilson JJ at 192 in the High Court took note of the conflicting views but found it unnecessary to resolve the matter.

2 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, Lord Dunedin at 86; *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6, Lord Robertson at 19. In *Campbell Discount v Bridge* [1962] AC 600, Lord Radcliffe at 622 expressed the view that, to refer to a penalty as being exacted in terrorem was not helpful, as penalty inflictors more often than not do not inspire terror, whereas enforcement of a valid liquidated damages provision may well induce the would be law-breaker to render performance.

damages clauses result from a genuine attempt to calculate or pre-estimate the loss likely to occur upon breach.[3]

Origin of the jurisdiction to relieve against penalties

[802] The court's jurisdiction over relief against penalties derived from the Court of Chancery's jurisdiction over penal bonds,[4] a jurisdiction which dated from about the latter half of the 15th century. This jurisdiction was at first narrow in compass, including, for example, cases where the debtor had paid the amount due on the face of the bond but had failed to obtain a sealed release, or cases where the bond appeared as a single or unconditional bond but was, in fact, conditional, and the condition of defeasance had been fulfilled by the debtor.[5] By the end of the 16th century, the jurisdiction had extended to embrace cases of accident and hardship. Thus, where the debtor paid the amount due in fulfilment of the substance of the condition of defeasance but had paid out of time due to illness, the debtor could expect to obtain an injunction in Chancery to restrain the creditor from suing on the face value of the bond in a court of law.[6] The form of the relief in Chancery was usually an award of an injunction to restrain an action at law on the bond, pending payment by the debtor of the amount due together with interest and costs.

In the early 17th century, the Court of Chancery's jurisdiction over penal bonds widened considerably from a narrow base of relief to a broad one.[7] The jurisdiction was no longer limited to

3 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79; *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6; *Public Works Commissioner v Hills* [1906] AC 368; *AMEV-UDC v Austin* (1986) 162 CLR 170; *Lax v Glenmore Pty Ltd* (1969) 90 WN (NSW) (Pt 1) 703 (CE); *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615; *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551.

4 The penal bond was introduced into England by Italian bankers at the end of the 13th century. The nature and use of the single bond and the penal bond with conditional defeasance is discussed by Simpson A W B, "The Penal Bond with Conditional Defeasance" (1966) 82 *Law Quarterly Review* 392.

5 See Simpson A W B, "The Penal Bond with Conditional Defeasance" (1966) 82 *Law Quarterly Review* 392. The history of the Court of Chancery's jurisdiction over penal bonds is traced in Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 1-26.

6 Some of the cases are cited by Spence G, *The Equitable Jurisdiction of the Court of Chancery* (Stevens, London, 1846), Vol 1, p 636 and Jones W J, *The Elizabethan Court of Chancery* (Clarendon, Oxford, 1967), p 442.

7 This development occurred in the 1630s and is traced in Turner R W, *The Equity of Redemption* (Cambridge UP, Cambridge, 1931), p 31 and Spence G, *The Equitable Jurisdiction of the Court of Chancery* (Stevens, London, 1846), Vol 1, pp 629-630.

grounds of fraud, accident, hardship or surprise. In the case of a penal money bond, the Court of Chancery ordered relief against enforcement of the bond in a court of law upon the debtor repaying the original debt together with interest and costs. In the case of a performance bond,[8] the Court of Chancery would relieve against the penalty by enjoining enforcement of the bond at law pending payment of the actual damages and costs incurred by the covenantee. The actual loss was assessed in a trial at law for the calculation of damages known as an issue quantum damnificatus.[9]

Legislative developments

[803] By the end of the 17th century, the grant of relief against the penalty in a penal bond had become accepted practice in the Court of Chancery. The debtor could expect to obtain relief as a matter of course if submitting to the conditions commonly attached to the grant of relief as outlined above. The time-consuming and expensive process of obtaining an injunction in Chancery to restrain an action at law was acknowledged by Parliament which responded with two pieces of legislation in 1697 and 1705.

The first of these statutes, often known as the *Statute of William*,[10] provided that, if the plaintiff sued at law to recover a penal sum due on a bond for breach of covenant in any deed, indenture or writing, the plaintiff could recover judgment in the usual way. However, under the terms of this statute, the plaintiff was obliged to plead the breach of the covenant or covenants the subject of the complaint, and a jury assessed the actual damage suffered. If the defendant then paid into court the amount of assessed damages with interest and costs, the defendant obtained a stay of execution.[11]

The second of the statutes, commonly referred to as the *Statute of Anne*,[12] dealt with actions to recover penalties in money bonds. Although a judgment could be obtained by the creditor

8 As to penal bonds given for the performance of a covenant, see Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), p 8 and Simpson A W B, "The Penal Bond with Conditional Defeasance" (1966) 82 *Law Quarterly Review* 392.

9 The procedure is referred to in the joint judgment of Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190.

10 8 & 9 Will III c 11.

11 8 & 9 Will III c 11, s 8.

12 4 & 5 Anne c 16.

for the penalty in the bond, payment by the debtor into court of the actual amount owed together with interest and costs was deemed payment in full and in discharge and satisfaction of the bond.[13]

The legal nature of the jurisdiction to relieve against penalties

[804] After the enactment of the *Statutes of William* and *Anne*,[14] the common law subsumed the equitable jurisdiction to relieve against penalties. The decline of equity's separate jurisdiction over penalties was accelerated by the advent of the Judicature system, a process described by Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 191 in the following terms:

> "The advent of the Judicature system, with its emphasis on the disposition of all issues in one proceeding, hastened the demise of equity's separate jurisdiction to relieve against penalties. Although it is not possible to identify when the principle that a penalty is unenforceable became an established rule of law, the Judicature system reinforced the principle. That system strengthened the development which had been taking place in the common law courts since the seventeenth century, whereby all relevant relief could be obtained in the one action in which the plaintiff sued to recover a penalty. It meant that there was no need to invoke the equitable jurisdiction … All this leads to the conclusion that the equitable jurisdiction to relieve against penalties withered on the vine for the simple reason that, except perhaps in very unusual circumstances, it offered no prospect of relief which was not ordinarily available in proceedings to recover a stipulated sum or, alternatively, damages."

Continuing developments

[805] Following the enactment of the *Statutes of William* and *Anne*,[15] there was little point in a creditor suing in a court of law for the

13 4 & 5 Anne c 16, ss 12 and 13.

14 See above, para [803].

15 See above, para [803].

penalty in a penal bond or indenture.[16] As the Statutes did not prevent the parties making an agreement for the payment of a stipulated sum as agreed or liquidated damages contingent upon breach of an obligation, it became important after the enactment of the Statutes to distinguish between penal sums, to which the provisions of the Statutes applied, and agreed or liquidated damages, to which they did not. Until the development of the modern law in the early part of the 20th century, the test favoured by the courts to discriminate between penalties and liquidated or agreed damages was the intention test.

The intention test

[806] If the contracting parties to a bond, indenture or other instrument expressly agreed that a stipulated sum was payable by the promisor to the promisee following breach of a specified obligation or upon the happening of a defined event, the stipulated sum was recoverable by the promisee as a sum certain as and for liquidated or agreed damages. In sanctioning recovery of the stipulated sum on the ground that the parties had expressly agreed that the sum was payable in certain events, the courts acknowledged the expressed contractual intention of the parties to differentiate between penalties and liquidated damages as manifested by the label assigned by the parties to the stipulated sum. A sum described as liquidated or agreed damages was recoverable in full by the promisee. By labelling the stipulated sum as liquidated damages, the parties were effectively able to outflank the provisions of the *Statutes of William* and *Anne*.[17] It is no coincidence that the high-water mark of the intention test was reached during the golden age of freedom of contract in the 19th century. The intention test remained law

16 "The result of suing for the penalty is therefore that the plaintiff recovers proved damages, but never more than the penal sum fixed ...": *Wall v Rederiaktiebolaget Luggade* [1915] 3 KB 66, Bailhache J at 72; "The penalty therefore is auxiliary to the enforcing performance of the contract; and the party grieved may either take the penalty as his debt at law and assign his breach under the *Statute of William*; or he may bring his action for damages upon the breach of the contract ... though to be sure the advantage of taking judgment for the penalty as the debt at law is very much cut down by the *Statute of William*": *Harrison v Wright* (1811) 13 East 343, Lord Ellenborough at 348; 104 ER 402.

17 See above, para [803]. Some of the cases favouring and applying the intention test included *Astley v Weldon* (1801) 2 Bos & Pul 346; 126 ER 1318; *Kemble v Farren* (1829) 6 Bing 141; 130 ER 1234; *Wallis v Smith* (1882) 21 Ch D 243; *Lamson Store Service Co v Weidenbach & Co's Trustees* (1904) 7 WALR 166; *Waterside Workers' Federation of Australia v Stewart* (1919) 27 CLR 119. In the last-mentioned case, Knox CJ, Barton and Gavan Duffy JJ declared at 128: "The question whether in any given case the amount secured by a bond is to be regarded as a penalty or as liquidated damages depends on the intention of the parties to the transaction, their intention being ascertained from the language of the bond read in the light of the circumstances under which it was given."

until three landmark decisions of the House of Lords and Privy Council in the early part of the 20th century.[18]

RELIEF AGAINST PENALTIES — A STATEMENT OF THE MODERN LAW

The formulation of a new test — a genuine pre-estimate of the likely loss

[807] A promise to pay a stipulated sum as liquidated or agreed damages for breach of a legal obligation is a valid promise under modern law and not a penalty if the amount of the stipulated sum were calculated in consequence of an agreement whereby the parties made a genuine and bona fide attempt to pre-estimate the likely loss resulting from the breach. This test, that is, whether the agreed stipulated sum was the product of a genuine attempt by the parties to pre-estimate the loss flowing from breach, was applied by the House of Lords in 1905 in *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6 and again in 1915 in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 and by the Privy Council in 1906 in *Public Works Commissioner v Hills* [1906] AC 368. These authorities have been followed on numerous occasions in Australia.[19]

In judging whether a covenanted sum represents a genuine pre-estimate of the likely loss, the courts have taken account of the following propositions summarised in the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 at 86-88:

> "1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages …

18 *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6; *Public Works Commissioner v Hills* [1906] AC 368; *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79. See below, para [807].

19 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; *AMEV-UDC v Austin* (1986) 162 CLR 170; *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131; *Lax v Glenmore Pty Ltd* (1969) 90 WN (NSW) (Pt 1) 703; *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615; *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551.

2. The essence of a penalty is a payment of money stipulated as of terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage …

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of breach …

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

   (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach …

   (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid …

   (c) There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' …

   On the other hand:

   (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

[808] The validity of a liquidated damages provision is judged at the time of the making of the contract and not at the time of breach.[20] It follows that the actual loss sustained by the promisee post-breach is irrelevant;[21] and further, that a stipulated sum for

20 *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6, Lord Davey at 17; *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564, Clarke JA at 574; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, Deane J at 400.

21 In some jurisdictions in the United States of America, the court may receive evidence of the actual loss. See s 356 of the *Restatement (Second) of Contracts* (American Law Institute, 1979); Ferris S V, "Liquidated Damages Recovery Under the Restatement (Second) of Contracts" (1982) 67 *Cornell Law Review* 862; Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 151-152.

liquidated damages will not be characterised as penal unless the disparity between the amount of the stipulated sum and the likely loss is extravagant and unconscionable.[22]

It should be noted that although Lord Dunedin spoke of a genuine covenanted pre-estimate between the parties, it is not necessary that the parties actually worked through and discussed the liquidated damages formula with each other, although, in some instances, that may happen.[23] The question is, as Lord Dunedin put it, whether, as a matter of construction, the liquidated damage provision amounts to a genuine pre-estimate of the likely loss having regard to the terms and inherent circumstances of the contract. Thus, where the terms of the liquidated damages clause were found in a tender document and where the parties did not address their minds to the wording of the clause, the clause was upheld as valid in the circumstances of the case.[24]

Although it is not a condition precedent to the validity of a liquidated damages provision that the parties actually addressed their minds to the formula or mode of calculation, there is what Owen J called a threshold issue if the parties made no attempt at all to pre-estimate the loss. A failure to do so may be relevant, in the circumstances of a particular case, to the judgment of a stipulated sum as extravagant or unconscionable.[25]

Application of the genuine pre-estimate test

Obligations to pay a larger sum of money upon default of an obligation to pay a smaller sum

[809] An obligation to pay a stipulated sum upon default of an obligation to pay a sum of money which is less than the stipulated sum was always ruled penal.[26] In fact, the principle had become so settled by the time of the decision in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 that Lord Dunedin (at 87) was able to state it as one of the tests

22 *AMEV-UDC v Austin* (1986) 162 CLR 170, Mason and Wilson JJ at 193; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564, Clarke JA at 576-577; *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131, Wilson and Toohey JJ at 141-142. As to the meaning of "extravagant" and "unconscionable", see below, para [823].

23 As was the case in *Multiplex Constructions v Abgarus Pty Ltd* (1992) 33 NSWLR 504.

24 *De Francesch Builders Pty Ltd v Riley* Supreme Court of Western Australia, Parker J, 8 December, 2000 (unreported).

25 *Westpac Banking Corporation v Australian Shipbuilding Industries Pty Ltd* (unreported, WA Sup Ct,, 25 September 1996).

26 *Astley v Weldon* (1801) 2 Bos & Pul 346; 126 ER 1318; *Kemble v Farren* (1829) 6 Bing 141; 130 ER 1234.

to aid in the construction of an agreed damages provision.[27] The reason why such a stipulated sum was ruled penal was that the amount of the stipulated sum was not the product of a genuine attempt to pre-estimate the likely loss following breach of the obligation to pay the smaller sum. This was for the reason that, at common law, damages were not recoverable for the late payment of a debt. A creditor could only expect to recover the amount of the debt plus costs and interest from the time of judgment, if a judgment had been obtained (*London, Chatham & Dover Railway Co v South Eastern Railway Co* [1893] AC 429).[28] A series of English decisions, commencing with the Court of Appeal decision in 1952 in *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, held that damages for late payment of a debt could be awarded as special damages under the second limb of *Hadley v Baxendale* (1854) 9 Exch 341; [1843-1860] All ER Rep 461[29] but not otherwise.[30]

In Australia, the validity of an agreed damages clause for damages for late payment of a debt must be seen in the light of the decision of the High Court of Australia in 1989 in *Hungerfords v Walker* (1989) 171 CLR 125, where the court ruled that damages for late payment of a debt were in the ordinary course within the contemplation of the parties and recoverable as general damages under the first limb of *Hadley v Baxendale*. Although there is as yet no reported decision on the point, it would appear as a matter of principle that an agreed damages clause for breach of an obligation to pay a sum of money would be valid as a genuine pre-estimate of the likely loss accruing to the creditor by reason of delayed payment if the agreed damages were calculated having regard, either, to the interest foregone as a lost opportunity to invest elsewhere or to the interest incurred on borrowed moneys.[31] It would thus appear that Lord Dunedin's rule (4)(b) in *Dunlop*[32] must now be received with some caution or, at least, reservation in Australia.

27 "4(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid."

28 Interest on a judgment debt was awarded following legislation first enacted in England in 1833: *Civil Procedure Act*.

29 The two limbs of damages in this case are as follows: (a) first limb losses incurred which, in all of the circumstances, are not unlikely to result from the defendant's breach are claimable damages; (b) second limb losses not incurred in the usual course of things, but which may reasonably be supposed to have been in the contemplation of parties when the contract was made, either by an implied or express acceptance of the risk involved, are claimable damages.

30 *President of India v La Pintada Compania Navigacion SA* [1985] AC 104 (HL); *President of India v Lips Maritime Corp* [1987] 3 All ER 110 (HL).

31 Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 37-42.

32 See above, para [807].

Concessional Rates of Interest and Provisions for the Charging of a Higher Rate of Interest

In sympathy with the notion that recovery of damages for late payment of a debt was not permitted, the common law ruled penal a provision for the charging of a higher rate of interest which was triggered upon default of an obligation to pay a sum of money loaned at a lower rate of interest. The probable explanations for frequent rulings to this effect lay in the laws outlawing usury and the abhorrence felt towards compound interest. The operation of the penalty rule was and is easily avoided by a device which exploited the principle that the rule against penalties applied only to agreed sums payable upon breach of contract and not to sums payable upon the happening of an event which was not a breach of contract.[33] Thus if the higher rate of interest is specified as the contract rate and the lower rate is charged as a concession for prompt payments, then the penalties doctrine has no operation. The avoidance of the penalties doctrine in such a case was recognised as long ago as 1693 in *Holles v Wyse* (1693) 2 Vern 290; 23 ER 787. Since then, there have been many cases upholding the validity of concessional interest rate clauses.[34]

The provision for payment of default interest upon arrears was likely to be struck down as a penalty or as a provision for compounding of interest and thus offending the usury laws. Some attempts were made to uphold such provisions but the reasoning justifying the decision was often less than satisfactory. Thus, in *General Credit and Discount Co v Glegg* (1883) 22 Ch D 549, the interest charge on arrears was described as "commission".

In recent authorities a more robust approach has been taken by the courts. In *Lorsvale Finance plc v Bank of Zambia* [1996] 3 WLR 688, a case concerning a bank-syndicated loan, a charge on arrears at a rate per annum equal to the aggregate of 1 per cent, the margin and the cost of obtaining dollar deposits from any source the defendant bank thought fit, was upheld on the ground of international banking custom and the absence of compelling reasons of principle in support of invalidating such a charge as a penalty. The court referred with approval to the decision of the Federal Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 93 ALR 271 where

33 See below para [819].

34 *Wallingford v Directors of the Mutual Society* (1880) 5 App Cas 685; *O'Dea v Allstates Leasing Systems (WA) Pty Ltd* (1983) 152 CLR 359 at 366-367.

the court upheld as valid a provision in a mortgage charging interest on arrears at a rate of 1.5 per centum per annum above the mortgage rate, principally on the ground that the charge was not retrospective, was not a punishment for default and was a genuine attempt to pre-estimate compensation.[35]

Loss not easily calculable

[810] A liquidated or agreed damages provision is most useful where the loss consequent upon breach is difficult to calculate. In such cases, the courts have recognised the utility of an agreed damages provision and have provided no impediment to its use in such circumstances. Thus, in *Clydebank Engineering & Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6, the House of Lords upheld the validity of an agreed damages clause in a shipbuilding contract, the subject of which was the construction and delivery of torpedo boats for the Spanish Navy. The shipbuilding company covenanted to pay agreed damages of £500 per boat for each week a boat was delivered beyond the promised date. It was submitted for the company that the agreed damages provision was void as a penalty as it did not amount to a genuine pre-estimate of the likely loss for the reason that, inter alia, ships of war did not earn freight and the buyer had suffered no loss. All of the speeches reflected a robust rejection of this submission. In the words of the Lord Chancellor, the Earl of Halsbury (at 110-111):

> "My Lords, it is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case. I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be said, to say whether the amount was unconscionable or not ... on the other hand, it is quite certain ... that the parties may agree beforehand to say, 'Such and such a sum shall be damages if I break my agreement.' The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of

35 In *Narhex Australia Pty Ltd v Telemarketing Australia Pty Ltd* (Unreported, NSWCA, Kirby ACJ, Handley and Sheller JJA, 24 August, 1995) interest on arrears at a rate of 0.06% daily (equivalent to 21.9% pa) was upheld as valid on the ground that the charge was prospective and not retrospective and the Supreme Court rate at the time was fixed at 21%. The court also took notice of the nature of the respondent's business in assessing the validity of the respondent's charge. Kirby ACJ noted that the result might be different if the credit charge were "manifestly punitive".

> it is extremely complex, difficult and expensive … It is obvious on the face of it that the very thing intended to be provided against by this practical amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage."

[811] A liquidated damages provision will be of particular benefit to a public authority where the public authority may have difficulty in proving or showing commercial loss. Thus, in *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551, the purchaser of land agreed with the vendor council to resell the land to the council for the contract price if the purchaser failed to erect industrial premises within a specified time. The purchaser challenged the validity of this promise on the ground, inter alia, that the promise to resell was a penalty. Handley JA, delivering the judgment of the New South Wales Court of Appeal, responded to this submission by pointing out:[36]

> "There is no doubt that the Council would have difficulty in recovering substantial damages for breach of the promise to erect industrial buildings on this land … The construction of such buildings would not increase the rateable value of the land or the Council's future rate revenue from it. It is doubtful whether such buildings would increase the value of any other industrial land retained by the Council nearby … Nevertheless, the council had the clearest interest in promoting industrial development within the shire for the benefit of the general body of ratepayers and for its long term benefit as well. The development would increase the prosperity of the shire as a whole and would indirectly benefit the Council itself.
>
> The courts have had no difficulty striking down liquidated damages clauses where the sum recoverable substantially exceeds the maximum damage the innocent party is likely to suffer on breach. However such a clause will not be characterised as penal merely because the innocent party would have difficulty in proving its damages. *Indeed for that very reason, the Court is more likely to find that there has been a genuine pre-estimate*."

Several breaches

[812] There is a presumption that a stipulated sum will be ruled penal if the one stipulated sum is payable for several breaches of obligation, some occasioning serious and others but trifling

36 (1994) 33 NSWLR 551 at 555-556 (emphasis added).

damage (*Dunlop Pneumatic Tyre v New Garage* [1915] AC 79, Lord Dunedin at 87). In such a case, it cannot be said that the parties have made a genuine pre-estimate of the likely loss if the losses vary significantly depending upon the gravity of the breach. The decision in *Ford Motor Co v Armstrong* (1915) 31 TLR 267, illustrates this point. A motor dealer had covenanted in the dealership agreement not to sell cars for less than the listed price, not to sell to other dealers and not to exhibit without the seller's permission. The dealer agreed to pay £250 damages for each breach. Given the disparity between the damages likely to result from breach of the three promises, the Court of Appeal ruled the liquidated damages provision unenforceable as a penalty.[37]

[813] In circumstances where the parties to a contract wish to provide for the payment of liquidated damages for more than one breach, or where the damages from breach are likely to vary in accordance with the time of breach, it may be necessary to provide for more than one stipulated sum as the appropriate amount of the liquidated damages, or to provide for the calculation of liquidated damages in accordance with a formula which takes account of the time of breach.[38] In the 1960s and 1970s, many finance leases and hire-purchase agreements contained a standard formula for the calculation of liquidated damages consequent upon termination for the hirer's breach. Typical of these clauses was the one ruled penal by the House of Lords in *Campbell Discount Co v Bridge* [1962] AC 600, providing for compensation for depreciation of the leased item equivalent to two thirds of the total rental instalments payable over the life of the lease. The calculation provided for by the clause was not a genuine pre-estimate of the owner's likely loss for two reasons. First, the hirer did not promise to compensate the owner for depreciation and, secondly, the amount was fixed in accordance with a sliding scale which moved in the wrong direction — the longer the lease item was used by the hirer, the less depreciation was paid.

37 There are several Australian authorities on point: *R v Stewart* [1938] QSR 87; *Arlesheim v Werner* [1958] SASR 136; *Premier Metal & Gravel Pty Ltd v Smith's Concrete Pty Ltd* [1968] 3 NSWR 775; *Pigram v Attorney-General* (1975) 49 ALJR 147.

38 Thus, in *Duffen v FRA.BO Spa* (unreported, English CA, Otton and Chadwick LJJ, 30 April 1998) a stipulated sum of £100,000.00, which the parties agreed was a reasonable pre-estimate, was struck down as a penalty on the ground that the clause took no account of the time of the breach in the life of the contract. The contract concerned an exclusive agency agreement in which the plaintiff was appointed agent for the sale of the defendants' products. The liquidated damages were payable in the event that the defendant failed to pay a monthly retainer of £4,000 or an invoiced commission. The liquidated damages provision was not graduated and was payable irrespective of the amount of the unexpired term of the agreement.

Repudiatory and non-repudiatory breaches

[814] As a general rule, a stipulated sum providing for damages for the loss of a contract is penal if the sum is exigible for more than one breach in circumstances where the parties fail to discriminate between repudiatory breaches, that is, breaches effectively causing the loss of the contract, and breaches which are non-repudiatory. Such a stipulated sum, if payable for breaches which did not result in the loss of the contract, is not a genuine pre-estimate of the likely loss of the contract. In *O'Dea v Allstates Leasing (WA) Pty Ltd* (1983) 152 CLR 359, an equipment lease provided for the lessor to terminate the lease for any breach by the lessees, and for the lessor to recover all past and future rental instalments undiscounted. The liquidated damages provision was ruled penal by the court for the principal reason that the provision for the acceleration of rental instalments was not a genuine pre-estimate of the lessor's loss consequent upon termination of the lease, given that there was no rebate for the early return of capital and that the obligation to pay rent over the life of the lease was not a present debt and did not, therefore, fall within the principle exemplified in the decision of *Protector Loan Co v Grice* (1880) 5 QBD 592.[39] Another reason advanced by Gibbs CJ and Deane J was that the liquidated damages provision entirely failed to discriminate between serious and trifling breaches.[40]

The basis of this reasoning is the assumption that damages for the loss of a contract are not recoverable from the promisor in the event of termination, unless the breach which enlivened the right to terminate was the effective cause of the loss of the contract, or the breach was a breach of a condition or essential promise. It is the law, both in Australia and England, that unliquidated damages for loss of bargain are not recoverable where the contract is lost not by the actions of the promisor but by the election of the promisee to activate a contractual termination clause consequent upon the promisor's breach, which is neither breach of a condition or essential promise, nor a repudiatory breach.[41]

39 That is, the obligation to pay future rent was not a debitum in praesenti, solvendum in futuro. See below, para [818].

40 "There is nothing at all in the contract to suggest that those provisions represent a genuine or a reasonable pre-estimate of damages ... They are applicable on the occurrence of any default in the punctual payment of an instalment of rent or of an insurance premium or in the performance of any one of a large number of terms and conditions ranging from the trivial to the serious. They could result in an unreasonable windfall to [the lessor] and an unconscionable burden upon the lessees in the event of breach of the most trivial condition": (1983) 152 CLR 359, Deane J at 400. The reasoning of Gibbs CJ proceeded along similar lines: at 369.

41 *Shevill v Builders' Licensing Board* (1982) 149 CLR 620; *Progressive Mailing House v Tabali Pty Ltd* (1985) 157 CLR 17; *AMEV-UDC v Austin* (1986) 162 CLR 170, Mason and Wilson JJ at 186; *Financings Ltd v Baldock* [1963] 2 QB 104.

[815] The exception to the general rule is where the parties have agreed on a stipulated sum for the loss of the contract and the stipulated sum represents a genuine pre-estimate of that loss. This exception is the result of three important Australian decisions in the 1980s. The decisions in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, *Esanda Finance Corp v Plessnig* (1989) 166 CLR 131 and *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564, the first two being decisions of the High Court of Australia and the last a decision of the New South Wales Court of Appeal, all concerned finance leases of chattels.[42] All three leases contained a liquidated damages clause providing for the calculation of damages for loss of the lessor's bargain in the event of early termination of the lease. In the case of the leases the subject of the litigation in *AMEV-UDC v Austin* and *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd*, the court ruled the liquidated damages clause unenforceable as a penalty, while the agreed damages provision in the lease considered in *Esanda Finance Corp v Plessnig* was held valid. Each of the leases contained a contractual termination clause or express avoidance clause capable of being activated for any breach of the lease whether the breach was a repudiatory or non-repudiatory breach or breach of an essential or non-essential promise.[43]

In the first of this trilogy of important cases, *AMEV-UDC v Austin*, dicta in several of the judgments lent support to the validity of a correctly drafted indemnity provision allowing for damages for the loss of the lease for any reason including the lessor's election to terminate for a non-repudiatory breach.[44] However, in *AMEV-UDC v Austin*, the liquidated damages provision was not the product of a genuine pre-estimate of the loss flowing from termination of the lease and was, therefore, ruled penal.[45] The result of the finding that the liquidated damages provision was unenforceable as a penalty was that the lessor was restricted to common law unliquidated damages which were limited to those damages flowing directly from the breach. In the case of a non-repudiatory breach, such damages did not extend to compensate

42 These have sometimes been described as tripartite finance leases: International Institute for the Unification of Private Law (Unidroit), *Convention on International Financial Leasing* (Rome, 1988). See also Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 89ff.

43 Indeed, a finding of the court below not challenged on appeal in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 was that the breach which triggered the express avoidance clause was not repudiatory.

44 (1986) 162 CLR 170, Mason and Wilson JJ at 194; Deane J (dissenting) at 204-205; Dawson J (dissenting) at 214-215.

45 There was no rebate for the accelerated liability of the rental instalments and the court followed its earlier decision in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359.

the lessor for the loss of the lease, notwithstanding that the lease had come to an end through the lessor's activation of the express avoidance clause.[46]

[816] A correctly drawn indemnity provision for the loss of a contract is enforceable as valid liquidated damages whether the loss flows directly from breach or from an election to terminate following breach. The dicta in *AMEV-UDC Finance Ltd v Austin* was approved as law by the High Court in *Esanda Finance Corp v Plessnig* and the same conclusion was reached independently of the High Court decision in *Esanda* by the New South Wales Court of Appeal in *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564. In the light of this reasoning, as Clarke JA pointed out in *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd*, it is now necessary to view with some caution Lord Dunedin's test of construction expressed in *Dunlop* that there is a presumption that an agreed damages sum is penal if the one stipulated sum is payable for more than one breach, some breaches occasioning serious and others but trifling loss. Such a presumption has little relevance where a stipulated sum is payable following termination pursuant to a contractual termination clause (at 574). However, it remains the law that, if the agreed damages provision for loss of bargain is ruled penal, the innocent party can only look to recover unliquidated damages limited to the actual loss directly resulting from breach.[47]

The application of the genuine pre-estimate test for distinguishing between penalties and liquidated damages, in the area of damages for loss of bargain following loss of a contract or lease through the activation of a contractual termination clause, has thus given rise to what Dawson J described in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 216 as an "incongruity". This incongruity is well described by Brennan J in *Esanda Finance Corp v Plessnig* (1989) 166 CLR 131 at 147:

> "I take the law to accept an incongruity in holding that an owner's damages at law for a non-repudiatory breach are limited to losses caused by the breach alone while holding that a clause which imposes a liability on the hirer to pay the losses caused by exercise of a power to terminate a hiring upon breach is not a penalty. It may be appropriate to reconsider this incongruity in some later case and, if that is done, it may well be necessary to canvass the correctness of some earlier decisions of this Court.

46 The court followed its reasoning in *Shevill v Builder's Licensing Board* (1982) 149 CLR 620.

47 See authorities cited above, para [814].

> For the moment I adopt, in common with the other members of the Court, the view that the owner's loss consequent upon the termination of the hiring for non-repudiatory breach is to be taken into account in determining whether the recoverable amount prescribed by cl 5 [the agreed damages provision] is a penalty."

THE SCOPE OF THE PENALTIES DOCTRINE — AGREEMENTS TO PAY STIPULATED SUMS CONDITIONED UPON THE HAPPENING OF AN EVENT NOT INVOLVING A BREACH OF CONTRACT

[817] There are two classes of cases where the obligation to pay a stipulated sum is not qualified by or susceptible to the doctrine of penalties. The first is where a presently owed debt is payable by instalments at the indulgence of the creditor, with a proviso that the indulgence will be withdrawn if the debtor defaults in the payment of any one instalment. Likewise, it has also been settled law for several centuries that the penalties doctrine has no application to a mortgage containing a high base rate, with a proviso that a concessional reduced rate of interest will be charged on all instalments paid punctually or within a prescribed time of the due date.[48] The second class of case is where the stipulated sum is payable on the happening of an event which does not involve a breach of contract.[49]

Present debt payable by instalments

[818] Where a stipulated sum is presently due and owing as a debt and the creditor grants the debtor an indulgence to pay the debt by

48 *Nicholls v Maynard* (1747) 3 Atk 519; 26 ER 1100; *Bonafous v Rybot* (1763) 3 Burr 1370; 97 ER 878; *Wallingford v Directors of the Mutual Society* (1880) 5 App Cas 685; *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514 at 518, 520. The distinction between raising the interest rate in a mortgage following default in payment of an instalment (which is unenforceable as a penalty) and providing for a higher base rate which is reduced to the lower "real" rate following payment within time (which is valid) is one without substance and has been the subject of cogent judicial comment: *Wallis v Smith* (1882) 21 Ch D 243, Jessel MR at 257; *Stanhope v Manners* (1763) 2 Eden 197, Lord Henley LC at 199; 28 ER 873.

49 Both classes of case were identified by Gibbs CJ in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 366-367.

instalments, it is not a penalty for the creditor to provide, as a condition of granting the indulgence, that the indulgence will be withdrawn if the debtor defaults in the payment of an instalment.[50] However, this principle, sometimes known as debitum in praesenti, solvendum in futuro, has no application where, having regard to the substance and notwithstanding the form of the transaction, the stipulated sum is not owing as a present debt. In *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, the High Court was careful to elevate substance above form when adjudging the validity of an acceleration of rental instalments clause in a chattel lease. The lease provided in form for the whole of the rental instalments to be paid on the signing of the lease, with a concession for payment by equal monthly instalments over the life of the lease, on condition that the payments were made on time. Upon the lessee's default, the lessor took possession of the goods and sued for the whole of the future unpaid rental instalments undiscounted. The court was of the view that the provision for the payment of the whole of the rent in advance was not a genuine present debt as, in substance, the rent was the consideration paid for the lessee's continued possession of the goods, and the obligation to pay the entire rent only arose upon the lessee's breach.[51] It was thus inconsistent for the lessor to claim both the entire rent and the possession of the goods.

As a consequence of the finding that the acceleration clause in the lease was not a genuine present debt, the question then arose as to whether the lessee's obligation to pay all future rental instalments was a penalty. The court held that it was, given that the lessor was entitled to all rental instalments without rebate and to receive early possession of the leased goods without giving credit for their value.[52] The earlier decision of the High Court in *Lamson Store Service Co Ltd v Russell Wilkins & Sons Ltd* (1906) 4 CLR 672, where a majority of the High Court[53] considered that the rental instalments payable over the life of the lease of a patented cash tramway system was a debitum in praesenti, solvendum in futuro, must, in the light of the judgments in *O'Dea v Allstates Leasing System (WA) Pty Ltd*,[54] be regarded as partly discredited.

50 *Thompson v Hudson* (1869) LR 4 HL 1; *Protector Endowment Loan & Annuity Co v Grice* (1880) 5 QBD 592; *Lamson Store Service Co Ltd v Russell Wilkins & Sons Ltd* (1906) 4 CLR 672.

51 (1983) 152 CLR 359, Gibbs CJ at 368-369; Wilson J at 382-383; Brennan J at 390.

52 (1983) 152 CLR 359, Gibbs CJ at 369; Wilson J at 383; Brennan J at 386.

53 (1906) 4 CLR 672, Griffith CJ and Barton J, O'Connor J (dissenting).

54 (1983) 152 CLR 359, Gibbs CJ at 373-374; Murphy J at 375; Brennan J at 387; Deane J at 403-404.

Stipulated sums payable on the happening of an event other than a breach of contract

General

[819] The modern rule against penalties has no application to the obligation to pay stipulated sums on the happening of events not predicated upon a breach of contract by the payer.[55] This is curious, given that the doctrine of penalties evolved from its original application to the conditioned penal bond in circumstances where the obligor (the debtor) did not actually make or enter into a promise or covenant. As Deane J put it in *AMEV-UDC v Austin* (1986) 162 CLR 170 at 197:[56]

> "Like all rules with true equitable foundations, [the rule against penalties is] concerned with substance rather than form. It would, for example, have been out of accord with equity's concern with substance for the availability of equitable relief against the enforcement of a performance bond ... to have depended upon whether it was possible to identify some implied contractual warranty of which the failure to perform or pay constituted a technical breach of contract on the part of the plaintiff. In fact, of course, equity observed no such limitation upon its jurisdiction to grant relief. It granted relief against the enforcement of such a bond by a common law action in debt regardless of whether the failure to bring about or prevent the event which precluded fulfilment of the condition of defeasance constituted a breach of contract at common law."

Notwithstanding the force of these comments, it is clear that the ambit of the rule against penalties is restricted to agreed damages for breach of contract. The modern law is exemplified in the decision of the House of Lords in *Export Credits Guarantee Department v Universal Oil Products* [1983] 1 WLR 399.[57] The appellant as the seller of goods entered into an agreement with the respondent whereby, in consideration of the respondent providing guarantees to the buyer's financier, the appellant undertook to indemnify the respondent for any losses incurred if

55 *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, Gibbs CJ at 367; *Campbell Discount Co v Bridge* [1962] AC 600; *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86; *Re Apex Supply Co Ltd* [1942] 1 Ch 108.

56 Similar sentiments had earlier been echoed by Lord Denning in *Campbell Discount Co v Bridge* [1962] AC 600 at 626.

57 The factual background of this is revealed in Fox D W, "Limiting the Ambit of Penalty Clauses" (1984) 128 *Solicitors Journal* 179.

the respondent were called upon to honour the guarantee at any time when the appellant was in breach of any contractual duty owing by it to the buyer. The appellant submitted that since the appellant's breach might be very minor, the amount payable to the respondent under the indemnity or recourse agreement was not a genuine pre-estimate of the loss likely to result from the breach by the appellant and was, therefore, unenforceable as a penalty. The submission was rejected in a short speech by Lord Roskill, delivering the decision of the House, who pointed out that the indemnity clause was not obedient to the penalty rules for the simple reason that it provided for payment upon the happening of an event which was not a breach of a contractual duty owed by the appellant to the respondent. The House of Lords was not disposed to broaden the penalty rules to include a review of this type of indemnity provision, Lord Roskill opining that: "it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain." ([1983] 1 WLR 399 at 402)

It is, perhaps, worth pointing out that the indemnity provision in *Export Credits* was correctly drawn and did not result in a windfall to the respondent (at 403).[58] What would have been the position if the clause had provided for payment of a sum which grossly and unconscionably inflated the respondent's true loss? In such a case, the appellant might have sought to invoke equity's general jurisdiction to restrain the respondent's unconscionable use of a legal right or to prevent unconscionable conduct rather than have relied upon any specific doctrine against penalties.[59]

Stipulated sums payable on the happening of events which include but which are not confined to breaches of contracts

[820] If one stipulated sum is payable for the loss of a contract following termination upon the happening of an event which

58 In *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, Deane J at 198-199, it was held that: "It is true that one can point to judicial statements, including some recent statements of high authority, which support the ... view that a contractual clause will not be unenforceable as a penalty unless it provides for payment upon breach of contractual duty ... Such broad statements appear to me, however, to have generally been made in a context where the grounds for declining to hold that a penalty was involved are properly to be seen as more narrowly confined ... that the relevant contractual liability was pursuant to an indemnity agreement and corresponded with the loss incurred ... I do not see any of those general statements as binding this Court."

59 See below, para [824]; Finn P D, "Unconscionable Conduct" (1994) 8 *Journal of Contract Law* 37 at 38, 47.

includes but is not restricted to a breach of contract, then the penalties doctrine applies if the stipulated sum becomes payable following breach, but does not apply if the stipulated sum becomes payable upon the happening of an event which is not a breach of contract. In *Campbell Discount Co v Bridge* [1962] AC 600, a stipulated sum was payable for the early termination of a hire-purchase agreement. The agreement did not discriminate between termination by the owner following the hirer's breach and termination following the hirer's election voluntarily to return the goods. In both cases, the same sum was payable. It was submitted for the owner that one sum could not be penal in one case and not all. Since the stipulated sum might be payable following the happening of an event which was not a breach of contract, it was submitted that the penalties doctrine did not apply to any provision of the agreement. In rejecting this submission, the House of Lords upheld the decision of the Court of Appeal in *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86, where it was held that a sum exigible for a breach of contract was susceptible to review by the doctrine of penalties, whereas the same sum, if payable following the happening of an event which was not a breach of contract, was not so susceptible.[60]

In judging the validity of a stipulated sum payable on the happening of an event which may or may not involve a breach of contract, the law has admitted an unfortunate paradox, clearly identified by Lord Denning in *Campbell Discount Co v Bridge* [1962] AC 600, when his Lordship noted that the law appears to favour the law-breaker whilst penalising the person who observes the terms of a contract. For example, if the lessee under the terms of a chattel lease, aware of an inability to make future rental instalments, exercises a right to early termination and agrees to pay a stipulated sum to the lessor as compensation for the loss of the lease, the stipulated sum is not liable to review as a penalty. On the other hand, if the lessee defaults in payment of rent or declares an inability or unwillingness to proceed with the contract, thus committing an anticipatory breach, the lessor may terminate and sue to recover the stipulated sum, but the stipulated sum is liable to review as a penalty. Such a paradox could be avoided if an action to enforce a grossly inflated indemnity clause were to be restrained in equity as an unconscientious use of a legal right.[61]

60 The reasoning in *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86 and *Campbell Discount Co v Bridge* [1962] AC 600 on this point was approved in *O'Dea v Allstates Leasing (WA) Pty Ltd* (1983) 152 CLR 359, Gibbs CJ at 367; *AMEV-UDC v Austin* (1986) 162 CLR 170, Mason and Wilson JJ at 184-185; *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1, Clarke J at 9.

61 See above, para [819], and below, para [823].

EQUITY AND RELIEF AGAINST PENALTIES

[821] The origin of the rule against penalties is equitable.[62] The influence of the equitable foundations and the effect of the absorption of equitable doctrine upon the modern rule are difficult to assess. Has the modern rule against penalties been completely denuded of its equitable characteristics following its reception into the common law, or does some residual discretion remain? The answer to this question should be seen in the light of the majority judgments in *AMEV-UDC Finance v Austin* (1986) 162 CLR 170.

In *AMEV-UDC Finance*, the lessor sought to recover liquidated damages for loss of the lease following the lessor's termination of the lease consequent upon the lessee's non-repudiatory breach. The liquidated damages clause provided for an acceleration of future rental instalments without any discount to present value and, at first instance, Rogers J held the clause penal as a result of the High Court decision in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359. It was conceded before the High Court that Rogers J's finding was correct. At the heart of the argument in the High Court was the correctness of Rogers J's further finding that the lessee, in seeking relief from the penal provisions of the agreed damages clause, was seeking equity and could, therefore, be put upon terms. Rogers J held that, as a condition of obtaining relief, the lessee should indemnify the lessor for the lessor's loss following termination of the lease.[63] A majority (Gibbs CJ, Mason and Wilson JJ) of the High Court disagreed with this line of reasoning. The court held that the consequence of a finding that the agreed damages clause was penal was that the lessor was restricted to recovery of unliquidated or general law damages. The assessment of unliquidated damages was governed by the court's own decision in *Shevill v Builders Licensing Board* (1982) 149 CLR 620 and was limited to the actual loss directly flowing from breach. Since the lessor had elected to end the lease for the lessee's non-repudiatory breach, it followed that it was not competent for the court to award damages for loss of bargain as a component of unliquidated damages.

62 See above, paras [801]-[802].

63 As it happened, the amount of the true loss was only slightly less than the amount provided for in the liquidated damages clause.

There is nothing in the majority judgments to sustain the view that the court was exercising an equitable jurisdiction when declaring an agreed damages clause unenforceable as a penalty. Indeed, the joint judgment of Mason and Wilson JJ refers to the equitable jurisdiction over penalties as having "withered on the vine" ((1986) 162 CLR 170 at 191) after the advent of the Judicature system. The Judicature system reinforced the principle that the unenforceability of a penalty was an established rule of law (at 191). In response to the submissions for the lessor seeking to uphold the reasoning of Rogers J, their Honours spoke of the "complications" in any attempt to "exhume a discretionary jurisdiction to grant relief" which had not been used for more than a century (at 183). Gibbs CJ stated (at 176) that:

> "The appellant cannot successfully seek to rely on general equitable principles which relate to the relief against penalties when those principles have long since hardened into definite rules governing the position of parties to a contract which contains a clause imposing a penalty for breach. It is well established in the modern law that the liability of a party who has broken a contract which contains a penalty clause is to pay the damages that have resulted from the breach."

The majority refused an invitation to develop a new law of compensation, distinct from damages at law, which would apply in a situation such as that litigated before the court.

It is suggested that the more likely conclusion to be drawn from the reasoning and comments in the majority judgments is that, whatever the antecedents of the rule may have been, the rule against penalties is a rule of law to be applied without regard to the exercise of equitable discretion. If so, the contrast with the court's jurisdiction to relieve against forfeiture of a proprietary interest, a jurisdiction which shares a common ancestry with the rule against penalties but which has retained its original equitable discretionary characteristics,[64] is quite marked.

[822] The English Court of Appeal has also taken the view that the rule against penalties must be applied as a rule of law without regard to the conduct of the person seeking relief from the penalty. In *Jobson v Johnson* [1989] 1 WLR 1026, the defendant had bought shares in a club under an instalment contract which provided that, on default in payment of an instalment, the defendant would retransfer the shares to the vendor. Following default in payment, the defendant sought relief against forfeiture of the

64 See below, Chapter 9: "Relief against Forfeiture".

shares, which specific performance of the retransfer agreement would have involved, but failed to comply with an undertaking given to the court. The claim for relief was then struck out. On appeal, the defendant submitted that, notwithstanding the dismissal of the claim for relief against forfeiture, the retransfer agreement remained a penalty which was unenforceable. The plaintiff submitted that the penalty clause created a binding obligation which remained enforceable unless the court granted equitable relief, and that the failure of the defendant to comply with the undertaking given to the court precluded entitlement to equitable relief. The plaintiff's submissions were rejected. In the words of Dillon LJ (at 1033-4):[65]

> "Where the penalty is a sum of money, the relief, once the penalty has been identified, does not involve a consideration of the circumstances of the defendant, or of the factors which might be appropriate to a grant of relief against a forfeiture in such a case as *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, where there was no question of penalty. Giving judgment for the actual damage without further inquiry into the circumstances was the course taken in *Cooden Engineering Co Ltd v Stanford* [1952] 2 All ER 915, [1953] 1 QB 86 and *Bridge v Campbell Discount Co Ltd* [1962] 1 All ER 385, [1962] AC 600 and in my judgment it was the correct course."

Nicholls LJ (at 1041-2) spoke in these terms:

> "In this respect, as the law has developed, a distinction has arisen between the enforcement of penalty clauses in contracts and the enforcement of forfeiture clauses. A penalty clause will not be enforced beyond the sum which equals the actual loss of the innocent party. A forfeiture clause, of which a right of re-entry under a lease on non-payment of rent is the classic example, may also be penal in its effect. Such a clause frequently subjects the defaulting party … to a sanction which damnifies the defaulting party, and benefits the other party, to an extent far greater than the actual loss of the innocent party … Normally the granting of such relief is made conditional on the payment of the rent with interest and costs. If that condition is not complied with … the forfeiture provision will be enforced … I see no reason why the court's ability to grant discretionary relief against forfeiture should deprive a defendant of the relief automatically granted in respect of a penalty clause, if, exceptionally, a contractual provision has characteristics which enable a defendant to pray in aid both heads of relief."

65 His Lordship went on to say that the result was the same if the penalty was not the payment of money but an obligation to transfer property.

His Lordship went on to hold that, in principle, the result is the same where the penalty is an obligation to transfer property, although, it was conceded, peculiar difficulties could arise in formulating the correct order and form of relief where the value of the property covenanted to be transferred exceeded the true loss sustained.

[823] In Australia, the extent of the continued influence of equity upon the application of the rule against penalties may come to depend upon the meaning to be assigned to a passage appearing at the end of the joint judgment of Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170. The passage deserves quotation in full (at 193-194):

> "Instead of pursuing a policy of restricting parties to the amount of damages which would be awarded under the general law or developing a new law of compensation for plaintiffs who seek to enforce a penalty clause, the courts should give the parties greater latitude to determine the terms of their contract. In the case of provisions for agreed compensation and, perhaps, provisions limiting liability, that latitude is mutually beneficial to the parties. It makes for greater certainty by allowing the parties to determine more precisely their rights and liabilities consequent upon breach or termination, and thus enables them to provide for compensation in situations where loss may be difficult or impossible to quantify or, if quantifiable, may not be recoverable at common law. And they may do so in a way that avoids costly and time-consuming litigation. But equity and the common law have long maintained a supervisory jurisdiction, not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing that distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term. The courts should not, however, be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers, in situations of the present kind, an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance

between the competing interests of freedom of contract and protection of weak contracting parties."

The meaning of this passage is open to different interpretations. It is suggested that the more likely meaning is that a liquidated damages clause will not be judged penal unless there is a significant or gross disparity between the agreed amount and the amount objectively construed as the loss likely to be incurred by the promisee. The reference to unconscionability is a reference to the kind of procedural unconscionability identified by the High Court, for example, in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. In circumstances where the promisee has exploited a weakness or special vulnerability of the promisor or has unduly influenced the promisor, a liquidated damages clause, even if not extravagant or excessive in amount, may yet be declared unenforceable by the court. In other words, having regard to what was said in the earlier part of the joint judgment, their Honours were not suggesting that the doctrine of penalties had been re-infused with equitable characteristics, but rather, were declaring it a rule of law but, at the same time, confirming that a valid liquidated damages provision will not be enforced against a promisor, where, given the relationship between the parties, it would be unconscionable to do so.[66]

The same quoted passage from *AMEV-UDC Finance Ltd v Austin* has been treated rather differently by Meagher JA in *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615. His Honour agreed, in the light of a distinguished line of cases,[67] that the rule against penalties is a mechanical test to be applied at the date of the contract and has nothing to do with judicial discretion or

66 It appears that the New South Wales Court of Appeal has embraced this view. In *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564, Clarke JA held that it was appropriate for the court to reconsider its judgment in *W T Malouf Pty Ltd v Brinds Ltd* (1980) 52 FLR 442, where Samuels JA at 462 (with whom Hope JA concurred) was of the view that it was not necessary to show that a stipulated sum was extravagant and unconscionable in every case in order for the sum to be ruled penal. Clarke JA at 576-577 said: "In these circumstances it seems to me that it is appropriate to reconsider the judgment in *W T Malouf Pty Ltd v Brinds Ltd* and upon that reconsideration to conclude that contractual terms providing for the payment of agreed liquidated damages should be struck down as a penalty only if the agreed sum be either extravagant in amount or imposes an unconscionable or unreasonable burden upon a party ... If, as seems clear, the inquiry is whether the sum was a genuine pre-estimate on the one hand or a penalty or sanction against a breach on the other the fact that the damages might exceed by a relatively small amount that which upon analysis could be recovered in an action at law seems a slippery base for a conclusion that the sum is a sanction ... In my opinion this approach draws a fair balance between the freedom of the parties to contract as they might wish and the public interest, which is reflected both in statutory instruments [*Contracts Review Act* 1980 (NSW)] and judicial decisions, in protecting a weaker party from oppressive burdens or the unconscientious use of power by a stronger party."

67 *Forestry Commission of New South Wales v Stefanetto* (1967) 133 CLR 507; *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1; *Lax v Glenmore Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 703.

any notion of unconscionability ((1991) 22 NSWLR 615 at 650-651). However, his Honour interpreted the quoted passage as supporting the view that "relief against penalties is in its nature discretionary, so that the nature of the relationship between the contracting parties may make the contractual stipulation in question unconscionable" (at 651). It appears that the same approach to the construction of this passage as that suggested by Meagher JA has been taken by Cole J in *Multiplex Constructions v Abgarus Pty Ltd* (1992) 33 NSWLR 504, which represents the most recent word on this subject. *Multiplex Constructions v Abgarus Pty Ltd* concerned a dispute over a construction contract for a high-rise commercial building. The plaintiff builder sought a declaration that a liquidated damages provision was unenforceable as a penalty. The clause, which had been the subject of some discussions and negotiations between the parties and their respective legal advisers, provided for damages for delay in the event that the builder did not complete within the stipulated time. The damages were calculated as interest, which was defined by a formula, on daily balances of certain holding charges which included the value of the development site at the date of contract and the total of certain other items delineated in the clause. The plaintiff submitted that the liquidated damages provision was penal on the ground that the amount provided could not possibly have represented a genuine attempt to pre-estimate the owner's loss. This was for the reason, the submission continued, that the owner of a high-rise commercial building was expected to derive revenue from the development enterprise either by a sale or by leasing. The interest on holding charges did not reflect either possibility. The submission was rejected for reasons not relevant to the point under discussion, but in deciding the issue, it became necessary for the court to rule on the admissibility of evidence concerning the background to the drafting of the clause and the negotiations preceding the clause as it appeared in the contract.

In ruling such evidence admissible, Cole J acknowledged that an agreed damages clause might be construed as penal on either one of two broad grounds: first, that the stipulated sum was grossly excessive or extravagant in relation to the likely loss, and, secondly, that set against the background to the drafting of the clause and the relationship between the parties, it would be unconscionable in the circumstances for a court to enforce the clause. In the latter case, the stipulated sum need not be extravagant or grossly excessive (at 509-510):

> "Whether a burden is unconscionable may well depend upon the circumstances of the parties at the date of the contract, their

> perceptions at that time regarding their respective positions should breach of contract occur at a later and perhaps distant time, the equality or inequality of bargaining position at the date of the contract, and the willingness or unwillingness of a party to accept an imprecise or in some respects ill defined obligation to pay damages as the price of obtaining what presumably was regarded as a profitable contract. The relationship between the parties at the time of contract concerning the proposed clause and its imposition touch upon these matters, as does the question of their understanding of the likely imposition generated by the clause. In my view these matters, and thus evidence relating to them, are admissible in order that the court may weigh any question of unconscionability, quite apart from an empirical examination of whether damage under the clause is excessive."

The decision to admit this kind of evidence, given that the parties were both corporations which had entered into a commercial dealing with the benefit of legal advice, indicates a propensity to search for unconscionability extending beyond the reach of traditional equitable doctrines, such as undue influence and the procedural unconscionability of the type identified in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, and extending beyond consumer legislation such as the *Trade Practices Act* 1974 (Cth) and the *Contracts Review Act* 1980 (NSW).[68]

[824] Notwithstanding "a distinguished line of authority" which compels the view that the rule against penalties is a rigid rule of law,[69] the courts may yet be introducing some discretion into the application of the rule by paying regard to the circumstances of the parties at the time the liquidated damages clause was negotiated. The interpretation of the quoted passage in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 193-194,[70] justifying attenuation of the rigidity of the penalties rule by the application of equitable discretion is, perhaps, a broad interpretation but it is one, nevertheless, which is intellectually sustainable. The decision in *Multiplex Constructions v Abgarus Pty*

68 The reasoning of Cole J in *Multiplex* was referred to, with evident approval, by Owen J in *Westpac Banking Corporation v Australian Shipbuilding Industries Pty Ltd* (unreported, WA Sup Ct, 25 September 1996). The relationship between the parties, whether or not there was any discussion of the liquidated damages provision, whether or not a party understood the terms and reach of the provision and whether or not the parties were professionally advised, were matters which raised a "threshold issue". That threshold issue may or may not be decisive, depending upon the circumstances of the case.

69 *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615, Meagher JA.

70 See above, para [823].

Ltd (1992) 33 NSWLR 504 is illustrative of a softening in the perception of the rule against penalties as a rigid rule of law. The tempering of the rule by the injection of a broad notion of unconscionability would be consistent with equity's sponsorship of a general doctrine of unconscionability so evident in current equity jurisprudence.[71] In view of the provisions of s 51AA of the *Trade Practices Act* 1974 (Cth), which proscribe the commission of unconscionable conduct in trade or commerce by a corporation, whether appellate courts adopt the same approach as that taken by Cole J in *Multiplex* is a matter of no little importance. Nevertheless, it is worthy of note that, in any case, the focus of equity's attention to date, appears to be limited to two matters: first, the "extravagance" of the amount of the agreed damages seen in the light of a bona fide attempt to pre-estimate the loss; secondly, the procedural unconscionability involved at the negotiation stage of the agreed damages clause. No case has yet gone so far as to suggest that evidence of the actual loss post-breach is admissible as demonstrative of a harsh and oppressive result, whereas in proceedings for relief against forfeiture, the circumstances and conduct of the parties at the time of the forfeiture and at the time relief is sought are very relevant.[72] Whereas relief against forfeiture was and remains equitable in nature and, therefore, discretionary,[73] the principles governing relief against penalties have become rules of law but remain, nonetheless, rules qualified by some equitable characteristics.

71 See above, Chapter 2: "The Conscience of Equity"; Finn P D, "Unconscionable Conduct" (1994) 8 *Journal of Contract Law* 37.

72 See below, Chapter 9: "Relief against Forfeiture".

73 See below, Chapter 9: "Relief against Forfeiture"; *Jobson v Johnson* [1989] 1 WLR 1026; 1 All ER 621, Nicholls LJ at 633-634, discussed above at [822].

CHAPTER NINE

RELIEF AGAINST FORFEITURE

Michael Tilbury and Chris Rossiter

INTRODUCTION

[901] Relief against forfeiture refers to the situation where a court protects a person against the loss or determination of an estate or interest in property, or a proprietary right, either in consequence of a failure to perform a covenant or condition[1] or in consequence of the determination of a contract for some other reason (*Hill v Terry* [1993] 2 Qd R 640). Such relief originated in equity to mitigate the rigours of the strict enforcement of conditions (and, to a lesser extent, covenants) at law. A classic example, which has a long history[2] and which is now regulated largely (but not exclusively) by statute,[3] occurs in the context of a covenant in a lease to the effect that, in the event of the tenant's failure to pay rent, the landlord has the right to re-enter and forfeit the lease. If the tenant fails to pay rent and the lease is forfeited at law, a court of equity may, nevertheless, relieve against its forfeiture.[4] The relief which equity gives in such a case may be a shield or a sword.[5] If, notwithstanding the determination of the lease, the tenant is still in possession of the leased premises, equity may, at the instance of the tenant, "undo" the determination of the lease and allow it to remain on foot on terms that the tenant pays the outstanding rent and makes

1 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 445.

2 Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 22-26.

3 See below, para [916].

4 *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of New South Wales Ltd* (1970) 2 BPR 9562; *Hace Corp Pty Ltd v F Hannan (Properties) Pty Ltd* (1995) 7 BPR 14,326; *Stieper v Deviot Pty Ltd* (1977) 2 BPR 9602; *Gill v Lewis* [1956] 2 QB 1; *Chandless-Chandless v Nicholson* [1942] 2 KB 321.

5 Consider *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615, Clarke JA (dissenting) at 645. Compare Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 83-84.

compensation for the delay in its payment. If, however, the landlord has re-entered, equity may, at the instance of the tenant, order the execution of a new lease on terms that the tenant makes compensation.[6]

RELATIONSHIP TO RELIEF AGAINST PENALTIES

General distinction between relief against penalties and relief against forfeiture

[902] Relief against forfeiture may be regarded as a particular application of the more general power of equity to relieve against penalties.[7] For example, the provision in a lease which makes the tenant's failure to pay rent the occasion of forfeiture of the lease. The object of the provision is to secure payment of the rent;[8] like a penalty, it can, therefore, be regarded as "accessional" to the main object of the contract, a security for its due performance;[9] and, in its effect, the provision can operate in terrorem of the lessee for whom the determination of the lease may involve damnification far in excess of that of the lessor, whose loss may consist solely in the delay in the payment of one instalment of rent.[10] However, notwithstanding a possible common origin,[11] the law relating to relief against forfeiture and the law of penalties have developed separately since approximately the

6 Such responses are possible by reason of equity's ability to order specific relief and relief on terms.

7 For example, *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507, Mason J (dissenting) at 519; *Hill v Terry* [1993] 2 Qd R 640, McPherson SPJ (dissenting) at 649. On penalties, see above, Chapter 8: "Relief against Penalties".

8 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 445.

9 For example, *Stern v McArthur* (1988) 165 CLR 489, Mason CJ (dissenting) at 499. Compare *Sloman v Walter* (1784) 1 Bro CC 418, Lord Thurlow LC at 419; 28 ER 1213; *Thompson v Hudson* (1869) LR 4 HL 1, Lord Hatherley at 15. See further Symons S W, *Pomeroy's Equity Jurisprudence* (5th ed, Bancroft-Whitney Co, San Francisco, 1941), Vol 2, para [433].

10 See *Jobson v Johnson* [1989] 1 WLR 1026, Nicholls LJ at 1041. Compare above, paras [807]-[808].

11 *Jobson v Johnson* [1989] 1 WLR 1026, Nicholls LJ at 1038. In the absence of historical evidence for a coherent theoretical basis for early equity jurisprudence, we need to guard against the ready assertion of what seems obvious to modern eyes, namely, a common origin for relief against penalties and forfeitures — just as (analagously) we need to avoid the seemingly compelling view that the equity of redemption in the law of mortgages is a particular manifestation of the power to relieve against forfeiture (see *G & C Kreglinger v New Patagonia Meat & Coal Storage Co Ltd* [1914] AC 25, Viscount Haldane LC at 35), for here, the evidence is that the equity of redemption developed before equity's general approach to forfeitures: see Turner R W, *The Equity of Redemption* (CUP, Cambridge, 1931), pp 38-42.

middle of the 18th century,[12] and it is important to highlight the differences which now exist between these two areas of the law.[13]

[903] First, relief against forfeiture is not, in principle, based on a determination that the forfeiture involves a penalty (*Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 425; Mason and Deane JJ at 445). Contractual provisions are penal where they involve the imposition of a different or additional liability upon breach (Mason and Deane JJ at 445). Whether they do so or not is judged according to established rules which are applied as at the date of the contract. If they are judged penal at that time, they are unenforceable. If they are judged not to be penal at that time, they remain enforceable notwithstanding that their enforcement takes place in changed circumstances which may, for example, create hardship for one of the parties to the contract.[14] The reason is the necessity of keeping the parties to their agreements. By contrast, where the enforcement of a contractual provision would result in the forfeiture of a proprietary interest, the law intervenes on the wider basis of unconscionability.[15] In such cases, the fact that the contractual provision is penal is merely one factor which is relevant to the court's discretion (*Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723-724).

[904] Secondly, relief against forfeiture is of purely equitable origin while the law of penalties developed as a complex amalgam of equity, common law and statute, with the common law prevailing.[16] Like all equitable relief, relief against forfeiture is available on terms (for example, on terms that the party in breach make compensation to the innocent party);[17] relief against penalties is not (*AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170).

[905] The distinction between the rules applicable to penalties and the principles governing relief against forfeiture is brought into sharp relief in cases containing a contractual provision that, on breach,

12 See Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), p 20.

13 See Symons S W, *Pomeroy's Equity Jurisprudence* (5th ed, Bancroft-Whitney Co, San Francisco, 1941), Vol 2, paras [449]-[450].

14 See above, Chapter 8: "Relief against Penalties".

15 See below, para [907]; above, Chapter 2: "The Conscience of Equity".

16 See above, Chapter 8: "Relief against Penalties"; *Austin v United Dominions Corp Ltd* [1984] 2 NSWLR 612, Priestley JA at 627-628 (affd as *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170).

17 See especially *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 447.

the promisor will transfer or forfeit property other than money to the promisee. It is clear that a contractual provision which requires a party on breach to make over property other than money is just as capable of being a penalty as a provision which requires a party on breach to make over money.[18] It is also clear that, where the promise is executory, the penalty rules will enable the promisor to resist a claim which *would* involve the forfeiture of the promisor's interest in the property.[19] By contrast, where the forfeiture of the promisor's interest has already taken place and the promisor seeks to recover the property in the hands of the promisee, the matter is determined by reference to the rules against forfeiture.[20]

Application of distinction to "forfeiture" of instalments in contracts for the sale of land

[906] The applicability of the penalty rules and the forfeiture principles is particularly controversial in instalment contracts for the sale of land where the contract provides that, on default, moneys already paid by the purchaser under the contract are forfeited to the vendor.[21] The provision providing for the forfeiture of moneys already paid is, in principle, susceptible of evaluation in terms of the penalty rules. However, those rules are not directly applicable since the court is not being asked to enforce an

18 *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615; *Jobson v Johnson* [1989] 1 WLR 1026. See also *Bysouth v Shire of Blackburn and Mitcham* [1928] VLR 562, Irvine CJ at 574-575.

19 *Bysouth v Shire of Blackburn and Mitcham* [1928] VLR 562; *Jobson v Johnson* [1989] 1 WLR 1026. But see *BICC Plc v Burndy Corp* [1985] Ch 232, Dillon LJ at 247. And consider the comments of Dillon LJ in *Jobson v Johnson* at 1043-5.

20 *Re Jigrose* [1994] 1 Qd R 382. See also *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507, Jacobs J at 523-524. Contrast *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615 (where the promisor had no interest to forfeit in the improvements to the land in isolation from the land itself). Compare *Legione v Hateley* (1983) 152 CLR 406 per Mason and Deane JJ at 445: "When non-payment of rent or a fine is made the occasion for forfeiture of an estate or interest in property it may be proper to treat the forfeiture as being similar in character to a penalty because it is designed to ensure payment of the rent or fine."

21 In the absence of such a provision, the instalments may be recoverable by the purchaser in restitution depending on the terms of the contract: see Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 535-540. Deposits are, however, immune from the law of penalties and forfeiture since they are an earnest for the plaintiff's performance of the contract: see *NLS Pty Ltd v Hughes* (1966) 120 CLR 583. But to qualify as a deposit, the sum paid must, in its amount, be capable of description as an earnest (usually not more than 10% of the total purchase price): *NLS Pty Ltd v Hughes* (1966) 120 CLR 583, Barwick CJ at 589; *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 (PC); *Smyth v Jessep* [1956] VLR 230; *Re Hoobin* [1957] VLR 341; *Coates v Sarich* [1964] WAR 2; see also *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC), Lord Hailsham LC at 94.

22 See above, Chapter 8: "Relief against Penalties".

allegedly penal sum payable on breach (which is the context in which the penalty rules generally apply),[22] but to order the repayment of money due, payable and paid before any breach of contract.[23] Nor, strictly, is the plaintiff seeking relief against "forfeiture", since the money paid already belongs to the vendor (*Stockloser v Johnson* [1954] 1 QB 476, Denning LJ at 488-489). There is no doubt, however, that the court has jurisdiction to relieve against "forfeiture" in these cases.[24] The basis of the jurisdiction is not clear (*Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 (PC), Lord Browne-Wilkinson at 582).[25] While the penalty rules are attracted by analogy in all cases,[26] their application is not necessarily determinative of the case. Where the prosecution of the forfeiture of the instalments is penal, the instalments are not recoverable by a purchaser who is unwilling to perform the contract where their recovery would, in all the circumstances of the case, *now* be unconscionable.[27] This means that the principles applicable in these cases are moving towards those applicable in cases of true forfeiture. This is a welcome development insofar as it injects an element of flexibility into the application of the penalty rules in this particular group of cases.[28]

23 See Tilbury M J, *Civil Remedies* (Butterworths, Sydney, 1993), Vol 2, para [13085].

24 *Pitt v Curotta* (1931) 31 SR (NSW) 477; *McDonald v Dennys Lascalles Ltd* (1933) 48 CLR 457; *Steedman v Drinkle* [1916] 1 AC 275 (PC); *Brickles v Snell* [1916] 2 AC 599 (PC). But see *Re Dagenham (Thames) Dock Co; Ex parte Hulse* (1873) LR 8 Ch App 1022; *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319 (PC).

25 See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, Lord Diplock at 702.

26 See *Stern v McArthur* (1988) 165 CLR 489, Mason CJ at 500-501, Deane and Dawson JJ at 524-525, Gaudron J at 540; *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131, Brennan J at 151-152; *Legione v Hateley* (1983) 152 CLR 406, Brennan J (dissenting) at 455-457; *McDonald v Dennys Lascalles Ltd* (1933) 48 CLR 457, Starke J at 470.

27 *Smyth v Jessep* [1956] VLR 230; following dicta in *Stockloser v Johnson* [1954] 1 QB 476, Somervell LJ at 486; Denning LJ at 490. See also *The Afovos* [1980] 2 Lloyd's Rep 469, Lloyd J at 478-479; *Pitt v Curotta* (1931) 31 SR (NSW) 477; *Berry v Mahony* [1933] VLR 314; *Real Estate Securities Ltd v Kew Golf Links Estate Pty Ltd* [1935] VLR 114 (relief on terms). And consider *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 443-444; *Coates v Sarich* [1964] WAR 2 at 7-8, 14; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615, Clarke JA (dissenting) at 646. But see *Stockloser v Johnson* [1954] 1 QB 476, Romer LJ at 501; *Galbraith v Mitchenall Estates Ltd* [1965] 2 QB 743; *Windsor Securities Ltd v Loreldal Ltd* (1975) *The Times* (London), 10 September 1975, Oliver J (following the judgment of Romer LJ in *Stockloser v Johnson* [1954] 1 QB 476). By contrast, where the purchaser is now willing and able to perform the contract, relief against forfeiture of the instalment payments may be granted simply on the basis of the penalty rules: consider *Steedman v Drinkle* [1916] 1 AC 275; *Starside Properties v Mustapha* [1974] 1 WLR 816; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446. These authorities are not conclusive, however, and the reason for a departure from the principle in the text is far from obvious.

28 Consider Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 115-117. See also Harpum C, "Relief against Forfeiture and the Purchaser of Land" [1984] *Cambridge Law Journal* 134 at 159-166.

THE BASIS OF THE MODERN JURISDICTION

Unconscionability

[907] It is clear that the jurisdiction to relieve against forfeiture is not founded on a power to relieve generally against bargains (*Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723).[29] Rather, the jurisdiction is "limited"[30] or "exceptional".[31] The limited or exceptional circumstances which justify the grant of relief against forfeiture are those which arise where it is unconscionable for one of the parties to insist on the performance of rights at law to ensure a forfeiture of the other party's proprietary rights or interests.[32] This normally (but not necessarily) requires fraud, mistake or surprise as a precondition to the grant of relief.[33] As in other contexts,[34] unconscionability looks to the conduct of the parties and to the effect in all the circumstances of either relieving against the forfeiture or allowing it to take place. In this context, the two leading Australian authorities, *Legione v Hateley* (1983) 152 CLR 406 and *Stern v McArthur* (1988) 165 CLR 489 have identified three principal meanings of "unconscionability".

First, and most narrowly, "unconscionability" is taken to refer to unconscionable conduct in the assertion of a legal right, especially taking that conduct in conjunction with the consequences of granting or not granting relief from forfeiture.[35]

29 But compare Lord Simon of Glaisdale at 726-727.

30 *Shiloh Spinners v Harding*, Lord Wilberforce at 723.

31 *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 429; Mason and Deane JJ at 449 (in the context of a purchaser who is in breach of an essential term); *Ciavarella v Balmer* (1983) 153 CLR 438, Gibbs CJ, Mason, Wilson, Deane and Dawson JJ at 454; *Stern v McArthur* (1988) 165 CLR 489, Mason CJ at 502-503; Deane and Dawson JJ at 526; Gaudron J at 530. For cases where relief against forfeiture was refused on the basis that they were not exceptional, see *Ciavarella v Balmer* (1983) 153 CLR 438; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446; *Berry v Hodson* [1989] 1 Qd R 361; *Hill v Terry* [1993] 2 Qd R 640; *Re Jigrose* [1994] 1 Qd R 382. See also *Dybing v Bridges* (1990) 5 BPR 11,402.

32 *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489.

33 For example, *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 722; *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 526; *Berry v Hodson* [1989] 1 Qd R 361 at 366.

34 See above, Chapter 2: "The Conscience of Equity".

35 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 444-449; *Stern v McArthur* (1988) 165 CLR 489, Mason CJ (dissenting) at 503; Brennan J (dissenting) at 520. And see also *Ciavarella v Balmer* (1983) 153 CLR 438 at 453-454; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 453; *CCS v Lopiron Pty Ltd* (1987) 16 FCR 15; *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247 (forfeiture under the *Conveyancing Act* 1919 (NSW), s 128).

Examples include the situation where the party opposing relief against forfeiture has contributed to the breach which occasions the forfeiture[36] (especially where that party's conduct is aimed at securing some unconscientious windfall)[37] or where that party has acted precipitately (*P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615). The focus of "unconscionability" is here on the quality of the actions of one of the parties (*Stern v McArthur* (1988) 165 CLR 489, Gaudron J at 538).

Secondly, "unconscionability" refers to "unconscientious conduct", namely, the inability of a party to insist on a legal right for the unjust enrichment of the party where to do so would be to take advantage of the other party's special vulnerability or misadventure.[38] One factor relevant to such unjust enrichment would be that a windfall arising from the grant or refusal of relief would not be distributed according to the expectations of the parties at the time of entering into the contract.[39] Another may be the ability of one party to exact a harsh penalty for a trivial breach.[40] The focus of "unconscionability" is here on the consequences of granting or not granting relief against forfeiture (*Stern v McArthur* (1988) 165 CLR 489, Gaudron J at 538).

Thirdly, "unconscionability" refers to the inability of one of the parties to insist on legal rights when to do so would, in the circumstances of the case, cause a hardship to the other party which is not outweighed by the benefit which will necessarily be foregone by the first party as a result of the grant or refusal of relief against forfeiture (*Stern v McArthur* (1988) 165 CLR 489, Gaudron J at 540-541). Once again, "unconscionability" is here result-oriented.

[908] Although the results of cases can vary according to the meaning assigned to unconscionability,[41] the courts have not finally committed themselves to one or other of the meanings of

36 Compare *Stern v McArthur* (1988) 165 CLR 489, Mason CJ at 503, who would limit the meaning of "unconscionability" to this situation.

37 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 449.

38 *Stern v McArthur*, Deane and Dawson JJ at 526-527; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615 at 634-637. Compare *Commonwealth v Verwayen* (1990) 170 CLR 395, Deane J at 440-441.

39 *Stern v McArthur* (1988) 165 CLR 489, Deane and Dawson JJ at 529; *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615; *Dillon v Bepuri Pty Ltd* (1986) 4 BPR 9362; *Tang v Chong* (1988) 4 BPR 9507. See also *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Mason J at 429. Compare *Chaka Holdings Pty Ltd v Sunsim Pty Ltd* (1987) 10 BPR 18,171.

40 Consider *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 429.

41 See especially *Stern v McArthur* (1988) 165 CLR 489, which was determined by a majority of three to two, and note Gaudron J's discussion of the differences between various meanings of "unconscionability" at 538-539.

"unconscionability" identified in para [907] as the "true" basis of the jurisdiction to relieve against forfeiture. Nor, perhaps, are they likely to do so. For there are advantages in keeping the jurisdiction as flexible as possible, and that flexibility is prejudiced by attaching a general meaning to "unconscionability" which is intended to have broad application. At a very general level, whether a narrower or wider meaning of "unconscionability" is adopted depends on the extent to which the jurisdiction to relieve against forfeiture is to be regarded as exceptional. This depends, in turn, on the extent to which the parties should be required to adhere to their agreement. Yet, as is well known, the force of this consideration now varies from context to context: it is, for example, much more powerful in commercial situations than others.[42]

The discretionary nature of the jurisdiction

[909] The importance of any controversy surrounding the meaning of "unconscionability" as the basis of jurisdiction in cases involving relief against forfeiture diminishes when it is borne in mind that, as with all equitable relief, relief against forfeiture is ultimately available only at the court's discretion. This means that the court must have regard to all the circumstances and factors in the case and weigh them up against one another in order to determine whether or not the balance of justice favours the grant of relief. In theory, unconscionability could attract the court's jurisdiction, yet relief could be denied in the court's discretion. In practice, "jurisdiction" and "discretion" are here likely to be confounded, for many of the same factors are relevant to both. They include the following: traditional equitable considerations, such as laches,[43] and the unwillingness of courts of equity to grant specific relief which will compel the maintenance of an unwanted personal relationship;[44] the conduct of the parties;[45] the willingness to compensate for improvements to the property;[46] the reasonableness of requiring the person in default

42 See, for example, Finn P, "Fiduciary Law and the Modern Commercial World" in McKendrick E, *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992), pp 13-19.

43 For example *Prendergast v Turton* (1841) 1 Y & CCC 98; 62 ER 807, Knight Bruce VC at 110, 113.

44 *Coleman v Jones* (1986) 4 BPR 9228.

45 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 449; *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723; *Sandeman v Wilson* (1880) 1 LR NSW (Eq) 1 (defendant acted high-handedly); *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247 (lessee's conduct in respect of leased premises). Compare *Abbey National Building Society v Maybeech Ltd* [1984] 3 All ER 262 (fact that plaintiff not in any way "at fault" favoured granting relief).

46 *Stern v McArthur* (1988) 165 CLR 489.

to accept alternative relief (such as monetary compensation);[47] the ability of the person in default to make prompt and adequate compensation;[48] the gravity of the breaches;[49] the penal nature or effect of the provision;[50] the importance of keeping persons to their contracts;[51] the benefits or windfalls (and any corresponding detriments) which will accrue to one or other of the parties from the grant or refusal of relief;[52] the precipitate conduct of one of the parties;[53] the consideration that relief should be had against wilful breaches only in exceptional cases.[54]

A more certain jurisdiction?

[910] The modern jurisdiction to relieve against forfeiture derives from the decision of the House of Lords in 1973 in *Shiloh Spinners Ltd v Harding* [1973] AC 691, in particular, from Lord Wilberforce's speech. Lord Wilberforce (at 723-724) held that:

> "[Courts of equity have power] in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

47 *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Simon at 727; *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 449.

48 *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 725.

49 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 449; *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723. See also *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131, Brennan J at 151-152.

50 *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 449; *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723-724; Lord Simon at 727; *Starside Properties Ltd v Mustapha* [1974] 1 WLR 816 at 824; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 at 457. And consider *Abbey National Building Society v Maybeech Ltd* [1984] 3 All ER 262.

51 *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723; Lord Simon at 727; *Legione v Hateley* (1983) 152 CLR 406, Mason and Deane JJ at 447.

52 *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 429; *Dillon v Bepuri Pty Ltd* (1986) 4 BPR 9362; *Tang v Chong* (1988) 4 BPR 9507; *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131, Brennan J at 152.

53 *Tutita Pty Ltd v Ryleaco Pty Ltd* (1989) 4 BPR 9635, Meagher JA at 9638. Compare *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615.

54 *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 725, Lord Simon at 727; *Legione v Hateley* (1983) 152 CLR 406, Gibbs CJ and Murphy J at 429; Mason and Deane JJ at 449.

While the second half of this passage focuses on the discretionary nature of relief against forfeiture, the first half looks more to an objective classification of the contract in question and to the result which relief against forfeiture is capable of achieving. The point to note is that, if the contract can be described in the terms Lord Wilberforce uses, it will be the sort of contract which, at least prima facie, is susceptible of relief against forfeiture. The terms chosen by Lord Wilberforce are a generalisation of the types of contractual relationships which, traditionally, attract relief against forfeiture, namely those in which the right to forfeit is inserted as a term in order to secure the payment of money (*Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722).[55] Mortgages and leases are the prime examples (*Shiloh Spinners Ltd v Harding* at 722). We have already seen why this is so in the case of leases.[56] In the case of mortgages, the position is stronger. From an early period, equity took the view that a provision which enabled the mortgagee to determine the mortgage for non-payment is inserted only to secure payment of the mortgage debt. The protection which this afforded the mortgagor did not stop at relief against forfeiture, but broadened into the mortgagor's interest in the mortgaged property in the form of the equity of redemption.[57]

[911] Lord Wilberforce's approach reduces some of the uncertainties which lie at the basis of the jurisdiction providing for relief against forfeiture because it provides an objective view of the sorts of contracts which are likely to attract relief against forfeiture. As such, it provides a useful starting point for consideration by analogy of the application of the principles of relief against forfeiture in new situations. This is apparent from *Stern v McArthur* (1988) 165 CLR 489 at 527-529,[58] where Deane and Dawson JJ, noticing the analogy between instalment contracts for the purchase of land and mortgages, applied Lord Wilberforce's reasoning to hold that such an instalment contract is susceptible to relief against forfeiture.

55 See especially *Peachy v Duke of Somerset* (1721) 1 Stra 447; 93 ER 626.

56 See above, paras [901] and [902].

57 See Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 20-22.

58 The analogy is also apparent in some legislative provisions: see Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), p 188. But compare *Stern v McArthur* (1988) 165 CLR 489, Brennan J at 517-520.

THE SCOPE OF THE MODERN JURISDICTION

Jurisdiction generally limited to cases involving proprietary rights and interests

[912] The jurisdiction to relieve against forfeiture can generally be invoked only to protect proprietary or possessory rights,[59] whether in real[60] or personal property,[61] and whether that property is corporeal or incorporeal.[62] In principle, the type of property involved is only relevant insofar as its nature operates on the court's discretion. Thus, while relief may be granted in principle in a case of forfeiture of shares,[63] it will not be granted in favour of a person faced with forfeiture of the shares by reason of a delay in meeting a call on the shares where the shares are subject to such extreme fluctuations in value, by reason of the company's business, as to require the prompt payment of any call on them.[64]

[913] In England, the House of Lords has held that relief against forfeiture is not available in respect of the forfeiture of contractual rights.[65] The Full Court of the Supreme Court of Western Australia has reached the same conclusion, but the decision is limited to contractual rights, the enforcement of which cannot give rise to any interest in property.[66] It is clear that

59 *Westminster Properties Pty Ltd v Comco Constructions Pty Ltd* (1991) 5 WAR 191; *Scandinavian Trading Tanker Co Ltd v Flota Petrolera Ecuatoriana* [1983] 2 AC 694. To the extent to which the judgment of Barwick CJ in *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507 can be interpreted as excluding the application of the principles of relief against forfeiture in cases involving possessory interests only, the dissenting judgment of Mason J is to be preferred. And consider *Esanda Finance Corp Ltd v Plessnig* (1988) 166 CLR 131, Brennan J at 151.

60 Most of the cases considered in this chapter involve real property.

61 For example *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507 (contractor's plant); *Coleman v Jones* (1986) 4 BPR 9228 (racehorse). See also *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131, Brennan J at 151. See also Pawlowski M, "The Scope of Equity's Jurisdiction to Relieve Against Forfeiture of Interests in Property Other Than Land" [1994] *Journal of Business Law* 372.

62 *BICC Plc v Burndy Corp* [1985] Ch 232 (patent).

63 See *Jobson v Johnson* [1989] 1 WLR 1026.

64 *Prendergast v Turton* (1841) 1 Y & CCC 98; 62 ER 807. See also *Rule v Jewell* (1881) 18 Ch D 662; *Sparks v Company of Proprietors of the Liverpool Waterworks* (1807) 13 Ves Jun 428; 33 ER 354.

65 *Scandinavian Trading Tanker Co Ltd v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 (no relief against forfeiture in the case of time charterparty not by demise); *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (contractual licence).

66 *Westminster Properties Pty Ltd v Comco Constructions Pty Ltd* (1991) 5 WAR 191 (builder's right to terminate contract involving no forfeiture of proprietary interest).

relief against forfeiture can be given in respect of a contractual licence where the licence is coupled with an equity (*Milton v Proctor* (1988) 4 BPR 9654 (CA, NSW)). And, it is likely that the jurisdiction extends to protect purely contractual licences (*Chaka Holdings Pty Ltd v Sunsim Pty Ltd* (1987) 10 BPR 18,171).[67] This is justified either to the extent to which such rights are enforceable by specific performance or injunction and where it would be unconscionable to refuse such remedy,[68] or on the wider basis that the jurisdiction to relieve against forfeiture extends to contractual rights, the enforcement or non-enforcement of which results in the acquisition or loss of an estate or interest in land.[69]

[914] The nature of the interest in property which the application for relief against forfeiture seeks to protect is, in principle, irrelevant except in relation to the court's discretion and to the form of relief which is appropriate to give effect to it.[70] Thus, as we have seen,[71] the applicant for relief may rely on a mere equity. Indeed, in the important group of cases in which purchasers, under an instalment contract for the sale of land, seek relief against forfeiture of their interest in the land, the interest on which they rely is merely the equitable interest in the land commensurate with their ability to obtain specific performance, or, possibly, other equitable relief.[72] In principle, it is difficult to see why a vendor who fails to tender performance on settlement and whose contract is terminated should not, in appropriate cases, have relief against the termination as a precursor to the grant of specific performance and relief against forfeiture.[73] For a vendor under a contract for the sale of land is, in principle, entitled to specific performance of the purchaser's obligation to pay the purchase price (*Turner v Bladin* (1951) 82 CLR 463).

[915] In *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131, a case concerning an alleged penal provision in a finance lease, the subject matter of which was a prime mover truck, Brennan J expressed the view that, in an appropriate case, a chattel/finance lease was susceptible to relief against forfeiture in the event of

67 Compare *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (HL).

68 *Chaka Holdings Pty Ltd v Sunsim Pty Ltd* (1987) 10 BPR 18,171, Young J at 18,182. See further below, para [914].

69 See *Milton v Proctor* (1988) 4 BPR 9654, McHugh JA at 9659-9660 (citing Sir Anthony Mason, "Themes and Prospects" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 248).

70 Consider *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615, Clarke JA (dissenting) at 649.

71 See above, para [913].

72 *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489. See generally Lennon A J, "Relief against Forfeiture of Real Property Interest" (1984) 10 *Queensland Lawyer* 157, 179. Compare Gummow W M C, "Forfeiture and Certainty: the High Court and the House of Lords" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), Ch 2.

termination of the lease following the lessee's breach (at 151). The same view has been taken by the English Court of Appeal in *On Demand Information plc v Michael Gerson (Finance) plc* [2000] 4 All ER 734. The lessee sought relief against forfeiture of a chattel lease of certain video and editing equipment. The lease took the form of a finance lease, not an operating or bailment lease. In the lessor's submission, equity was not possessed of a jurisdiction to relieve against forfeiture of purely contractual rights and a finance lease produced only contractual rights. Further, that as the chattels the subject of the lease were of a wasting and precarious nature, the lease was not the proper subject for relief in equity. These submissions were rejected by the court. In the firm view of the court, contractual rights entitling hirers to possession of chattels generated property rights in the hirer and not just purely contractual rights. Proprietary rights in chattels were susceptible to equitable protection provided that the forfeiture in question came within one of the heads of jurisdiction referred to by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691. On the facts of the case in *On Demand*, relief was refused. This was because in the assessment of the majority on this point (Robert Walker and Pill LJJ, Sir Murray Stuart-Smith dissenting), the claimants for relief had consented to an order for judicial sale of the goods in question and relief against forfeiture, after the disposal of the subject matter of the claim for relief, was impossible.

Application to contracts for the sale of land

[916] Until the decision of the High Court of Australia in 1983 in *Legione v Hateley* (1983) 152 CLR 406, it was thought that there was no jurisdiction to order specific performance of a contract for the sale of land which had been validly terminated at law for the promisor's breach. The rediscovered[74] jurisdiction to order relief against forfeiture of a contract for sale of land as a prelude to specific performance is only available in exceptional circumstances[75] and, in the case of contracts which are not instalment contracts, where it would be unconscionable to refuse relief. In the assessment of unconscionability, the court may focus upon all of the circumstances attendant upon the forfeiture or, more

73 Consider *Dainford Ltd v Yulora Pty Ltd* [1984] 1 NSWLR 546, Mahoney JA at 551-552.

74 The "modern" jurisdiction to order relief against forfeiture of a contract for the sale of land dates from 1983. However, the principle has a longer lineage and was recognised and applied in *Re Dagenham (Thames) Dock Co; ex parte Hulse* (1873) 8 Ch App 1022 and again in *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319.

75 *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489; *Ciavarella v Balmer* (1983) 153 CLR 438; *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18,085.

particularly, upon the conduct of the vendor.[76] It seems clear that whatever be the limits or parameters of the jurisdiction in Australia, there exists, in this country, a greater willingness to sponsor the jurisdiction and to grant relief than exists in the United Kingdom.[77]

In the seminal decision of the House of Lords in *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Simon exclaimed that "equity has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties. What have sometimes been regarded as fetters to the jurisdiction are, in my view, more properly to be seen as considerations which the court will weigh in deciding how to exercise an unfettered jurisdiction." (at 726) Notwithstanding this pronouncement, the English judges have not always encouraged the development and application of the jurisdiction to relieve against forfeiture of contracts for the sale of land. Relief has been refused in the case of commercial dealings on the principal ground "that the English courts have time and time again asserted the need for certainty in commercial transactions — for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly." (*Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 per Lord Diplock at 704) In the case of forfeiture of a contract for the sale of land for domestic purposes, there is a similar unwillingness to order equitable relief. *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, was a decision of the Judicial Committee of the Privy Council on appeal from Hong Kong.[78] Time for completion of

76 See above, paras [907]-[908].

77 The recent decision of the New South Wales Court of Appeal in *Pentagold Investments Pty Ltd v Romanos* [2001] 10 BPR [97911] illustrates a willingness to embrace and even to extend the jurisdiction to relieve against forfeiture. After the purchaser failed to pay the second instalment of a deposit by a time which was of the essence, the vendor terminated. There was no contest on appeal as to the validity of the termination at law and given the significance of the obligation to pay the deposit on time, this was hardly cause for surprise. By a majority of 2-1 (Mason P and Sheller JA, Giles JA dissenting), the court ordered relief against forfeiture of the contract on the ground that the vendor could easily be compensated by payment of the deposit and the purchaser had incurred expense in obtaining a development approval for development of the land which may have enhanced its value. The right to terminate a contract for the sale of land for non-payment or late payment of the deposit was seen principally as a security for the payment of money and, thus, within a head of jurisdiction identified by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691. Compare the decision of the same court in *Tanwar Enterprises Pty Ltd v Cauchi* [2002] 10 BPR [97821] (Handley and Beazley JJA; Matthews AJA), where a more conventional approach to the exercise of the jurisdiction was taken and the opportunity seized to re-emphasise the point that exercise of the jurisdiction is predicted upon the existence of exceptional circumstances.

78 The decision has been the subject of academic comment by Abedian H and Furmston M P, "Relief Against Forfeiture After Breach of an Essential Time Stipulation in the Light of *Union Eagle Ltd v Golden Achievement Ltd*" (1998) 12 *Journal of Contract Law* 189; Heydon J D, "Equitable Aid to Purchasers in Breach of Time Essential Conditions" (1997) 113 *Law Quarterly Review* 385; Stevens J, "Having Your Cake and Eating It" (1998) 61 *Modern Law Review* 255.

the contract in question was of the essence and completion was to take place no later than 5pm on the specified date. The purchaser tendered performance some ten minutes after 5pm. It was held that the vendor's termination of the contract for the purchaser's breach of an essential time stipulation was valid at law. The purchaser's application for equitable relief against forfeiture was refused. Lord Hoffmann, in delivering the advice of the Judicial Committee, expressed the view that the contract, being an ordinary one for the sale of land, was not the proper subject for relief against forfeiture. "Their Lordships think that [the case] ... shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene."(at 523)

The divergence between the English and Australian approaches to the subject has been noted in New Zealand, where the approach of the English courts has been preferred (*Location Properties Ltd v G H Lincoln Properties Ltd* [1988] 1 NZLR 307).[79]

Jurisdiction limited neither to breach of contract nor to particular breaches of contract

[917] Relief against forfeiture is usually granted in the context of breach of contract. The jurisdiction may, however, be attracted even where forfeiture occurs as a result of the determination of a contract without breach; for example, by reason of the exercise of an option.[80] In the case of breach of contract, the jurisdiction is called into play both by essential[81] and non-essential breaches, it being generally irrelevant which particular obligation has been breached.[82] In principle, the nature of the obligation breached is

79 Greig J was of the view that relief should not be extended to contracts which remained largely executory. The paradigm case for relief was seen as forfeiture of an instalment contract for the sale of land where the purchaser had taken possession. In that type of case, the analogy with the mortgage was regarded as particularly apt.

80 *Hill v Terry* [1993] 2 Qd R 640; *Malding v Metcalfe* (1989) NSW Conv R 55-495; *Hillier v Goodfellow* (1988) V Conv R 54-310; *Melacare Industries of Australia Pty Ltd v Daley Investments Pty Ltd* (1999) 9 BPR 17,079; *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18,085; Rossiter C J, *Penalties and Forfeiture* (Law Book Co, Sydney, 1992), pp 195-196; Redfern M, "Relief against Loss of Option to Purchase or renew Lease" (1993) 1 *Australian Property Law Journal* 195. Consider also *Lerch v Eurobodalla Shire Council* (1994) ANZ Conv R 244.

81 *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489. See Nicholson K G, "Breach of an Essential Time Stipulation and Relief Against Forfeiture" (1983) 57 *Australian Law Journal* 632.

82 Compare the approach of Lord Eldon, who sought to confine the jurisdiction over forfeiture of leasehold interests to forfeitures consequent on breach for non-payment of rent: *Hill v Barclay* (1810) 16 Ves Jun 402; 33 ER 1037 (Ch); (1811) 18 Ves Jun 56; 34 ER 238 (Ch).

only relevant insofar as it may operate on the court's discretion. Thus, where a party is in breach of a covenant for which compensation may be speculative, the court may decline to grant relief against forfeiture (*Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 724). By contrast, the court may lean in favour of granting relief against forfeiture where the breach is of a minor term which causes no appreciable damage.[83]

The inherent and statutory jurisdictions

[918] The reluctance of 19th century courts of equity to apply the forfeiture doctrine to leases except for breach of the covenant to pay rent led to statutory reforms empowering the courts to grant relief against forfeiture in cases of breaches of other covenants. In all jurisdictions, statute now authorises and regulates relief against forfeiture of leases for breach of the covenants other than the covenant to pay rents.[84] Provision is also made in most jurisdictions to regulate the forfeiture of leases for breach of the covenant to pay rent.[85] It is important to note that legislation such as this does not, in principle, oust the inherent equitable jurisdiction to grant relief against forfeiture,[86] except to the extent that it covers the field in question (*Billson v Residential Apartments Ltd* [1992] AC 495).

83 *Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corp Pty Ltd* [1975] Qd R 151 (breach of non-rent covenant in lease). See also *Tutita Pty Ltd v Ryleaco Pty Ltd* (1989) 4 BPR 9635. Compare *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247 (in the case of a lease where all the rent is paid up, relief against forfeiture will ordinarily be granted at the instance of the lessee, though it will be refused where the lessee's breach is such (for example a breach of the clause against sub-letting) that, in all the circumstances of the case, it is unconscionable to grant relief because of the lessee's conduct in relation to the leased premises).

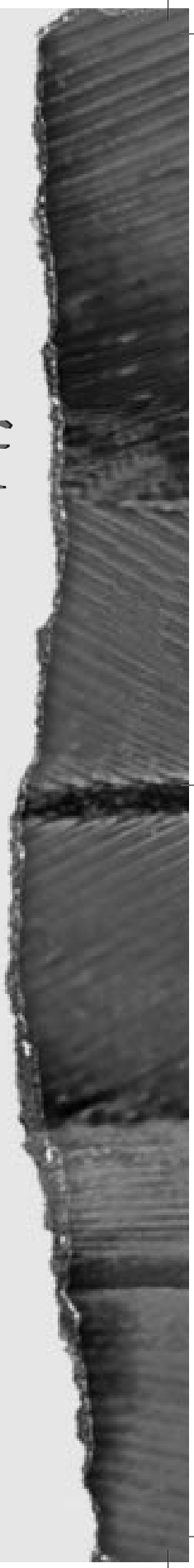
84 ACT: *Forfeiture of Leases Act* 1901 (NSW); *Conveyancing Act* 1919 (NSW), s 129; NT: *Landlord and Tenant Act* 1893 (SA); *Property Law Act* 1974 (Qld), s 124; *Landlord and Tenant Act* 1936 (SA), s 11; *Conveyancing and Law of Property Act* 1884 (Tas), s 15; *Property Law Act* 1958 (Vic), s 146; *Property Law Act* 1969 (WA), s 81.

85 *Landlord and Tenant Act* 1899 (NSW), ss 8-10; *Property Law Act* 1974 (Qld), ss 123-128; *Landlord and Tenant Act* 1936 (SA), ss 4, 5, 7, 9; *Supreme Court Civil Procedure Act* 1932 (Tas), s 11(14) and (14A); *Supreme Court Act* 1986 (Vic), ss 79, 80, 85.

86 *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 725; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687; *Abbey National Building Society v Maybeech Ltd* [1984] 3 All ER 262 (CA).

PART III

Obligations of Trust and Confidence



CHAPTER TEN

FIDUCIARY OBLIGATIONS

Patrick Parkinson

INTRODUCTION

Definition

[1001] Within certain relationships, and in certain situations, equity enforces stringent duties of loyalty and propriety which go far beyond the obligations which people owe to each other at common law.[1] These obligations are known as fiduciary obligations.[2] They are imposed upon those who are placed in positions of trust and confidence, and the main purpose of the enforcement of these fiduciary obligations is to ensure that the position of trust in which the fiduciary is placed is not abused for personal gain. The relationships in which fiduciary obligations generally arise are those in which the parties are not dealing with each other at arm's length, and where the obligation of one party is to act in the interests of, and for the benefit of the other or in pursuance of their joint interests. In the modern law, fiduciary obligations have assumed a considerable importance. Fiduciary law has been a primary means by which the courts have expanded the reach of equity's concern with unconscionable conduct.[3] It has rightly been said that "[f]iduciary obligation is imposed by private law, but its function is public, and its purpose social."[4]

1 *Meinhard v Salmon* 164 NE 545 (1928), Cardozo J at 546: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

2 Fiduciaries may also have powers which are governed by equitable principles, but these are not dealt with in this chapter. For a full exposition, see Finn P, *Fiduciary Obligations* (Law Book Co, Sydney, 1977).

3 See generally above, Chapter 2: "The Conscience of Equity".

4 Lord Wedderburn, "Trust, Corporation and the Worker" (1985) 23 *Osgoode Hall Law Journal* 203 at 221. See also *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, La Forest J at 186: "The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules."

[1002] The law of fiduciary obligations rests in the exclusive jurisdiction of equity. Where the court finds that there has been a breach of fiduciary duty, a range of remedies are available which are not available at common law. Thus an account of profits, a constructive trust, rescission and equitable compensation are all available as remedies for breach of fiduciary duty. A right to trace is also available. Since fiduciary law is in the exclusive jurisdiction of equity, claims of breach of fiduciary duty are not subject to the *Statute of Limitations*, although the equitable defences of laches, acquiescence and delay are available. The remedies for breach of fiduciary duty are dealt with in the various other chapters of this book, as are the general defences.

The categories of fiduciary relationship

[1003] Certain categories of relationship are established as being fiduciary in nature. These may be termed status-based categories of fiduciary relationship since the fiduciary obligations may be demonstrated merely by showing that the defendant belongs to one of the nominate categories.[5] By contrast, other fiduciary obligations may arise from the facts of particular cases.

There is no single agreed list of the status-based fiduciary categories. Numerous lists are to be found in the reported cases[6] and in books on the subject. The categories are not regarded as closed.[7] Among the main categories of fiduciary are trustees, solicitors, company directors, promoters, agents, partners and senior employees.[8]

[1004] The trustee is regarded as the paradigm of the fiduciary,[9] indeed, as will be seen, the law of fiduciary obligations developed by

5 Flanigan R, "The Fiduciary Obligation" (1989) 9 *Oxford Journal of Legal Studies* 285 at 301.

6 See, for example, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68; Mason J at 96; *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, Sopinka J at 61.

7 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* (1988) 2 Qd R 1, Williams J at 11; *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, Sopinka J at 61.

8 This list is not exhaustive. For example, executors, administrators of estates, receivers and liquidators are also in positions of fiduciary responsibility: Meagher R P and Gummow W M C, *Jacobs' Law of Trusts* (5th ed, Butterworths, Sydney, 1986), p 10. This fiduciary position arises from the fact that they have the management and control of property on behalf of others in a way which is analogous to the position of a trustee. Tenants for life of property are also in some lists: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68. In addition, the relationship of parent and child and guardian to ward may be included: *Clay v Clay* (2001) 202 CLR 410; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 (Minister as guardian). The relationship between a foster carer and a child may also have fiduciary characteristics: *KLB v British Columbia* (2001) 197 DLR (4th) 431.

9 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68.

analogy with the role of the trustee.[10] The fiduciary obligations of trustees tend to be applied with a particular strictness. However, within certain boundaries,[11] the scope of those obligations, and the liability of trustees for breach of duty, may be limited by the trust instrument.

[1005] The relationship of solicitor to client is fiduciary in nature. The duties of solicitors go beyond a mere duty of care in carrying out their professional work, and the standards which they are required to uphold are those arising from their fiduciary obligations and not merely the professional standards of the Law Society as a regulatory body (*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, Richardson J at 92). Solicitors owe a duty of loyalty to the client, and, corresponding to that, have an obligation to give impartial advice. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. The only duty to the former client which survives the termination of that relationship is a continuing duty to preserve the confidentiality of the information provided (*Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222, Lord Millett at 235).

[1006] Directors are in a fiduciary relationship to the company. The duties of directors are manifold and derive not merely from equity but from the superstructure of detailed statutory regulation which has been built on top of the general law rules. Directors owe obligations to act honestly, to act in good faith for the benefit of the company as a whole, to give adequate consideration to the exercise of their powers, and to exercise their powers only for the proper purposes of the company.[12] Directors have at times been described as being "trustees" of the company property since they control that property on behalf of the members.[13] There are certainly many parallels. In companies, as with trusts, there is a separation between ownership and

10 See below, paras [1017]-[1019].

11 *Armitage v Nurse* [1998] Ch 241. In this case, Millett LJ observed (at 253) that there is an "irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts." See also Hayton D, "The Irreducible Core Content of Trusteeship" in Oakley A, (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996), p 47.

12 For a detailed exposition, see Ford H and Austin R, *Principles of Corporations Law* (7th ed, Butterworths, Sydney, 1995), Ch 8. See also Heydon J D, "Directors' Duties and the Company's Interests" in Finn P (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 120. See also *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; *R v Byrnes* (1995) 183 CLR 501.

13 *Great Eastern Railway Co v Turner* (1872) LR 8 Ch App 149, Lord Selborne LC at 152; *Re Exchange Banking Co; Flitcroft's Case* (1882) 21 Ch D 519; *Cullerne v London & Suburban General Permanent Building Society* (1890) 25 QBD 485.

management which makes the owners particularly vulnerable to abuse of discretion by the fiduciary. Furthermore, directors, like trustees, must exercise their powers by giving adequate consideration to the exercise of their discretion. However, in general, the description is misleading (*Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, Gummow J at 230). Directors often need to take commercial risks in order to fulfil their role. The role of the trustee in the management of trust property has traditionally been seen in contrast as one of conservation of the trust property together with careful investment.[14] While trading trusts and some forms of investment trust place the trustees in a similar role to directors of companies, in general the body of law concerning the role of trustees is inappropriate to the context of directors' duties.[15]

Directors generally owe their duties to the company and not to individual shareholders,[16] but there are exceptions. As Lord Wilberforce put it in *Re Westbourne Galleries Ltd* [1973] AC 360 at 379:

> "a … limited company is more than a mere legal entity, with a personality in law of its own: … there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure".

Thus for example, fiduciary obligations were held to exist where the company was a small family company involving personal relationships of trust and confidence between directors and shareholders and the shareholders were not given full information on a takeover;[17] and, in another case, where the directors acted as agents of the shareholders in a particular transaction (*Allen v Hyatt* (1914) 30 TLR 444 (PC)). In *Brunninghausen v Glavanics* (1999) 46 NSWLR 538[18] the New South Wales Court of Appeal held that a majority shareholder had breached a fiduciary duty to the only other shareholder by failing to disclose the existence of negotiations for the purchase of the company at a

14 See *Re International Vending Machines Pty Ltd* [1962] NSWR 1408; *Mulkana Corp NL v Bank of New South Wales* (1983) 8 ACLR 278.

15 See generally Sealy L, "The Director as Trustee" [1967] *Cambridge Law Journal* 83.

16 *Johnson v Gore Wood* [2001] 2 WLR 72, Lord Bingham at 94 (HL); *Esplanade Developments Ltd v Dinive Holdings Pty Ltd* [1980] WAR 151.

17 *Coleman v Myers* [1977] 2 NZLR 225.

18 The decision has not passed without criticism. See for example Valentine R, "The Director-Shareholder Fiduciary Relationship: Issues and Implications" (2001) 19 *Company and Securities Law Journal* 92; Abadee A, "A Fiduciary's Obligation to Disclose in a Commercial Setting" (2001) 29 *Australian Business Law Review* 33.

time when he was seeking to buy the minority shareholder's shares. The majority shareholder paid an amount for these shares much less than their proportionate value in relation to the eventual sale price of the company. The breach of fiduciary duty lay in the defendant's promotion of his personal interest in conflict with the duty loyally to promote the joint interests of all shareholders when there are negotiations for a takeover or an acquisition of the company.

[1007] Company promoters, and others who promote investment opportunities, are in a fiduciary position.[19] Company promoters owe a duty to display the "utmost candour and honesty" towards those whom they seek to involve in the floatation of a company (*Central Railway of Venezuela v Kisch* (1867) LR 2 HL 99, Lord Chelmsford LC at 113). While the promotion of companies is now subject to extensive regulation by statute,[20] the principles of fiduciary obligation apply also to those who promote enterprises which are not incorporated. In particular, the analogy has been drawn between company promoters and those inviting others to join a partnership or other business venture.[21]

[1008] Agents are fiduciaries to their principals. Thus, for example, real estate agents are fiduciaries for the vendors of property. A disposition in favour of the agent is likely to be regarded as a breach of fiduciary duty (*McKenzie v McDonald* [1927] VLR 134).[22] However, it is possible for a real estate agent to take on different clients who may have conflicting interests, for this is the nature of the business (*Kelly v Cooper* [1993] 3 AC 205). The scope of the fiduciary duty of any agent is determined by the express or implied terms of the contract of agency (*Kelly v Cooper*).

[1009] Partners are fiduciaries to each other.[23] Whereas fiduciaries owe duties to a person or entity apart from themselves, each partner owes obligations to act in the joint interests of the partners in

19 *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215; *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193.

20 *Corporations Act*, 2001 (Cth).

21 *United Dominions Corp Ltd v Brian* (1985) 157 CLR 1, Gibbs CJ at 5-6. See also *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, Rogers J at 651-655; *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, Gummow J at 228-234; *Hill v Rose* [1990] VR 129, Tadgell J at 140-141.

22 See also *Lintrose Nominees Pty Ltd v King* [1995] 1 VR 574; *Korkontzilas v Soulos* (1997) 146 DLR (4th) 214.

23 In *Helmore v Smith* (1886) 35 Ch D 436, Bacon V-C (at 444) said: "If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on." See also *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384, Dixon J at 407-408.

relation to the conduct of the business of the partnership and in respect of its assets. The fiduciary obligations of the partners continue even during the period when the partnership is being wound up. Thus, in *Chan v Zacharia* (1984) 154 CLR 178, it was held to be a breach of fiduciary duty for one partner in a medical practice to renew a lease for himself when the option to renew had been a valuable asset of the partnership. Surviving partners may also claim against the deceased estate of a former partner for breach of fiduciary obligations (*Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384).

[1010] Doctors are fiduciaries for limited purposes in relation to their patients. Doctors might be described as fiduciaries in the sense that their relationship of ascendancy over patients imposes on them a duty to prove that any gift received by a patient was given free from undue influence (*Breen v Williams* (1996) 186 CLR 71, Brennan CJ at 83).[24] Doctors must also hold the information given to them by patients in confidence, and failure to do so may result in liability for breach of confidence in equity.[25] Doctors may also be fiduciaries in a more general sense. In *Breen v Williams* (1996) 186 CLR 71, Gummow J said (at 134-135):

> "Advice given by the physician to the patient involves specialised knowledge and matters of skill and judgement, which render the advice difficult, if not impossible, of objective and unassisted assessment by the patient. Hence the particular reliance placed upon the physician. In a real sense, especially if invasive procedures upon the person of the patient are involved, the patient has delegated control to the person providing health care. Further, for the patient to obtain the benefit sought from the relationship the patient often must reveal confidential and intimate information of a personal nature to the medical practitioner. Finally, the efforts of the medical practitioner may have significant impact not merely on the economic but upon the fundamental personal interests of the patient. These considerations ... serve to emphasise why there is a fiduciary element in the relationship between medical practitioner and patient."

This means that doctors may be in breach of fiduciary duty if, without disclosing the conflict of interest to the patient, they advise a patient to be treated at a particular private hospital in

24 See further, Chapter 11: "Undue Influence". It is preferable, however, to keep the doctrines of fiduciary duty and undue influence analytically distinct. See Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), pp 10-13.

25 *W v Egdell* [1990] Ch 359 (CA); *Breen v Williams* (1996) 186 CLR 71, Dawson and Toohey JJ at 92.

which they have a financial interest, send specimens to a pathology lab in which they have an interest, or prescribe a particular drug among a number which are equally suitable in order to gain a benefit from a pharmaceutical company (*Breen v Williams* (1996) 186 CLR 71, Dawson and Toohey JJ at 94, Gummow J at 136).[26] However, it was held in *Breen v Williams* that doctors are not under a fiduciary obligation to give their patients access to medical records.

[1011] Employees may owe fiduciary obligations if they are in positions of trust and confidence and are given particular powers or discretion such that the employer is in a position of vulnerability if the trust is abused. There are indeed, authorities which would indicate that all employees owe fiduciary obligations to their employers. The relationship of "master and servant" commonly appears in lists of fiduciary relationships.[27] However, not all employees should be considered fiduciaries, since not all are in such positions of trust and confidence as would justify the full application of fiduciary law to them. Employees who are not in positions of trust within an organisation are bound by their contract of employment to provide labour, but should not be seen as taking on the stringent obligation of loyalty to the employer which is inherent in a fiduciary relationship.[28] Employers' interests may be protected by contract, since it is open to the employer to stipulate that the employee's services will be applied exclusively to the employer. Their interests are also protected by the law of breach of confidence. In addition, employees owe to their employers a duty of fidelity which is regarded as an implied term of the contract.[29] Thus in *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, two manual employees were held to have been in breach of their duties of fidelity where they worked in their spare time for the competitor of their employer. There are considerable similarities between the duty of fidelity at common law and the fiduciary obligations which may arise in equity. However, the range of remedies at common law is not nearly as extensive, nor is the application of the doctrine as draconian as the application of fiduciary law can be. In the main, the application of fiduciary law has been in respect of senior employees who exercise considerable discretion in the management of the enterprise, and whose activities it may

26 See also *Moore v Regents of the University of California* 793 P 2d 479 (1990).

27 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Gibbs CJ at 68. See also *New Zealand Netherlands Society "Oranje" Ind v Kuys* [1973] 2 All ER 1222, Lord Wilberforce at 1225.

28 Creighton B and Stewart A, *Labour Law: An Introduction* (2nd ed, Federation Press, Sydney, 1994), pp 164-165.

29 See, for example, *Lamb v Evans* [1893] 1 Ch 218, Lindley LJ at 226; Bowen LJ at 229-232; *Robb v Green* [1895] 2 QB 315.

be difficult to supervise.[30] As Laskin J stated in *Canadian Aero Services v O'Malley* (1973) 40 DLR (3d) 371 at 384, fiduciary standards are applied strictly against directors and senior management officials because of "the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings".

[1012] Fiduciary obligations may also arise in a great variety of situations outside of the nominate categories: see further below, paras [1028]ff. In all such cases, it is because the parties are not dealing with one another at arm's length, and one party is particularly vulnerable to unfair dealing by the other. Courts will not normally find fiduciary obligations in arm's length transactions, especially where well-advised commercial parties are involved,[31] but in some situations courts have held that the circumstances of the relationship between the parties are such that one party should not be permitted to act in total disregard of the interests and reasonable expectations of the other. For example, if certain conditions are fulfilled, fiduciary obligations might arise in the course of negotiations towards a co-operative business venture, whether it is envisaged that the parties will become partners or will formalise their co-operation legally in some other way.[32] In such situations, a relationship of trust and confidence may exist between the parties which justifies the court in holding that one party owed a duty to the other to disclose certain information relevant to the fairness of the planned venture. Another context in which fiduciary obligations have been imposed is between banker and customer in situations in which the customer is reasonably entitled to rely on the bank for investment advice and could not anticipate that the bank would have interests contrary to that of the customer.[33]

30 See, for example, *Canadian Aero Services v O'Malley* (1973) 40 DLR (3d) 371; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 493; *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] WAR 1; *AWA Ltd v Koval* (1993) 35 Ind LR 217 (SC NSW); *Warman International Ltd v Dwyer* (1995) 69 ALJR 362.

31 In *Paul Dainty Corp Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495 at 515, the Full Court of the Federal Court stated: "The authorities make it clear that equity will not impose fiduciary obligations on parties who have entered into ordinary and arm's length commercial relationships, which fully prescribe the respective powers and duties of the parties. This is particularly so when the parties involved are substantial corporations, having equal bargaining power." See also *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, Gummow J at 238.

32 *United Dominions Corp v Brian Pty Ltd* (1984) 157 CLR 1; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* (1988) 2 Qd R 1; *Hill v Rose* [1990] VR 129.

33 *Commonwealth Bank v Smith* (1991) 102 ALR 453; *Hayward v Bank of Nova Scotia* (1984) 45 OR (2d) 542; affd (1985) 51 OR (2d) 193; *McBean v Bank of Nova Scotia* (1981) 15 BLR 296. See further below, para [1038].

The nature of fiduciary obligations

[1013] Fiduciary duties may take many different forms, depending on the nature of the fiduciary office and whether or not the office involves the management of property. Some fiduciary obligations, such as the obligations which trustees, executors and company directors have in the exercise of their discretion in managing property, may be expressed in terms of positive duties.[34] Essentially, however, fiduciary obligations proscribe what it is impermissible to do, not what ought to be done. As Gaudron and McHugh JJ expressed it in *Breen v Williams* (1996) 186 CLR 71 at 113,[35] the law of fiduciary obligations is proscriptive not prescriptive. Fiduciary obligations arise because a person has come under an obligation to act in the interests of another. They are not the source of a positive obligation to act in the interests of another and no breach of duty arises per se from a failure to act in the interests of another. An action may lie in negligence, or breach of contract, but not in breach of fiduciary duty. Some positive obligations, such as the duty to disclose material information to prospective investors, may be the outworking of the proscriptive obligations.[36]

What then are the obligations of fiduciaries, and what is it that they are proscribed from doing? The primary obligations of fiduciaries are twofold. First, the fiduciary must not place herself or himself in a position of conflict between duty and interest (*Boardman v Phipps* [1967] 2 AC 46). Secondly, a fiduciary is not permitted to profit from the position of trust, beyond the terms of remuneration provided for in the contract or retainer. These are known as the "conflict" and "profit" rules. Fiduciaries who breach these, and other fiduciary obligations, will be legally liable unless they have the informed consent of those to whom the fiduciary duty is owed. A classic exposition of these principles is in a passage from the judgment of Lord Herschell in *Bray v Ford* [1896] AC 44 at 51-52:

34 Finn P, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), Ch 10, describes the obligations of fiduciaries in exercising a discretion in terms of four duties: the duty not to act for the fiduciary's own benefit or for the benefit of any third person, the duty to treat beneficiaries of the same class equally, the duty to treat beneficiaries of different classes fairly, and the duty not to act capriciously or unreasonably. But see Austin R, "Moulding the Content of Fiduciary Duties" in Oakley A (ed), *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996), p 153, who argues that the duties attributed to fiduciaries which are not proscriptive are explicable on other doctrinal bases. See also *Pace v Antlers Pty Ltd (In Liq)* (1998) 26 ACSR 490.

35 See also *Pilmer v Duke Group Ltd (in liq)* (1999) 180 ALR 249 at 270-71; *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1.

36 Finkelstein J in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628 (Fed Ct) said: "that which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on a fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest, or the duty not to make a secret profit" (judgment at p14) citing Nolan R, "A Fiduciary Duty to Disclose" (1997) 113 *Law Quarterly Review* 220 at 224.

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not, unless expressly otherwise provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect."

The conflict and profit rules have more accurately been described by Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 198 as "themes" which underlie a number of specific rules and areas of case law. The rules are applicable to all the major categories of fiduciaries such as trustees, solicitors, company directors, senior employees, agents and partners. However, beyond these established categories, the characterisation of a relationship as a fiduciary one does not mean, in itself, that a fixed body of rules is automatically applicable to that relationship. As Deane J said in *Chan v Zacharia* at 195: "Fiduciary relationships may take a wide variety of forms and may give rise to a wide variety of obligations." Some of those who are termed fiduciaries have a limited range of obligations, while the detailed outworking of the "conflict" and "profit" rules for those who owe general fiduciary obligations is, at least partially, dependent upon the particular relationship in view.[37]

The scope of the fiduciary obligation

[1014] In determining whether there has been a breach of fiduciary obligations it is important to determine the scope of those obligations. A person who is in a fiduciary position is entitled to engage in profit-making activities outside of her or his fiduciary office, as long as those activities do not fall within the scope of the obligations which the fiduciary owes. Bryson J, in *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 at 15, stated the principle as follows:

> "A person under a fiduciary obligation to another should be under that obligation in relation to a defined area of conduct, and exempt from the obligation in all other respects. Except in the defined area, a person under a fiduciary duty retains his own economic liberty."

37 In *SEC v Chenery Corp* 318 US 80 (1943) at 85-86, Frankfurter J stated: "To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" See also *Re Goldcorp Exchange Ltd (in receivership)* [1994] 1 AC 74.

It has been said also that a person "may be in a fiduciary position quoad a part of his activities and not quoad other parts" (*NZ Netherlands Society "Oranje" Inc v Kuys* [1973] 2 All ER 1222, Lord Wilberforce at 1225).[38] Thus an employee may engage in activities outside of her or his employment which bear no relation to the obligations of that employment and do not rely on information or opportunities gained in the course of that employment, and a partner may engage in activities which are unrelated to the activities of the partnership (*Aas v Benham* [1891] 2 Ch 244). A director of one company may also be the director of another company which is not in competition. Indeed, there is longstanding authority for the proposition that a person may even be a director of a competing company as long as he or she does not disclose confidential information gained as a director of one company to the other company.[39] However, it is questionable whether this proposition is consistent with the basic principles of fiduciary law concerning possible conflicts of interest,[40] and a director's actions which favour one company at the expense of the other may indeed constitute a breach of fiduciary duty.[41]

[1015] The scope of a person's fiduciary obligations depends upon the circumstances.[42] In particular, the court is likely to examine the extent of the undertaking made by the fiduciary and the nature of the activity to which the fiduciary obligations relate. Reference might be made to relevant documents such as an employment contract or a partnership deed. However, these are not definitive of the scope of the fiduciary's obligations. In the context of a partnership, Dixon J said in *Birtchnell v Equity Trustees Executors & Agency Co Ltd* (1929) 42 CLR 384 at 408:

> "The subject matter over which the fiduciary obligations extend is ... to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm."

38 See also *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1.

39 *London & Mashonaland Exploration Co v New Mashonaland Exploration Co* [1891] WN 165; *Bell v Lever Bros* [1932] AC 161, Lord Blanesburgh at 195. See also *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150; *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238; *On the Street Pty Ltd v Cott* (1990) 3 ACSR 54; *Rosetex Co Pty Ltd v Licata* (1994) 12 ACLC 269, Young J at 272; *SEA Food International v Lam* (1998) 16 ACLC 552, Cooper J at 556 (Fed Ct).

40 Christie M, "The Director's Fiduciary Duty Not to Compete" (1992) 55 *Modern Law Review* 506. See also Lawrence J, "Multiple Directorships and Conflicts of Interest: Recent Developments" (1996) 14 *Company and Securities Law Journal* 513.

41 For example, in *Mordecai v Mordecai* (1988) 12 NSWLR 58, it was held to be a breach of duty for a director to ask the company's customers to cease dealing with the company and to deal with the director in a competing company. On liability under the *Corporations Act*, see *R v Byrnes* (1995) 183 CLR 501.

42 For a full analysis, see Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), Ch 4.

In regard to this, it may be necessary to look at the firm's balance sheet, accounts and other indicia of its activities. In this case, the estate of a deceased partner was held liable to account for profits made by that partner in an arrangement with a client of the partnership. The partnership was a firm of estate agents. The arrangement was for profit sharing from the subdivision of certain land. Although the partnership was not constituted to engage in land speculation, it was clear from the course of dealing of the firm that this was an aspect of the business of the partnership.

A further factor in determining the scope of the obligation is the degree of discretion and influence which the fiduciary has in the performance of her or his role. Austin Scott[43] suggested: "The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty." Mahoney JA made a similar point in relation to the fiduciary duties of company directors in *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 225:

> "A director owes fiduciary duties to his company. The nature of those duties flows of course from his office as a director but the content of the duties will or may be affected by the powers and opportunities which, as a director, he has. Similarly, a person who is a chairman of the board of directors has additional rights and duties and additional opportunities. Ordinarily, it is the function of the chairman to settle the agenda of the meetings of the board: at least he exercises a significant influence upon it. He is in a position … to ensure that proposals are brought forward for consideration by the directors at their meetings. And this, in a particular case, may affect the content of fiduciary duties which he owes to his company."

Related doctrines

[1016] It is not only in the law of fiduciary obligations that equity protects those who place trust and confidence in others. The law of undue influence operates to allow transactions to be set aside which have been procured, or are presumed to have been procured, through taking advantage of a person's trust, as well as in cases where actual pressure is placed upon the party to the transaction.[44] Where the undue influence arises from the abuse of a person's trust, courts have sometimes referred to the

43 Scott A, "The Fiduciary Principle" (1949) *California Law Journal* 539 at 541.

44 See below, Chapter 11: "Undue Influence".

relationship as a "fiduciary" one. Thus, in *Johnson v Buttress* (1936) 56 CLR 113, Dixon J said that, in the relationships which give rise to a presumption of undue influence, fiduciary characteristics may be seen.

The language of "fiduciary relationships of influence" to describe the position of people who are in a position of ascendancy over others is helpful to the extent that it draws attention to the underlying purpose of the doctrine of undue influence, which is to prevent the abuse of positions of trust. However, the language of fiduciary relationships can easily mislead. The fact that a person is among the categories of people subject to the doctrine of undue influence does not mean that he or she is a fiduciary for all intents and purposes. Certain relationships give rise to both fiduciary obligations and to a presumption of undue influence. The relationship of solicitor and client provides one example. However, there are certain established categories which give rise to a presumption of undue influence but which are not established categories of general fiduciary obligation.

The law of breach of confidence is also similar to the law of fiduciary obligations in certain respects.[45] The law of breach of confidence is principally concerned with information which is entrusted to another, and it is the exploitation of this information given in confidence for personal gain which gives rise to equitable relief. Because the action in breach of confidence is based upon the abuse of a trust, there has been a tendency for some courts to see the action as being a species of fiduciary obligation.[46] The underlying rationale, that equity intervenes where there is an abuse of trust and confidence, is the same.[47] There is also an area of overlap between the two doctrines. In many cases, fiduciaries are entrusted with confidential information, and the breach of fiduciary duty lies in the misuse of that information for personal gain. In such circumstances, either an action for breach of fiduciary duty or an action for breach of confidence would be available. The two actions are, however, quite distinct (*Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 577 (Can Sup Ct)). In *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, a small mining company revealed to a large company details of its drilling results during the course of negotiations for a joint venture. These results indicated that significant mineral deposits might exist.

45 See below, Chapter 12: "Breach of Confidence".

46 See, for example, *Fractionated Cane Technology Ltd v Ruiz-Avila* [1988] 1 Qd R 51, McPherson J at 62; *Schering Chemicals Ltd v Falkman Ltd* [1982] 1 QB 1, Shaw LJ at 27.

47 See above, Chapter 2: "The Conscience of Equity".

The large company purchased the relevant land for itself without involving the original discoverers. As a result, it developed a gold mine worth hundreds of millions of dollars. By a majority, the Supreme Court of Canada held that there was no fiduciary relationship between the two companies arising out of their negotiations for a joint venture. Nonetheless, they held the defendant liable for breach of confidence, and imposed a constructive trust on the property.

THE HISTORICAL ORIGINS OF FIDUCIARY OBLIGATIONS

[1017] The origin of the law of fiduciary obligations lies in equity's treatment of relationships of trust and confidence.[48] Situations in which confidences are betrayed and positions of trust are abused have always attracted the attention of equity. In the case of *Gartside v Isherwood* (1788) 1 Bro CC 558 at 560 in 1788, Lord Thurlow expressed the general principle, which was applied by the Court of Chancery, that "if a confidence is reposed, and that confidence is abused, a court of equity shall give relief".

The most obvious application of this principle was in the law of trusts. The Court of Chancery enforced trusts originally to prevent people from fraudulently relying upon a common law title to deny the obligation they had undertaken to hold that property for the benefit of another (*Muschinski v Dodds* (1985) 160 CLR 583, Deane J at 613). In the modern law, the terms "trust" and "trustee" have a precise legal meaning in relation to the holding of property. Trustees are those who have undertaken, or had imposed upon them, the obligations of trusteeship which require them to keep that property separately from their own, and to manage it in accordance with the terms of the trust. Prior to the 19th century, however, the words "trust" and "trustee" were used in a much more general sense and applied not only to those who held property for the benefit of others, but to all those who were in positions of trust and confidence, whether or not their position involved the trusteeship of property.[49] Where those in a position of trust and confidence breached that trust, they were liable to be treated in the same way as if they had been trustees.[50]

48 This account is derived from Len Sealy's seminal article, "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69.

49 Sealy L S, "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69 at 70-72.

50 See, for example, *Charitable Corporation v Sutton* (1742) 2 Atk 400 at 405-406.

Such imprecision of terminology and generality of principle was characteristic of the law prior to the 19th century. However, the 19th century was an age of definition and categorisation, influenced by the concept that law was a science which ought to be capable of orderly and precise exposition.[51] In the course of the century, the term "trust" became more precisely defined. It took longer for the textbook writers and the judges to find an appropriate term to describe those other relationships which were treated in the same way as trusts. At first, they were described without an alternative title, as being analogous to trusts for some purposes. Thus Lord Eldon, writing in 1820, referred to "relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a cestui que trust; and yet you cannot deny that to some intents and some purposes one is a cestui que trust and the other a trustee" (*Cholmondeley v Clinton* (1821) 4 Bligh 1 at 96; 4 ER 721 at 754-55). Eventually, these relationships were described as "fiduciary relationships" to distinguish them from trusts.[52] The courts emphasised that a breach of fiduciary duty gave rise to the same remedies against the wrongdoer as a breach of trust. Thus Fry LJ said in *Re West of England & South Wales District Bank; ex parte Dale & Co* (1879) 11 Ch D 772, at 778:

> "What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust."

[1018] The analogy with a position of trusteeship has played an important role in the law of fiduciary obligations. Indeed, the trustee is regarded as the paradigm of the fiduciary. The trustee must exercise her or his trust powers only for the benefit of the trust. All gains arising from the trust property, or from information gained in the performance of trust duties, belong to the trust. The trustee may receive remuneration, but only as much as is provided for in the trust instrument. The trustee must not accept other positions which place her or him in a position of conflict with the obligations of the trusteeship.

The fiduciary obligations of trustees are manifested in the strict rule which concerns the purchase of trust property.[53] This rule, known as the rule against self-dealing, provides that a trustee

51 Parkinson P, "Chaos in the Law of Trusts" (1991) 13 *Sydney Law Review* 227.

52 Sealy L, "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69 at 71-72.

53 *Ex parte Lacey* (1802) 6 Ves 625; 31 ER 1228; *Ex parte James* (1803) 8 Ves 337; 32 ER 385.

may not purchase for herself or himself property which belongs to the trust without either authorisation from the trust instrument, the informed consent of all the beneficiaries (being capable of giving a lawful consent) or the approval of a court.[54] Transactions made in breach of this principle, even where the trustee has acted honestly and the purchase price is regarded as a fair one, are voidable, and may be set aside on the application of a beneficiary (*Re Postlethwaite* (1888) 60 LT 514).[55]

This strict prohibition on self-dealing is an illustration of the principle that the trustee cannot place herself or himself in a position where duty and interest conflict. It is not possible to avoid its application by retiring from trusteeship. Jacobs J explained the basis for this in *Gould v O'Carroll* [1964] NSWR 803 at 805:

> "It is my view that the basis for the rule that a trustee cannot retire for the purpose of effecting a transaction between himself and the trust is twofold. First, in the ordinary case, the fact that he retires in order to effect that purpose means that the decision to effect that purpose has been taken during the period of his trusteeship when he was actually performing the duties of a trustee; in other words the decision to deal with the trust is his own. Secondly, the trustee who has been actively managing the trust has all the advantage of the information and knowledge which comes to him as a trustee and which he should use in no way for his benefit, but purely for the benefit of the beneficiaries."

Sales of trust property to people associated with the trustee are also suspect. A sale to a spouse or close relative is presumed to be for the benefit of the trustee unless the contrary is proven.[56]

Another rule which is applied to trustees with particular strictness is the rule in *Keech v Sandford* (1726) Sel Cas t King 61; 25 ER 223.[57] In this case, a trustee renewed a lease of a market in his own name after the lessor refused to renew it in favour of

54 See generally Ford H and Lee W, *Principles of the Law of Trusts* (3rd ed, LBC Information Services, Sydney, 1996 — looseleaf service).

55 In unusual cases, the court may decide to ratify a sale notwithstanding breach of the self-dealing rule: See *Holder v Holder* [1968] Ch 353. In this case, it was a relevant factor that the plaintiff beneficiary had acquiesced in the purchase and that the defendant was only technically an executor, due to his renunciation of the position being ineffective.

56 *Re Douglas* (1928) 29 SR (NSW) 48; *Tanti v Carlson* [1948] VLR 401.

57 See further below, Chapter 21: "Constructive Trusts". For an explanation of the historical background to this case, which explains the strictness of the rule, see Cretney S, "The Rationale of Keech v Sandford" (1969) 33 *Conveyancer (NS)* 161.

the trust. It was held that the trustee held the new lease on trust for the beneficiary. Lord King LC said that it was a rule which should be "strictly pursued" that a trustee who renews a lease should hold it for the estate. The rule thus is one designed to ensure that the trustee uses her or his best endeavours to ensure that the lease is renewed for the trust.

Because fiduciaries were treated as being in a position of trust and responsibility akin to that of a trustee, they were subjected to the same high standards of propriety as trustees, and a breach of fiduciary duty gave rise to similar equitable relief. Further, it was because fiduciaries were treated in the same way as trustees that the Court of Chancery could justify the stringency with which it enforced fiduciary obligations and the remedies which it employed for this purpose.

[1019] In what sense was a fiduciary regarded as being in a position akin to a trustee? Three distinct analogies were drawn in the early case law on fiduciary obligations. First, certain categories of person were "like trustees" to the extent that they had the management or control of property like trustees. Thus company directors, agents and bailees were treated as being subject to fiduciary obligations in relation to the management of property. The prohibition against self-dealing which was applied to trustees was thus applied also to other fiduciaries who are involved in the management of property,[58] either as property holders or advisers.

Secondly, certain categories of person were treated as being in a position akin to a trustee where they undertook to act in the interests of another. They were thereby entrusted with the responsibility to advance that person's interests. On this basis, employees were regarded as being in a fiduciary position, and so too were solicitors, agents, partners, directors and company promoters, even when they did not have control of the property of a "beneficiary". The analogy with the position of the trustee lay in the fact that these fiduciaries, like trustees, had an obligation to act in the interests of another, and this precluded self-interest. As Lord Loughborough put it at the end of the 18th century: "He who undertakes to act for another in any matter, shall not in the same matter act for himself." (*Whichcote v Lawrence* (1798) 3 Ves 740 at 750). The trustee's duty of selfless loyalty was thus extended to other categories of person.

58 This includes executors (*Benningfield v Baxter* (1886) 12 App Cas 167); solicitors in relation to property which is the subject matter of their obligations to the client (*McPherson v Watt* (1877) 3 App Cas 254); agents (*De Bussche v Alt* (1878) 8 Ch D 286); receivers (*Nugent v Nugent* [1908] 1 Ch 546) and others. See generally Finn P, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), Ch 20; Finn P, "Fiduciary Law and the Modern Commercial World" in McKendrick E (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon, Oxford, 1992), pp 37-39.

Thirdly, certain categories of legal titleholder were regarded as being "like trustees" in that they had a limited title to property, and any accretion of additional rights was treated as being subject to the same conditions as the original property. Thus tenants for life and mortgagees in possession were subject to fiduciary rules concerning the acquisition for themselves of an extended interest in the property. This principle derives from the Rule in *Keech v Sandford* (1726) Sel Cas t King 61, 25 ER 223. The courts, applying the analogy of the trustee in other categories of case, have held that the rule which prevents a trustee from renewing a lease personally when the leasehold had been held by the trust, is applicable to others who have limited interests in property and who might get a "preemptive opportunity"[59] to renew the lease or to purchase a reversion, which would not have come to them if they had been strangers to the property. Tenants for life may be regarded as being in a fiduciary position vis-a-vis the person entitled in remainder under English law[60] because the tenant for life may exercise wide powers under the settlement.[61] While mortgagees are not fiduciaries, in the sense of holding property for the benefit of another, the reasoning of *Keech v Sandford* has been extended to them, since they are treated as having been in a "special position" in relation to an old lease, although the rule is not as strictly applied and it is open to the defendant to show that a renewal was obtained fairly (*Re Biss* [1903] 2 Ch 40). The same rule was applied to the purchase of reversions, at least where the lease was renewable by contract or longstanding custom,[62] or the fiduciary gained an unconscionable advantage from his position (*Griffith v Owen* [1907] 1 Ch 195, Parker J at 204-205).

This area of fiduciary law has been criticised as arising from "a mechanical application of the doctrine of precedent", in which the rule is applied irrespective of any conflict of duty or interest or misuse of the position of trust.[63] In *Chan v Zacharia* (1984) 154 CLR 178 at 201, Deane J sought to rationalise the rules in this regard. He said that the rule should not be seen merely as a

59 *Meinhard v Salmon* 164 NE 545 (1928), Cardozo J at 547.

60 *Lloyd-Jones v Clark-Lloyd* [1919] 1 Ch 424.

61 *Settled Land Act* 1925 (UK), s 107.

62 *Phillips v Phillips* (1885) 29 Ch D 673; *Wicks v Bennett* (1921) 30 CLR 80, Higgins J at 98; *Metlej v Kavanagh* [1981] 2 NSWLR 339; *Brenner v Rose* [1973] 1 WLR 443. In *Protheroe v Protheroe* [1968] 1 WLR 519 and *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 All ER 1239, the rule was held to apply irrespective of whether the lease was renewable by custom or contract.

63 Finn P, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), p 261; Cretney S, "The Rationale of Keech v Sandford" (1969) 33 *Conveyancer* (NS) 161.

manifestation of the rule concerning profiting from a fiduciary position. Where a trustee renews a lease for her or his personal use which he or she had previously held as a trustee, there is an irrebuttable presumption of law that it was obtained by use of the trustee's fiduciary position and therefore is held on a constructive trust for the trust estate. By contrast, where other fiduciaries renew a lease, the presumption that it was acquired by use of the fiduciary position is a rebuttable one.

In these various ways, fiduciary obligations developed by analogy with the trust. If there are common features of these various applications of the fiduciary principle beyond the analogy with the trust, it is that all of the relationships involve either the management of property, or other positions of trust of a financial nature. This was true even of the relationship of guardian and ward. Although this quasi-parental role now would be associated with the care and nurture of children, originally, the important role of the guardian in law was as the person entrusted with the preservation and management of the child's property.[64]

Historically, fiduciary law was about property rights and financial interests, and its main focus has been on ensuring the highest standards of honesty and integrity in such matters. This is reflected in the remedies available for breach of fiduciary duty which are primarily confiscatory. The court may impose a constructive trust over property in the hands of the defaulting fiduciary, or may order an account of profits. Compensation for breach of fiduciary duty may also be awarded, but it was only belatedly that the remedy of equitable compensation became firmly established as a remedy with the landmark decision in *Nocton v Lord Ashburton* [1914] AC 932. In this case, the loss arose because a solicitor, who had a conflicting interest, persuaded his client to discharge certain securities leaving him with securities which proved to be inadequate when there was a default on the loan.[65]

64 The Court of Chancery could nonetheless intervene in other aspects of the child's upbringing, such as choice of school, on the basis that the guardians were like trustees and subject to similar judicial supervision: *Duke of Beaufort v Berty* (1721) 1 P Wms 703.

65 For commentary on this case, see Gummow W M C, "Compensation for Breach of Fiduciary Duty" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 57.

THE CENTRAL THEMES OF FIDUCIARY OBLIGATION

Introduction

[1020] The conflict and profit rules are overlapping rules, in the sense that in most cases, where there is a profit gained from a fiduciary position, there has also been a conflict of duty and interest. The connection between the two was expressed by Rich, Dixon and Evatt JJ in *Furs Ltd v Tomkies* (1936) 54 CLR 83 at 592 in the context of directors' duties:

> "An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing a conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company."

While linked in this way, the conflict and profit rules are nonetheless distinct themes of fiduciary obligation. As Deane J stated in *Chan v Zacharia* (1984) 154 CLR 178 at 199, "neither theme fully comprehends the other and a formulation of the principle by reference to only one of them will be incomplete". In many situations, there will have been a conflict of duty and interest which did not result in a profit to the fiduciary from misuse of a fiduciary position. This is the case, for example, where the person to whom the fiduciary duty was owed is seeking compensation for losses rather than the confiscation of the profits of the fiduciary (*Nocton v Lord Ashburton* [1914] AC 932). Similarly, a profit may arise from a fiduciary office where there is no real possibility of conflict between duty and interest, for example, where the fiduciary makes use of confidential information and thereby makes a profit from her or his fiduciary position, in circumstances where the fiduciary was not under an obligation to make that profit for the principal.

[1021] The courts have varied over the years in the strictness of their interpretation of the conflict and profit rules. Perhaps the highwater mark of a strict application of the law was the decision of the House of Lords in *Boardman v Phipps* [1967] 2 AC 46. The case was brought by beneficiaries of a trust against Boardman,

the solicitor to the trust, and another beneficiary, Tom Phipps. The trust held a significant parcel of shares in a company, and, in the course of acting as agents of the trust in attending meetings with the company, Boardman and Tom Phipps obtained confidential information which led them to purchase more shares in their own names in order to gain control of the company. Having taken over the company, they then proceeded to sell off certain assets and to achieve a considerable profit for both themselves and the trust. The trust benefited from the profit through its own shareholding. The trust could not have purchased more of the shares for itself since investments in this company would not have been authorised under the terms of the trust. The investment could only have been authorised by a court. In any event, the trust would not have had the resources to mount a takeover. Boardman and Phipps did seek the consent of the trustees, but could not obtain the consent of all of them since one of the trustees was suffering from senile dementia. They also sought the consent of the beneficiaries, but it was held in the courts that they had not disclosed sufficient information for this to be an informed consent.

A majority of the judges in the House of Lords held that Boardman and Phipps were liable as constructive trustees of the profit arising from the shares, although they acted with perfect honesty. They had not obtained the requisite consents, and, in the absence of a valid consent, they were in breach of fiduciary duty. As solicitor to the trust, Boardman was a fiduciary, and both he and Phipps obtained confidential information while acting as agents of the trust. Furthermore, Phipps did not seek to be treated differently from Boardman. Although they were held liable as constructive trustees, they were nonetheless given a liberal allowance for their work and skill in achieving the profit.

There were a number of bases for the decision. The main one was that Boardman and Phipps had gained a profit from their fiduciary position because they had made use of confidential information in order to launch the takeover bid, information which could only have come to them because they were acting as agents of the trust in attending meetings, and engaging in negotiations with the company. Two judges, Lords Cohen and Hodson, held that Boardman had been in a position where there was a possibility of conflict between duty and interest since he could have been called upon to advise on whether an application should be made to the court to authorise a further purchase of shares in the company (*Boardman v Phipps* [1967] 2 AC 46, Lord Cohen at 103-104; Lord Hodson at 111-112). A further basis for

the decision was that the information was the property of the trust,[66] although the notion that information can itself be property is not a proposition which is likely to be accepted in Australia.[67]

[1022] As *Boardman v Phipps* demonstrates, the fiduciary may be required to account for the profit made in breach of fiduciary duty, or as a result of the fiduciary position, whether or not the principal could have acquired that benefit for itself.[68] In this case, the trust could not have purchased the additional shares without the permission of the court, and such consent would have been difficult to obtain given the risks involved in the takeover. Furthermore, the most active of the trustees had made it clear that there was no possibility of the trust seeking a court order to permit further investment in that company.[69] It is also irrelevant that a fiduciary has taken up an opportunity that the principal could not afford to take up for itself, if the principal does not give an informed consent to the fiduciary's own use of the opportunity.[70]

Thus it is clear that the purpose of the law concerning fiduciaries is not merely to prevent an unjust enrichment of the fiduciary at the expense of the beneficiary,[71] for a constructive trust will be imposed whether or not the profit which was gained could have been gained for the principal.[72] Nor is it premised on the dishonesty or lack of good faith of the fiduciary. Rather, the purpose of the law is to ensure that the fiduciary is motivated only by a duty of loyalty which is not compromised by the possibility of gaining a personal advantage.[73]

Nonetheless, *Boardman v Phipps* may be regarded as a harsh application of fiduciary law which was based upon a rigid

66 Lord Hodson at 107ff; Lord Guest at 115.

67 For a discussion, see Stuckey J, "The Equitable Action for Breach of Confidence: Is Information Ever Property?" (1981) 9 *Sydney Law Review* 402. But see McPherson B, "Information as Property in Equity" in Cope M (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995), p 234.

68 Similarly, in cases which do not involve an account of profits made in breach of fiduciary duty, the grant of a remedy for breach of fiduciary duty is not conditioned on proof of harm or loss flowing from the breach. As the High Court said in *Maguire v Makaronis* (1996) 188 CLR 449 at 465, "[e]quity intervenes … not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to, and vindicate, the high duty owed the plaintiff."

69 See [1967] 2 AC 46, Lord Cohen at 95, 100; Lord Upjohn at 120.

70 *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; *DPC Estates v Grey* [1974] 1 NSWLR 443.

71 See also *Warman Industries Ltd v Dwyer* (1995) 69 ALJR 362 at 367.

72 For further discussion, see above, paras [410]-[411].

73 See also *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, Gibbs J at 394; *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 198-199; *Warman International Ltd v Dwyer* (1995) 69 ALJR 362 at 367.

approach to equitable doctrine.[74] Viscount Dilhorne and Lord Upjohn gave cogent dissenting judgments. The conflict of duty and interest was remote; the position of the trustees concerning the use of trust funds to purchase more shares was unequivocal, and indeed the active trustees gave their blessing to the activities of Boardman and Tom Phipps. Had Boardman's advice been sought concerning an application to court for permission to invest in more shares, he could have declined to advise on the grounds of conflict of interest. Lord Upjohn said that the test of a possible conflict of duty and interest means that a reasonable person looking at the circumstances would think that there was a "real sensible possibility of conflict" ([1967] 2 AC 46 at 124). Nor was Lord Upjohn persuaded either by the argument that Boardman and Tom Phipps had profited from their position as agents of the trust. He said that the law only prohibited the misuse of information which would amount to a breach of confidence or which was being used to injure the trust (at 129). He concluded by saying (at 133-134):

> "In the long run the appellants have bought for themselves at entirely their own risk with their own money shares which the trustees never contemplated buying and they did so in circumstances fully known and approved of by the trustees.
>
> To extend the doctrines of equity to make the appellants accountable in such circumstances is, in my judgment, to make unreasonable and unequitable applications of such doctrines."

The language and tenor of Lord Upjohn's dissent is reflected in the Australian case law on fiduciary obligations. In *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 at 3,[75] the Privy Council, on appeal from Australia, used the test of "a real sensible possibility of conflict", echoing Lord Upjohn's formulation. In his landmark judgment in *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 Deane J similarly spoke of a "significant possibility of conflict". He also echoed Lord Upjohn's remarks on the application of equitable principles in commenting (at 205) that:

> "[O]ne cannot but be conscious of the danger that the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility may destroy the

74 *Boardman v Phipps* has been extensively criticised: see, for example, Jones G, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 *Law Quarterly Review* 472; McLean A, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 *Alberta Law Review* 218.

75 See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Mason J at 103. In *Farrington v Rowe McBride & Partners,* [1985] 1 NZLR 83, Richardson J (at 92) stated that the conflict between duty and interest must be "immediate" and not merely a hypothetical possibility.

> vigour which it is intended to promote in that it will exclude the ordinary interplay of the doctrines of equity and the adjustment of general principles to particular facts and changing circumstances and convert equity into an instrument of hardship and injustice in individual cases."

In the light of this, care may need to be taken in the use of some of the English authorities concerning the strict and inflexible application of fiduciary principles. Fiduciaries ought not to be required to practice a monastic asceticism in which the highest virtue is the achievement of a rigorous and unbending self-denial.[76] The application of the conflict and profit rules needs to be only as strict as is necessary to fulfil their underlying social and moral purpose, which is to ensure the highest standards of honesty and propriety from those who are entrusted with the property of another, or with the protection and advancement of that person's interests. Nothing less than this is required by the principles of equity, but also, nothing more.

The conflict rule

[1023] A fiduciary who has undertaken to act solely in the interests of another (or, in the case of partners, in their joint interest) owes a duty of loyalty to the principal, and must not put herself or himself in a position where duty and interest are in conflict,[77] or there is a significant possibility of conflict (*Chan v Zacharia* (1984) 154 CLR 178, Deane J at 198-199). Where profits are gained by the fiduciary in breach of this rule, those profits belong in equity to the one to whom the fiduciary duties are owed, and the court may either impose a constructive trust or order an account of profits.

Deane J explained in *Chan v Zacharia* (1984) 154 CLR 178 at 198 that "the objective is to preclude the fiduciary from being swayed by considerations of personal interest." Similar explanations have been given by other judges. In *Costa Rica Railway Co v Forwood* [1901] 1 Ch 746 at 761, Vaughan Williams LJ stated that the rule

76 As John Glover, in *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), p 18, has observed, fiduciaries tend to be professionals with a profit motive for their work. They are not "disinterested persons performing superogatory or selfless acts". Weinrib E, "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1 at 2 also notes: "Examination of the activities of fiduciaries involves, above all, an inquiry into the propriety of profit-making". This is in the context of a capitalist social order which accepts the basic validity of the profit-motive as an incentive for economic activity.

77 *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461; [1843-60] All Eng Rep 29; *Boardman v Phipps* [1967] 2 AC 46; *Chan v Zacharia* (1984) 154 CLR 178.

is to "protect directors, trustees and others against the fallibility of human nature by providing that, if they do choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby". The rule of equity is thus an answer to the prayer of fiduciaries that they be not led into temptation.[78]

In any case where it is alleged that there has been a conflict of duty or interest, or a significant possibility of conflict, a key question to examine will be the scope of the fiduciary obligation owed to the principal. Only in the light of this can the possibility of conflict be determined. In a situation where the scope of the obligation is strictly limited, the fiduciary will not be in breach of the conflict rule even if he or she had an interest in the transaction. For example, in *Van Rassel v Kroon* (1953) 87 CLR 298, a man purchased a lottery ticket as fiduciary agent or trustee for himself and a friend. He also purchased one in his own name. His own ticket won, but he was not liable to account for the profit since his obligation was very limited and did not preclude him from also entering the same lottery. Dixon CJ said that the fiduciary obligations flowing from the arrangement to purchase a ticket for himself and another were few, and mostly negative. His duty was to do nothing to impair the rights of the persons for whom he holds the ticket and to distinguish that property from his own (at 302-303). This, he had done.

The remedies, where there is a conflict of duty and interest, are not limited to confiscatory remedies, but include prohibitory or mandatory injunctions, rescission,[79] and equitable compensation (*Nocton v Lord Ashburton* [1914] AC 932). In *McKenzie v McDonald* [1927] VLR 134, equitable compensation was awarded to a woman who was persuaded by her estate agent to sell her farm to him and to buy his shop at prices which were extremely disadvantageous to her. Rescission of the transaction was not available because the farm had passed into the hands of a third party, but compensation was awarded instead to give her the amount she should have received on a fair valuation of the properties. In this case, the extent of compensation could have been measured by the fiduciary's gain. In other cases, the plaintiff may seek to recover losses which have resulted because the fiduciary was in a position of conflict between duty and

78 Herring CJ of the Supreme Court of Victoria explained the rule as arising from the desire of courts of equity to "prevent a person from burdening his conscience by the acquisition of property to which, in conscience, he is not entitled": *Re Taylor* [1950] VLR 476 at 479.

79 *Maguire v Makaronis* (1996) 188 CLR 449 (rescission of a mortgage on condition of repaying the principal and interest on a loan); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; *Daly v Sydney Stock Exchange* (1986) 160 CLR 371.

interest. However, the losses must be causally related to the breach. In *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, a solicitor took a secret profit from a real estate transaction. The purchasers built a warehouse on the land, and due to the negligence of the soil engineers, it subsided. The purchasers sought to recover from the fiduciary what it was unable to recover from the soil contractors. The Supreme Court of Canada unanimously rejected that claim,[80] and held that the solicitor was not liable for all the losses to the purchasers which flowed from the transaction. His breach of fiduciary duty was causally unrelated to the loss except insofar as the purchasers would not have gone ahead with the transaction if they had known of the secret profit. It has also been held in New Zealand that the court may take account of contributory negligence in assessing the level of compensation which the fiduciary ought to pay.[81]

Unauthorised profits from a fiduciary position

[1024] Fiduciaries are required to account for any benefit received by reason of or by use of a fiduciary position, or use of an opportunity or knowledge resulting from it. Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 199 stated that the objective of this rule "is to preclude a fiduciary from actually misusing his position for his personal advantage."

Like the conflicts rule, the profit rule is grounded in equity's concern with the possibility of fraud. In *Benson v Heathorn* (1842) 1 Y & CCC 326 at 343-344; 62 ER 909,[82] Knight Bruce V-C said:

> "It is mainly this danger, the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees and all parties whose character and responsibilities are similar … induces the Court … for the protection of the public generally … to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced".

80 There were significant differences in the reasoning between the majority and minority judges. The majority held that tortious principles of foreseeability and remoteness could be introduced into the assessment of equitable compensation. The minority took the view that such fusion of law and equity was inappropriate and unnecessary, and that equity could examine the issue of causation without resorting to common law concepts: see further below, Chapter 22: "Equitable Compensation". See also *Target Holdings Ltd v Redfern* [1995] 3 All ER 78; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161.

81 *Day v Mead* [1987] 2 NZLR 443 (CA): see further below, Chapter 22: "Equitable Compensation".

82 This was cited with approval by McTiernan J in *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 604-605. See also Rich, Dixon and Evatt JJ at 592-593.

Like the conflict rule, the profit rule has often been strictly applied. It was explained by Lord Russell of Killowen in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 as a principle which applied independently of either fraud or harm (at 144-145):

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

The strict application of the profit rule, already illustrated by *Boardman v Phipps*,[83] may also be seen in *Regal (Hastings) Ltd v Gulliver*. In this case, the directors of a company which owned a cinema formed a subsidiary company to lease other cinemas. In order to lease the cinemas, it was necessary that £5,000 of shares should be paid up. The company could only afford £2,000 and so the directors and the company solicitor purchased the remaining £3,000 of shares in their own names, and with the use of their own money. Subsequently, the holding company and the subsidiary were sold, and the value placed upon the subsidiary's shares represented a considerable profit for the directors. The new controllers of the company then brought a claim on behalf of the company claiming the personal profit made by the fiduciaries. The claim has been described as "remarkably unmeritorious".[84] Nonetheless it succeeded, even though this meant that the controllers of the new company were able to claim back part of the purchase price which they had agreed to pay. The reason was that the directors had acquired their shares by reason of their fiduciary position and in the course of their work as directors. Lord Porter regarded the principle that a fiduciary should not make a profit by reason of his fiduciary position as being of such vital importance that it should be applied despite the unmeritorious gain made by the new controllers of the company (at 157). The only way that the Regal directors could have protected themselves from the claim which was eventually brought against them would have been to obtain a resolution by the shareholders at a general meeting.

83 [1967] 2 AC 46: see above, para [1013].

84 Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), p 124.

It is quite possible that the High Court of Australia might take a different approach on similar facts. In *Warman v Dwyer* (1995) 69 ALJR 362 at 368, the High Court indicated that, notwithstanding the decisions in *Boardman v Phipps* and *Regal (Hastings) Ltd v Gulliver*, the profit rule might not be applied in an undiscriminating fashion. The court quoted the following passage from Deane J's judgment in *Chan v Zacharia* (1984) 154 CLR 178 at 204-205:

> "[T]he liability to account for a personal benefit or gain obtained or received by use or by reason of fiduciary position, opportunity or knowledge will not arise in circumstances where it would be unconscientious to assert it or in which, for example, there is no possible conflict between personal interest and fiduciary duty and it is plainly in the interests of the person to whom the fiduciary duty is owed that the fiduciary obtain for himself rights or benefits."

In applying the profit rule, the question which arises in each case is whether the profit was gained by reason of the fiduciary position. As was made clear in *Boardman v Phipps*, there is no absolute prohibition on making personal use of information gained in the course of acting as a fiduciary. The fiduciary is only liable to have her or his profits confiscated if the information obtained was confidential, and would not otherwise have been readily obtainable.

Furthermore, if the use to which the information is put is outside of the scope of the fiduciary's duty to the principal, then the fiduciary is not liable to account for the profits gained. Thus, in *Aas v Benham* [1891] 2 Ch 244, the English Court of Appeal held that the defendant, who was a partner in a ship-broking business, was entitled to retain the profit he had made from a shipbuilding business since the shipbuilding was outside the sphere of work in which the partners were engaged. This was despite the fact that the shipbuilding business arose out of the broking work and that the broker's name and letterhead were used in correspondence. Lindley LJ (at 255-256), with whom Bowen LJ agreed (at 257) said:

> "As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such

> information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business … It is not the source of the information, but the use to which it is applied, which is important in such matters."

Applications of the conflict and profit rules

[1025] There are numerous applications of the conflict and profit rules apart from the cases discussed above. The rules against fiduciaries engaging in self-dealing in relation to property are applications of the principles, as are those concerning secret commissions and bribes.[85] A number of such cases are considered below, Chapter 21: "Constructive Trusts". Numerous cases concern fiduciaries who take up opportunities for themselves when they were under a duty to pursue them for their employer or principal, or who otherwise take advantage of an opportunity which came to them in their capacity as a fiduciary.

An example is *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] WAR 1 (FC). The defendant, Green, was a senior manager in a company involved in the building industry. He worked in Victoria, but was aware of the tendering practices in other parts of the country, including Western Australia. On learning that tenders were being invited for a major building project in Perth, he set up his own proprietary company and resigned his position with his employer. Knowing how his former employer would calculate its tender bid, his company put in a lower bid and won the tender. He put in his tender before he had finally left the employer. The employer put in the third lowest bid. Green, and his proprietary company were held liable to account for the profits from the venture. It was irrelevant that his former employers would have been unsuccessful in the tendering process had he not put in a bid. Nor did his resignation prevent liability arising, since he took advantage of the confidential knowledge he had acquired in the course of his employment to put in a lower bid.

Similarly, in *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371, the senior officers of a subsidiary company were held liable to account for profits where they resigned from their positions to form another company which was in direct competition with their former company. They succeeded in gaining a lucrative contract which they had previously been

85 See further Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [525]-[537].

pursuing on behalf of their former employer. Laskin J, for the Supreme Court of Canada, said that a director or a senior officer of a company is disqualified

> "from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired." (at 382)[86]

Conflict of duty and duty

[1026] A theme of obligation which is particularly relevant to service professions such as solicitors,[87] is the need to avoid a conflict between duty and duty, where the interests of different clients may conflict. The duty of loyalty owed to both clients may involve a conflict since the fiduciary is required to use her or his best endeavours on behalf of the interests of each client. Potentially, the problem of a conflict between two duties is one which may be faced by a number of categories of fiduciary. In *Kelly v Cooper* [1993] AC 205, for example, the Privy Council had to decide whether a real estate agent had been in breach of his fiduciary duty to one client by not revealing information which he had obtained while acting on behalf of another client. The Privy Council rejected this particular claim.

In the main, the cases on conflict of duty and duty involve solicitors, for solicitors in particular are likely to have the problem of having different clients with conflicting interests. Such a conflict might occur where a solicitor is acting for both purchaser and vendor in the same conveyancing transaction.

The rule that solicitors must not act for two clients who may have conflicting interests is not an inflexible one as a matter of law.[88] In *Clarke Boyce v Mouat* [1994] 1 AC 428,[89] the Privy Council held,

86 See also *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443.

87 See generally, Dal Pont G, *Lawyers' Professional Responsibility in Australia and New Zealand*, (2nd ed, Lawbook Co., 2001).

88 *Clarke Boyce v Mouat* [1994] 1 AC 428; *Bristol and West Building Society v Mothew* [1996] 4 All ER 698, Millett LJ at 712.

89 For critical comment, see Nolan R, "Conflicts of Duty and the Morals of the Market Place" [1994] *Cambridge Law Journal* 34.

on an appeal from New Zealand, that a solicitor had not been in breach of his fiduciary duty where he acted for a mother who wanted to mortgage her house as security for a loan to her son, who was the client of the solicitor. The solicitor had been at pains to emphasise that her interests were not the same as her son's, and he encouraged her to obtain independent legal advice. She declined to do so. The court held that the mother had engaged the solicitor only to ensure that the mortgage documents were drawn up properly and not to offer advice on the wisdom of the transaction. Lord Jauncey stated (at 435):

> "There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other."

It is nonetheless a dangerous course for a solicitor to act for two clients with potentially conflicting interests.[90] A conflict between duty and duty was found, for example, in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, in which a solicitor advised a client to invest the proceeds of a personal injury claim in a group of development companies which was also a major client of the solicitor's firm. The group later went into receivership. The New Zealand Court of Appeal held that there was a conflict between the solicitor's duty to the company and his duty to give impartial advice on appropriate investments to his client who had the money to invest. Where it is clear that there is a conflict between a solicitor's duty to one client and another, the solicitor needs to withdraw from both to avoid the conflict (*Stewart v Layton* (1992) 111 ALR 687).

In determining whether there is a real, sensible possibility of conflict between the interests of different clients, it is important to look carefully at the nature of the fiduciary's undertaking. It is not enough to create a conflict between duties that a fiduciary is providing a service to two or more clients who may have conflicting interests. As *Clarke Boyce v Mouat* [1994] 1 AC 428 demonstrates, a solicitor's work may be instrumental rather than advisory. Fiduciary obligations do not arise merely from the

90 *Simmonds and Simmonds* (1991) FLC 92-219; *Wan v McDonald* (1992) 105 ALR 473.

status of the relationship, but the scope of the undertaking. This point was made by the New South Wales Court of Appeal in *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1[91] in determining that a firm of solicitors was not in a position of conflict between duties where it was advising more than one company in relation to a restructure of the group. The Court said (at 45):

> "Even in the case of a solicitor-client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from the status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances. Not every aspect of a solicitor-client relationship is fiduciary. Conduct which may fall within the fiduciary component of the relationship of solicitor and client in one case, may not fall within the fiduciary component in another."

It is not only individual solicitors who may be affected by the problem of a conflict of duty and duty. The problem of conflict may arise also in cases where two different members of the same firm are employed and there are potential conflicts between the interests of their respective clients. A client does not instruct the individual solicitor, but rather the firm, and it is the firm as a whole which assumes legal liability to the client. As Lord Millett said in *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222 at 234: "... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position". Consequently, where Rules of Court provide that a legal practitioner may not act for two or more parties having adverse interests in proceedings, this rule will prevent one partner of a firm acting for a client in litigation against another client of the same firm (*R v O'Halloran; ex parte Hamer* [1913] VLR 116).

The problem of a potential conflict between duty and duty extends to non-contentious matters. In the age of the large multi-national firm, and in cases where there are numerous people who may have an interest in a matter, it is indeed possible for a firm to have a conflict of duty and duty without realising it.[92]

The law of fiduciary obligations is concerned with simultaneous representation, not successive representation. In situations in which a solicitor or other fiduciary acts against a former client, the issue is not one of a conflict between duties but rather that

91 Special leave to the High Court refused, 14 April 2000.

92 See, for example, *Harrods Ltd v Lemon* [1931] 2 KB 157. See further Finn P, "Fiduciary Law and the Modern Commercial World" in McKendrick E (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon, Oxford, 1992), pp 23-27.

confidential information given to the fiduciary by the former client, or knowledge acquired while acting on her or his behalf, may be used by the fiduciary while acting on behalf of the subsequent client. In such circumstances, the former client may seek an injunction restraining the fiduciary from acting against her or him in the subsequent matter.

In an age when many law firms are large enterprises with hundreds of solicitors operating in more than one jurisdiction, the problem of conflicts between the interests of present and former clients is a major one. Some firms have sought to overcome the problem of confidentiality of information received from former clients by erecting what are known as "chinese walls" within the firm. These are arrangements which are designed to ensure that the solicitors who have carriage of the present matter do not receive any information which has been obtained by the firm in acting for the previous client. Such arrangements may include the isolation of one group of solicitors in a different location from another group, restrictions being placed on access to the files from the previous case, and undertakings to maintain silence by the solicitors involved in the previous matter. In a number of cases, the courts have held that such arrangements are not sufficient to protect the former client from potential leakage of information, and have granted injunctions restraining the firm from acting against its former client.[93]

The test for determining whether a solicitor or other fiduciary should be disqualified from acting against a former client was laid down by the House of Lords in *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222, which disapproved an earlier decision of the English Court of Appeal in *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831. The case concerned a large firm of accountants which had acted for a client from Brunei in the context of litigation support and was then engaged in another project which was adverse to its former client's interests. Lord Millett ([1999] 2 AC 222 at 235), with whom the other members of the House of Lords agreed, said that

> "it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish: (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own".

93 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222; *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357; *Fruehauf Finance Corp Pty Ltd v Feez Ruthning* [1991] 1 Qd R 558; See also, for example, *Re a Firm of Solicitors* [1992] 1 All ER 353.

Lord Millett went on to say that whether or not a person is in possession of confidential information is a matter of fact. There is no cause to impute or attribute the knowledge of one partner to fellow partners. Once the plaintiff has discharged the burden of proof of demonstrating that these circumstances exist, it is then up to the fiduciary to satisfy the Court that there is no risk of disclosure of the confidential information to those acting for the other party. He stated (at 237):

> "There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate that risk. But the starting point must be that, unless special measures are taken, information moves within a firm."

Prince Jefri Bolkiah v KPMG (A Firm) thus places a substantial onus of proof on the firm which wishes to act in a case where the interests of the client are adverse to those of a former client.

The defence of informed consent and excusing the breach

[1027] It is a defence to a claimed breach of fiduciary duty that the breach occurred with the informed consent of those to whom those fiduciary duties are owed or that the breach was subsequently excused. The onus of proof is on the fiduciary to demonstrate that such informed consent was given (*Birtchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384, Isaacs J at 398). The High Court said in *Maguire v Makaronis* (1996) 188 CLR 449 at 455 that "[w]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given."

The disclosure must be of all the relevant information necessary for the beneficiary of the obligation to make a proper judgment as to whether to give consent to the activity which would otherwise be a breach of duty.[94] Those to whom the fiduciary duties are owed may also ratify or excuse a breach after the event if they are given sufficient information.[95]

94 In *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 All ER 1222 at 1227, Lord Wilberforce (for the Privy Council), said that there must be a "full and frank disclosure of all material facts". For discussion of the level of disclosure necessary in relation to a real estate transaction, see *Grantwell Pty Ltd v Franks* (1993) 61 SASR 390. See also *Boardman v Phipps* [1967] 2 AC 46 in which, although Boardman did seek the consent of the trustees and beneficiaries, the trial judge concluded that he had not given sufficient information to them.

95 *Bamford v Bamford* [1970] Ch 212; *Winthrop Investments Ltd v Winns Ltd* [1975] 2 NSWLR 666. But see *Residues Treatment & Trading Co v Southern Resources Ltd* (1988) 51 SASR 177, King CJ at 204 (fraud on the minority).

The relevant consent depends on the nature of the fiduciary office. In the case of company directors, such consent ought to be given by the company in general meeting, but, in an exceptional case, it is possible that the consent of the board of directors will be sufficient to permit one director to take personal advantage of an opportunity. In *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 (PC), the directors of a joint venture company made a decision based on proper information not to pursue a particular mining venture. The Privy Council held that a director who took up that opportunity in a personal capacity was not in breach of his fiduciary duty. The consent of the board, however, is unlikely to be sufficient in most cases. If a number of the directors see the chance for personal gain from an opportunity which first came to their attention while acting for the company, it is possible that they will not use their best endeavours to persuade the other directors to take up the opportunity.

Corporate opportunities do not come only to directors. A test for deciding whether the board of directors can waive a breach of fiduciary duty was given by Young J in *Fexuto v Bosnjak Holdings* (1998) 28 ACSR 688 at 721. He said that where the breach of duty affects the value of the shares, the directors cannot waive a breach. This can only be done by the shareholders in general meeting after full disclosure.

IDENTIFYING NEW FIDUCIARY RELATIONSHIPS

[1028] An important question in determining the potential application of fiduciary law in the modern world is to establish the criteria by which relationships beyond the established categories will be deemed to be fiduciary in character. What is it that justifies the imposition of the stringent standards of fiduciary obligation upon particular categories of person and requires the sometimes draconian remedies which may result from a breach of those obligations?

The range of circumstances in which fiduciary obligations are found to arise makes it difficult to provide one comprehensive definition of a fiduciary relationship,[96] although some have been

96 *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 195; *Re Coomber* [1911] 1 Ch 723, Fletcher Moulton LJ at 728-729; *Breen v Williams* (1996) 186 CLR 71, Dawson and Toohey JJ at 92: "the law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another".

offered.[97] A number of theories have also been put forward concerning the identification of relationships as being fiduciary in nature.[98] The difficulty with many such theories is that they look for an "element common to, and thus definitive of, all those situations which produce the fiduciary".[99] However, the piecemeal development of the case law has made it difficult, if not impossible, to define a fiduciary relationship in terms which capture the variety of contexts in which fiduciary obligations are imposed. Furthermore, it is a pointless exercise to try to reconcile all the cases on fiduciary law, particularly if an attempt is made to incorporate precedents throughout the common law world, or take account of the variety of dicta of appellate judges in the course of minority judgments. When case law has developed without a proper concern for theory and purpose, coherence is not to be expected.

An additional difficulty is that courts have sometimes fallen into the temptation of finding a fiduciary obligation as a means of justifying a particular result, and not because the circumstances of the case were such as to make an analogy with existing fiduciary relationships appropriate. This is generally because the finding of a fiduciary obligation is the gateway to such powerful equitable remedies.[100]

97 In *Cook v Evatt (No 2)* [1992] 1 NZLR 676, the New Zealand Court of Appeal stated that the essence of a fiduciary relationship is "an inequality of bargaining power brought about by the trust or confidence reposed in, and accepted by, the fiduciary to perform some function for another's benefit in circumstances where the beneficiary lacks the power adequately to control or supervise the exercise of that function". See also the definition offered by the New South Wales Court of Appeal in *United States Surgical Corp v Hospital Products Ltd* [1983] 2 NSWLR 157 at 208: "[A] fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interest of another and not in his own". Asquith LJ also offered a definition in *Reading v The King* [1949] 2 KB 232 at 236.

98 For theories which have been offered, see Scott A W "The Fiduciary Principle" (1949) 37 *California Law Review* 539; Weinrib E, "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1; Shepherd J C, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 *Law Quarterly Review* 51; Flanigan R, "The Fiduciary Obligation" (1989) 9 *Oxford Journal of Legal Studies* 285; Easterbrook F and Fischel D, "Contract and Fiduciary Duty" (1993) 36 *Journal of Law and Economics* 425; Frankel T, "Fiduciary Relationship in the United States Today", in Waters D (ed), *Equity, Fiduciaries and Trusts* 1993 (Carswell, Toronto, 1993), 173; Gautreau M, "Demystifying the Fiduciary Mystique" (1989) 69 *Canadian Bar Review* 1; Glover J, "Wittgenstein and the Existence of Fiduciary Relationships: Notes Towards a New Methodology" (1995) 18 *University of New South Wales Law Journal* 443. For a discussion of the traditional theories, see Shepherd J C, *The Law of Fiduciaries* (Carswell, Toronto, 1981), pp 51-91.

99 Ong D S, "Fiduciaries: Identification and Remedies" (1986) 8 *University of Tasmania Law Review* 311 at 315.

100 See for example *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 where a plaintiff mistakenly made a second (unnecessary) payment of the same amount of money to the defendant. The court allowed the plaintiff an equitable tracing remedy following the bankruptcy of the defendant, on the basis that "the payment into wrong hands itself gave rise to a fiduciary relationship" (at 119). As La Forest J noted in *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 22, this uses the law of fiduciary obligations to justify a particular result and "reads equity backwards" from the desired result to the obligation. The reasoning has now been disapproved by the House of Lords (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, Lord Browne-Wilkinson at 714-715). Lord Browne-Wilkinson considered that the result may have been correct for other reasons.

[1029] The search for a defining principle which underlies the law of fiduciary obligations has in particular been hampered by the fact that fiduciary law developed by analogical reasoning, and still does. It is because directors, senior employees, partners and agents were considered to be "like trustees" that obligations similar to trustees were imposed upon them. As has been seen, more than one kind of analogy has been drawn with trustees.[101] The problem with reasoning by analogy is that it is often not grounded in any coherent theory. As John Glover[102] has written:

> "[A]nalogies can be misleading. Quite irrelevant likenesses may establish a common link between two things. Sticks of dynamite and candles have several common features. There may be coincidences of shape, size and age that have no bearing on why the two things are being compared … Some 'criteria of sameness' must exist to control this process and make it useful."

When analogies are drawn, it is not always clear in the discussion in the cases why the characteristic which is identified as existing in common should justify the imposition of fiduciary obligations. For example, it may be said that government is like a trust, and the notion that governments are trustees for the people has origins far back in the history of political theory.[103] In some jurisdictions, the analogy with a position of trusteeship has led courts to describe the relationship between the government and Aboriginal people as being fiduciary in character.[104] Yet what flows from describing a government's relationship with indigenous peoples as fiduciary? It cannot be said that government owes a duty of loyalty to act only in the interests of Aboriginal people, for the responsibility of government is to act in the interests of all people, and the nature of all government is that balances must be found between different legitimate community interests and needs.

The New Zealand Court of Appeal stated another view of the nature of fiduciary obligation in *Te Runanga o Wharekauri Rehohu*

101 See above, para [1019].

102 Glover J, "Wittgenstein and the Existence of Fiduciary Relationships: Notes Towards a New Methodology" (1995) 18 *University of New South Wales Law Journal* 443 at 445.

103 See Finn P, "The Forgotten 'Trust': The People and the State", in Cope M (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995), p 131.

104 For example, in *R v Sparrow* (1990) 70 DLR (4th) 385, the Supreme Court of Canada held that the Canadian government's fiduciary obligations to its Aboriginal peoples require it to justify any government regulation which infringes upon or denies Aboriginal rights. In the circumstances of this case, restriction of the fishing rights of native peoples had to be justified by a valid legislative objective such as to protect fishing stocks. See also *Guerin v The Queen* (1984) 13 DLR (4th) 321; *Cree Regional Authority v Canada* (1991) 84 DLR (4th) 51; *Apsassin v Canada* (1993) 100 DLR (4th) 504. Similar views were expressed by Toohey J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 203, but have not commanded support from decisions of Australian courts.

Inc v Attorney-General [1993] 2 NZLR 301 at 304. The court said that the New Zealand government owed a fiduciary obligation to the Maori people to "act in good faith, fairly, reasonably and honourably". While these are important virtues, it is not clear that they flow in any meaningful way from the description of the relationship as fiduciary. At best, the importance of the analogy with trusteeship might be that, like trustees, governments owe an obligation to act fairly between different classes of beneficiaries, and so must not act in a discriminatory fashion.[105] However, that ground is more specifically covered in Australia by the *Racial Discrimination Act* 1975 (Cth).

[1030] In understanding the law of fiduciary obligations, it is necessary to identify the different purposes for which one may be said to be a fiduciary. In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 68-69,[106] Gibbs CJ said that:

> "The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established … Fiduciary relations are of different types, carrying different obligations … and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose."

This is because the notion of a fiduciary relationship has its origins in at least two different concerns of equity. Brennan CJ noted in *Breen v Williams* (1996) 186 CLR 71 that fiduciary duties arise from either of two sources: one is agency, and the other is a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other. In a similar vein, the Full Court of the Federal Court in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 drew a distinction between vertical relationships and horizontal relationships (*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 (FC), the Court at 539-540).[107] Vertical relationships are relationships such as those between principal and agent or employer and employee. Horizontal, or collaborative relationships, are relationships such as partnerships and joint ventures. Commenting on the criteria used to determine whether a fiduciary relationship exists, the Court noted that:

105 See Finn P, "The Forgotten 'Trust': The People and the State", in Cope M (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995), pp 136-138.

106 See also Dawson J at 141: "No satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary."

107 The Court referred to Bean G M D, *Fiduciary Obligations and Joint Ventures* (Oxford, Clarendon, 1995), 117.

> "[T]he significance of a particular criterion may vary, depending upon whether the relationship is 'vertical' or 'horizontal'. For example, although the notion of mutual trust and confidence can be applied to certain vertical relationships which are clearly fiduciary in character, it is perhaps more readily applied to collaborative undertakings. Similarly, it may be easier to apply the notion of a party undertaking to act *solely* in the interests of another where the relationship between them is vertical. A horizontal relationship is more likely to involve an undertaking, actual or imputed, that the parties act only for their mutual advantage." (*News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 (FC), the Court at 540 (emphasis in original).)

The definition or identification of fiduciary relationships must take place with reference to the purposes that the law of fiduciary obligations serves, and must be grounded in the historic concerns of equity. Three distinct purposes may be identified, although particular cases might be analysed by reference to more than one category. All three purposes reflect foundational concerns of equity, but it would be a mistake to try to analyse or define fiduciary law by reference to only one of them. The difficulty in finding an underlying rationale for fiduciary obligations arises from the attempt to find just one such rationale. The purposes are:

- the maintenance of high standards of honesty and propriety by those who are under a duty to act in the interests of others;
- the confiscation of gains arising from the abuse of a relationship of trust; and
- the protection of one person's reasonable expectations that the other will act in her or his interests, and not in pursuance of a contrary self-interest or conflicting duty.

The maintenance of high standards of honesty and propriety

[1031] The conflict and profit rules ensure that those who have undertaken to act in the interests of others, or who are otherwise under a legal duty to do so, are held to the highest standards of honesty and propriety. Those who are fiduciaries for the purposes of the rules which prohibit conflicts of duty and interest and unauthorised profits are those who are under obligations, whether arising from agreement or otherwise, which preclude the pursuit of a contrary self-interest and the making of unauthorised profits (*Bristol and West Building Society v Mothew* [1996] 4 All ER 698, Millett LJ at 712). This is not circular.

No one, after all, can be guilty of allowing a conflict between duty and interest unless they have an obligation to others which precludes self-interested behaviour. Nor can it be said that a person has made unauthorised profits, unless the nature of their activity is one in which unauthorised personal profit-making would be a breach of duty. Certain characteristics of such fiduciaries were suggested by Mason J in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-97:

> "The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations … viz trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interest of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of' and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility."

Three elements are of particular significance in this definition. First, the fiduciary has undertaken to act in the interests of another. Secondly, that undertaking gives to the fiduciary the power to affect the interests of the other party. Thirdly, the person to whom the fiduciary duty is owed is vulnerable to the fiduciary's abuse of his or her position.[108]

This is not a comprehensive definition. There are those who owe fiduciary obligations, who have not given an explicit undertaking to act in the interests of another. Their obligation to act in the interests of another arises by operation of law. Examples of this are the relationship of parent and child or guardian and ward.[109] However, the presence or absence of such an undertaking to promote the interests of another to the exclusion of one's own interests is a major factor in determining whether fiduciary obligations are owed.

108 See also Beazley JA (with whom Meagher JA agreed) in *Pavan v Ratnam* (1996) 23 ACSR 214 at 224: "The cases establish that a number of factors may characterise a relationship as being of a fiduciary nature. They include vulnerability, reliance and the presence of loyalty, trust and confidence" (NSWCA).

109 *Clay v Clay* (2001) 202 CLR 410; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408. See also *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.

An undertaking

[1032] Whether or not there has been an undertaking to act in the interests of another may in many cases be the defining issue in determining whether fiduciary duties are owed. In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 the issue was whether a distributor was in a fiduciary relationship with the manufacturer such that breach of his duties gave rise to the equitable remedies of an account of profits or a constructive trust. United States Surgical Corporation ("USSC") manufactured surgical stapling devices and appointed Blackman as its sole distributor in Australia. As distributor, he was under a contractual obligation to use his best efforts to promote USSC's products. He formed a company called Hospital Products as the vehicle for his distributorship business. During the period that he was acting as USSC's distributor, he used a process of reverse engineering to manufacture his own products which had been copied from USSC. He then sold his own products to the detriment of USSC's business in Australia. It was held by a majority of the High Court that, although Blackman was in breach of his contractual obligations to USSC, he was not in a fiduciary relationship. Central to the reasoning of the majority was that the arrangement was a commercial one in which USSC and its distributor did not necessarily have the same interests. In a distributorship situation, the manufacturer's interest is in maximising the number of units which are sold. The distributor's interests may be served in the same way, but it may equally decide that it can best maximise its profit by selling a smaller number of units at a higher price. Blackman was liable, but not as a fiduciary, and nor could a constructive trust be imposed over the business that he built up.[110]

To the extent that a fiduciary relationship is based upon a contract between the fiduciary and those to whom fiduciary obligations are owed, the role of fiduciary law may be seen as supplementing the terms of the contract. Easterbrook and Fischel[111] argue that the role of fiduciary law is to imply contractual terms in those relationships in which the cost of detailing the obligations of the fiduciary is high and there are difficulties in monitoring the performance of those obligations. Thus the "duty of loyalty replaces detailed contractual terms, and courts flesh out the duty of loyalty by prescribing the actions the parties themselves would have preferred if bargaining were cheap

110 Contrast the decision of the New Zealand Court of Appeal in *Watson v Dolmark Industries Ltd* [1992] 2 NZLR 311.

111 Easterbrook F and Fischel D, "Contract and Fiduciary Duty" (1993) 36 *Journal of Law and Economics* 425.

and all promises fully enforced."[112] It follows that the fiduciary obligations imposed by law are subject to the express agreement of the parties to the contrary. In *Hospital Products*, Mason J explained the link between fiduciary obligations and contractual ones (*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, at 97):

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations, it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

Fiduciary obligations are also subject to implied terms of the contract. Thus in *Kelly v Cooper* [1993] AC 205, the Privy Council held, in reference to the implied terms of the contract of agency, that the fiduciary obligations of an estate agent in acting for a vendor did not include a duty to disclose confidential information received while acting on behalf of another client which might have affected the vendor's decision to accept a particular offer.

Not all undertakings arise from contract. The undertaking may not have been given to the beneficiaries of that undertaking, and nor does it necessarily arise from an agreement with them. While the fiduciary obligations of partners arise from agreement between themselves, and the relationship between solicitor and client also results either from an agreement or from the acceptance of the client's instructions, other fiduciary obligations arise from different forms of undertaking. Trustees are generally appointed by persons other than the beneficiaries. They may be appointed by the settlor or by an appointor of the trust; alternatively they may be appointed by the existing trustees or by a court. The source of their obligations is the trust instrument and

112 Easterbrook F and Fischel D, "Contract and Fiduciary Duty" (1993) 36 *Journal of Law and Economics* 425 at 427. The authors offer this as a complete theory of fiduciary law. For a critique of the contractual view, see Maxton J, "Contract and Fiduciary Obligation" (1997) 11 *Journal of Contract Law* 222, DeMott D, "Beyond Metaphor: An Analysis of Fiduciary Obligation" [1988] *Duke Law Journal* 879.

not an agreement with the beneficiaries. The fiduciary obligations of executors arise from the will and the general law, and not from an agreement with the legatees and devisees under the will.

The power to affect the interests of another

[1033] The power or discretion to affect the interests of the other in a legal or practical sense is a second characteristic of fiduciary relationships which was identified by Mason J in *Hospital Products*. It is not all those who undertake to act in the interests of another who are fiduciaries. This would cast the net too wide. What is distinctive about the established categories of fiduciary is that all have a power to affect the interests of the other by what they do. Trustees and company directors manage property and have a power to affect the financial interests of those to whom they owe fiduciary duties. Agents have the power to bind the principal within the actual or ostensible scope of their authority. Solicitors have the power to affect the interests of clients in all sorts of ways in the course of representing them in negotiations and litigation. Although they must act on the instructions of their clients, it is their advice which may well shape what those instructions are.

Thus the power to affect the interests of the one to whom fiduciary duties are owed is an intrinsic feature of those whom the law classes as fiduciaries. In Australian law, however, this characteristic should be seen as limiting the operation of the "undertaking" principle, not as an independent characteristic. In Mason J's definition, the requirements are cumulative. There must be an undertaking or agreement to act in the interests of another together with a power to affect the interests of that person in a legal or practical sense.[113]

113 The position is different, for example, in Canada. There, the power to affect the interests of another is seen as the defining characteristic of a fiduciary without reference to an obligation to act in the other's interests. *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, Sopinka J at 62-63; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, McLachlin J at 154-155; *Norberg v Wynrib* (1992) 92 DLR (4th) 449, McLachlin J at 488-493; *M(K) v M(H)* (1992) 96 DLR (4th) 289, La Forest J at 324-325; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161. Thus, in deciding that parents are fiduciaries in *M(K) v M(H)* (1992) 96 DLR (4th) 289 at 325, La Forest J emphasised the position of power: "Parents exercise great power over their children's lives, and make daily decisions that affect their welfare. In this regard, the child is without doubt at the mercy of her parents." In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 200-201, Toohey J echoed the Canadian view in saying that the power to affect a person's interests is one of the reasons for the imposition of fiduciary duties, and offered this explanation: "It is in part at least, precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person." This view that fiduciary obligations can be a source of an obligation to act in the interests of another was clearly rejected by the High Court in *Breen v Williams* (1996) 186 CLR 71. See Dawson and Toohey JJ at 95, Gaudron and McHugh JJ at 112-113.

Vulnerability

[1034] The vulnerability of the one to whom fiduciary duties are owed is a third characteristic which Mason J emphasised in *Hospital Products*. He said that as a consequence of the power to affect her or his interests:

> "The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position." (*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 97)

The protection of the vulnerable was also a feature emphasised by Dawson J in *Hospital Products* (at 142):

> "There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other."

If vulnerability is a common (if not universal) characteristic of those to whom fiduciary obligations are owed, it is at least a different kind of vulnerability from that which motivates the protective intervention of equity in other branches of the law. In the law of unconscionable dealing, equity acts to set aside unfair transactions where a party takes advantage of the vulnerability of another, whether that vulnerability arises from drunkenness, lack of education, old age, poor English or a host of other reasons.[114] Those who benefit from fiduciary obligations being owed to them are often not vulnerable in this sense. Large, multi-national companies are frequently the beneficiaries of fiduciary obligations. Such obligations are owed by the company directors, by senior managers, by the company solicitors, and perhaps by other professionals. They are not vulnerable in the sense of being weak and unable to defend their own interests.

The vulnerability of those to whom fiduciary obligations are owed does, however, derive from another source. It is characteristic of many fiduciary relationships that the fiduciary is

114 See above, Chapter 5: "Unconscientious Dealing".

difficult to supervise,[115] and defalcations are not easily discovered. This may explain the strictness of the obligation to avoid possible conflicts and to disgorge unauthorised profits. As McLachlin J said in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 155:[116]

> "[B]ecause the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing."

Thus it is very difficult for a company to monitor the activities of its directors, or for a client without knowledge and legal training to assess the impartiality of the advice being given by a solicitor. Trustees are in a position where the beneficiaries are particularly vulnerable to an abuse of the position of trust since trustees have the legal title to property and may dispose of it as the legal owner. Because of the difficulty of supervising the activities of fiduciaries and discovering particular acts of wrongdoing, equity does not require a beneficiary to prove fraud before it may confiscate the gains of a fiduciary or require compensation for losses. It is enough that there was a possible conflict or any unauthorised profit, whether or not the plaintiff is able to prove a clear abuse of trust by the fiduciary. It is this form of vulnerability which justifies the stringency of fiduciary obligations.

[1035] The undertaking theory does not explain all the circumstances in which fiduciary relationships are owed. This is because, in certain circumstances, the law provides that certain people ought to have had regard for the interests of another, whether or not they had undertaken to do so. Paul Finn[117] has written:

> "A fiduciary responsibility, ultimately, is an imposed, not an accepted one ... The factors which lead to its imposition doubtless involve recognition of what the alleged fiduciary has agreed to do. But equally public policy considerations can ordain what he must do, whether this be agreed to or not."

115 *Ex parte Lacey* (1802) 6 Ves 625; 31 ER 1228; *Ex parte James* (1803) 8 Ves 337; 32 ER 385; *Benson v Heathorn* (1842) 1 Y & CCC 326; 62 ER 909; *Furs Ltd v Tomkies* (1936) 54 CLR 583, Rich, Dixon and Evatt JJ at 592-593, McTiernan J at 604-605; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 at 392.

116 Citing Cooter R and Freedman B, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 *New York University Law Review* 1045.

117 Finn P, "The Fiduciary Principle" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto 1989), p 54.

One circumstance in which the courts are likely to find a fiduciary relationship in the absence of any undertaking to do so is where a person takes upon herself or himself the role of a fiduciary by self-appointment. In *Boardman v Phipps* [1967] 2 AC 46,[118] Phipps was in this position at times when he acted on behalf of the trust, together with Boardman, in negotiations for the purchase of shares. It is possible in particular, for someone to take on the role of an agent even though he or she was not appointed as such. In *Walden Properties Ltd v Beaver Properties Ltd* [1973] 2 NSWLR 815, a director of one company was said to be a self-appointed agent of another company for the purposes of certain negotiations (Hope JA at 833). A similar approach was taken in *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, in which a property developer submitted an application for planning permission purporting to be the agent of the legal owners, but without their authority, prior to an exchange of contracts. It was held that the property developer had taken upon itself the fiduciary obligations of an agent, and was therefore liable to account for the profits which had been made as a result of the grant of the planning permission. This reflects a principle of broader application, that those who take on themselves a legal role will be held accountable as if they had been properly appointed to it.[119]

The protection of relationships of trust and confidence

[1036] A further purpose of the law of fiduciary obligations is to prohibit the abuse of positions of trust and confidence and to confiscate profits made by taking advantage of the trust and vulnerability of another. It is in the law of undue influence that this purpose is most clearly seen. Equity sets aside gifts and contracts which are presumed to have been acquired through taking advantage of the trust which one person places in another. The term "fiduciary", based on the Latin "fiducia" which means trust,[120] draws attention to this purpose of the law — to ensure that one who is trusted does not abuse that trust for personal gain.

118 In the Court of Appeal, Boardman and Phipps were described as self-appointed agents: [1965] Ch 992 at 1017-8, 1030. In the House of Lords, Lord Guest preferred to describe them as having placed themselves in a special position of a fiduciary character in relation to the negotiations: [1967] 2 AC 46 at 118. See also Lord Cohen at 100.

119 See, for example, *Lyell v Kennedy* (1889) 14 App Cas 437; *Gawton v Lord Dacres* (1590) 1 Leon 219.

120 Discussed in *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, Southin J at 362.

It is not a necessary feature of all fiduciary relations that the beneficiary reposes trust and confidence in the fiduciary, and nor is it a sufficient reason for the imposition of fiduciary obligations. However, the reposing of trust and confidence is a feature of most fiduciary relationships,[121] and it is this element in particular which is used to justify the imposition of fiduciary obligations in some contexts.[122]

Thus, where the relationship is one of trust and confidence, the court is likely to find it to be fiduciary in character, and gains made by abusing that trust may be restored to the one of whom advantage was taken. In *United Dominions Corp v Brian Pty Ltd* (1985) 157 CLR 1, one party to a joint venture mortgaged the joint venture property to another party, the financier, not only as security for the money advanced towards the venture but also as collateral for its other liabilities, without the knowledge and consent of a smaller co-venturer, Brian Pty Ltd. This was held to be a breach of fiduciary obligations, even though at the time the mortgage was executed, no joint venture documents had been signed. Consequently, the court held that the financier was not entitled to diminish Brian's share of the profits in order to recoup losses arising from the other party's borrowings which were unrelated to the joint venture. The court took the view that, at the time when the joint venture was formally entered into, it bore the character of a partnership. It was irrelevant that the mortgage was executed prior to this time, since the parties had begun to embark on the joint venture and the relationship of trust and confidence existed at this time. Mason, Brennan and Deane JJ stated (at 11-12):

> "A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement."

121 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Dawson J at 141-142.

122 See, for example, *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, McMullin J at 94.

In this case, neither of the other joint venture participants had made any undertakings to protect the interests of Brian Pty Ltd at the time when the mortgage documents had been executed. Nonetheless, their relationship was such that "each participant was under a fiduciary duty to refrain from pursuing, obtaining or retaining for itself or himself any collateral advantage in relation to the proposed project without the knowledge and informed assent of the other participants" (Mason, Brennan and Deane JJ at 13). Their breach did not consist in the failure to honour an undertaking to act only in the interests of another, forsaking self-interest, but in taking advantage of the relationship of trust and confidence which existed between the prospective joint venturers.[123]

There is authority for the proposition that the relationship of trust and confidence may even exist in negotiations towards a co-operative business venture where no partnership eventuates. In *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1986] 2 Qd R 1, the plaintiff was a lessee in certain premises which was given the opportunity to lease other premises in the same shopping centre for the purpose of retailing sunglasses. The offer was contained in a letter from the landlord, which indicated that acceptance could be made by completion and return of the form contained in the letter. The plaintiff passed the letter to the defendant, with which it was conducting negotiations concerning the joint operation of a business at those premises, and introduced the defendant to the landlord as its partner. The defendant returned the letter of acceptance and took the lease in its own name. The landlord assumed that this was pursuant to the planned partnership arrangement, but in fact, the defendant went into the business on its own accord. Applying *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1, the Supreme Court of Queensland held that the parties were in a fiduciary relationship as the same degree of trust and confidence existed between the parties as would exist between partners.

In *Hospital Products Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Dawson J drew a distinction between situations where trust is misplaced, and situations where there is an abuse of a relationship which is inherently characterised by trust and confidence (at 147):

123 In the words of Gibbs CJ: "[T]here was, in the circumstances of the present case, a relationship between UDC and Brian based on the same mutual trust and confidence, and requiring the same good faith and fairness, as if a formal partnership deed had been executed" (at 7-8).

> "A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one ... A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability."

The distinction which Dawson J made between a relationship of trust and a situation of misplaced trust may need to be clearly kept in mind. The issue arises in examining the decision of Tadgell J in the Supreme Court of Victoria in *Hill v Rose* [1990] VR 129. In this case, the plaintiff invested a large sum in a business with a view to owning a share in it based on the oral representations of the defendant. The business was in a precarious financial state, but the plaintiff did not ask to see the relevant books. He relied for his information on the defendant's word. It was held that there was a fiduciary relationship between the parties which required the defendant to disclose the true financial state of the business, and also that the company was a trustee for a family trust.

A question which arises continually in applying the principles of equity is how far the courts ought to go to protect people from the consequences of their own mistakes where another person has also behaved unconscionably. The tendency is for the courts to be more influenced by the unconscionability of the defendant than the folly of the plaintiff, and this explains the decisions in a number of such cases.[124] In this case, it must be questioned whether a court of equity should have come to the aid of a businessman who did not make the most basic investigations before investing his money.

[1037] In Canada, the courts have taken equity's concern with the abuse of trust and confidence even further, and have awarded compensation in cases where the abuse of trust has taken the form of sexual abuse. In *Norberg v Wynrib* (1992) 92 DLR (4th) 449, a doctor prescribed drugs to a woman who was addicted in return for sex. The issue arose as to whether her subsequent action was barred by the *Statute of Limitations*. While the majority found in

124 For an example in the context of unconscionable dealing, see *Louth v Diprose* (1992) 175 CLR 621.

her favour on other grounds, McLachlin J, in the minority, argued that the doctor's conduct was a breach of fiduciary duty. This minority judgment was applied in *Taylor v McGillivray* (1994) 110 DLR (4th) 64.[125] A doctor was held to be in breach of his fiduciary duty when he engaged in consensual sexual relations with an adolescent patient. This theme was taken up further by the Supreme Court of Canada in *M(K) v M(H)* (1992) 96 DLR (4th) 289. The court held that it was a breach of the fiduciary duty of a parent to sexually abuse his daughter.

This usage of fiduciary law to protect interests which are not economic in nature was considered by the Full Court of the Federal Court in *Paramasivam v Flynn* (1998) 160 ALR 203 (Fed Ct of Aust FC). In this case the plaintiff alleged that he was sexually abused by a man who became his guardian. The issue was whether the claim of breach of fiduciary duty should be allowed as a means of avoiding the effect of the *Statute of Limitations*. The Full Court noted that the claim could be framed in fiduciary terms as a conflict of duty and interest. However, it noted that the role of fiduciary law has hitherto been to protect economic interests. While the application of the law could be extended, an advance must be justifiable in principle. The Court could find no reason to extend the application of equity into an area already within the purview of the law of tort.[126]

The protection of reasonable expectations

[1038] A third purpose of fiduciary law is to protect one person's reasonable expectations that the other will act in her or his interests, and not in pursuance of a contrary self-interest or conflicting duty, even though their relationship does not fall within one of the established categories of fiduciary relationship (*Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR [97590], Santow J at 14,703-04).[127] Here, the courts are not merely enforcing a duty of loyalty by sanctioning the pursuit of a contrary self-interest, for there is in these cases no legal duty to

125 The sexual relationship began when the patient was 16. For a part of the time in which they had sexual relations, the doctor had also been a foster-parent to the plaintiff. The judge held specifically that her consent was legally valid for the purposes of the tort of battery.

126 See also *Pilmer v Duke Group Ltd (in liq)* (2001) 180 ALR 249 at 270-272; *Cubillo and Gunner v The Commonwealth* (2001) 183 ALR 249 at 365-70 (FC Fed Ct); *Williams v The Minister, Aboriginal Land Rights Act* 1983 (1999) 25 Fam LR 86.

127 In *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, La Forest J expressed the question as being "whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue". See also *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, La Forest J at 40.

act in the interests of another. Rather, as in other areas of equity,[128] the courts intervene to protect the reasonable assumptions which people make and which may neither have been articulated expressly nor made the subject of binding legal obligations.[129] As with the other areas of fiduciary law, the purpose of the court in protecting these reasonable expectations is to confiscate unjust gains or to order compensation for losses for which the other party should bear some responsibility. In such cases, it is enough to avoid liability as a fiduciary that the person disclosed the fact that he or she had a contrary interest, thereby removing the reasonableness of any expectation that he or she would act only in the interests of the other.

This purpose of fiduciary law is particularly seen in relation to investment advisers and bank managers.[130] It is illustrated by *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453. In this case, the bank manager in a small country town took on the role of financial adviser to a couple who had been customers of the bank for many years and who were interested in purchasing a licensed leasehold of a hotel. One of the bank's other customers was selling the hotel and it was in the bank's interests to see that sale occur, since the customer had a substantial overdraft. The bank manager introduced the prospective vendor and the purchasers, and gave advice on the merits of the purchase. Although he revealed that the vendors were customers and that he was not at liberty to disclose confidential information, he did not encourage the purchasers to seek independent advice. Indeed, he discouraged them from doing so.

The price they paid was much too high, and they lost a lot of money as a result. Even at this high price, however, the bank's loan to the purchasers was secure since the purchasers were able to offer substantial security for the loan. The bank was held liable to compensate the purchasers for some of their losses on a number of grounds, including breach of fiduciary duty. In finding a fiduciary obligation, Davies, Sheppard and Gummow JJ stated (at 476):

> "A bank may be expected to act in its own interests in ensuring the security of its position as lender to its customer but it may

128 See above, Chapter 2, "The Conscience of Equity", para [215].

129 See for example, *Bulun Bulun v R & T Textiles* (1997) 157 ALR 193. Von Doussa J, at 209, cited Brennan CJ in *Wik v Queensland* (1996) 187 CLR 1 at 95 in support of the reasonable expectation principle to find that an Aboriginal artist owed a fiduciary obligation to his people in relation to the use of ritual knowledge in his artistic work.

130 For a discussion of the fiduciary obligations of banks, see Waters D, "Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 *Canadian Bar Review* 37.

> have created in the customer the expectation that nevertheless it will advise in the customer's interests as to the wisdom of a proposed investment. This may be the case where the customer may take it that to a significant extent his interest is consistent with that of the bank in financing the customer for a prudent business venture. In such a way the bank may become a fiduciary."

The purchasers could not have anticipated that the bank would be more concerned with the vendor's interests than its own, since it would not ordinarily be expected to lend money on the basis of an unwise investment. Furthermore, the bank manager took on an active role as an investment adviser to customers who had limited business experience and who had long relied on the bank for advice. In such circumstances, the bank needed to do much more than it had done to disclose the existence of the conflict and to encourage the purchasers to seek independent advice.[131]

Similarly, in *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, a majority of the Supreme Court of Canada held that an accountant was liable for breach of fiduciary duty where he acted as an adviser to a client concerning tax shelters and recommended that he invest with certain real estate development projects. The accountant failed to disclose that he received fees from the developer when clients invested in the developer's projects. The client stated in evidence that he would not have heeded the accountant's advice if he had known of this arrangement, and the accountant was held liable for the losses which resulted from a downturn in the real estate market.

The protection of reasonable expectations may be the principle which lies behind the fiduciary obligations of stockbrokers and other investment advisers. It may be said that they are fiduciaries, but the main content of their fiduciary obligation is to disclose any conflict of interest. In *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 at 377,[132] Gibbs CJ said:

"Normally the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure

131 See also *Hayward v Bank of Nova Scotia* (1984) 45 OR (2d) 542; affd (1985) 51 OR (2d) 193; *McBean v Bank of Nova Scotia* (1981) 15 BLR 296. Banks may come under obligations to customers also in terms of the law of negligent mistatement. See *Potts v Westpac Banking Corporation* [1993] 1 Qd R 135, Macrossan CJ at 138.

132 For a discussion of the remedial aspects of this case, see Chapter 21, "Constructive Trusts", paras [2119]-[2120].

of the broker's own interest in the transaction … The duty arises when, and because, a relationship of confidence exists between the parties."

Ordinarily, this is as much as is necessary to ensure that the stockbroker or other investment adviser acts with propriety.

This category of fiduciary obligation is one which has considerable potential for expansion in its application. Its limits, however, need to be clearly stated. The reason that equity is concerned about such situations is that a relationship of trust and confidence exists between the parties of such a kind that one party relies on the advice of the other and would not expect that the other would have its own contrary self-interest. The fiduciary liability in such cases ought to arise not from negligence in the giving of that advice,[133] but only where the intervention of equity is necessary to confiscate gains, or to compensate for losses, which arise from the giving of self-interested advice in circumstances in which the recipient of that advice could reasonably expect that the adviser's recommendations would not be motivated by personal gain or by a conflicting duty. The common law now has expanded its reach to encompass cases in which the advice is negligent,[134] and contractual rights may also be relevant.

THE FUTURE OF FIDUCIARY LAW

[1039] The modern law of fiduciary obligations is difficult to expound in a coherent way so as to incorporate all the precedents which exist on the subject. The word "fiduciary" is now used in such a variety of contexts that it has ceased to have a clearly definable meaning. It has been described as "the peripatetic adjective".[135] As courts have shown a greater willingness to impose obligations of good faith and fair dealing upon parties who would hitherto have been seen as being in an arm's-length relationship, there has been a tendency to utilise fiduciary law as the doctrinal source of this obligation, even though the relationship of the parties could not be described as a relationship of trust and confidence in most respects. In North America, in particular, fiduciary law is widely invoked as a source of obligation alongside the obligations which arise from contract and tort as a

133 *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761, Lord Browne-Wilkinson at 799.

134 *Hedley Byrne & Co Ltd v Heller and Partners* [1964] AC 465.

135 Finn P, "The Fiduciary Principle" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1988), p 1.

way by which courts have justified equitable relief for unconscionable conduct in the absence of any other doctrine to invoke.[136] Thus care must be taken in utilising precedents from other jurisdictions in which the term "fiduciary" has been given an expansive definition and where the role of fiduciary law is quite different from that in Australia.

The modern law of fiduciary obligations must be grounded in the historic role and purpose of the doctrine, so that modern extensions of the relevant principles are in historic continuity with the traditional usage of fiduciary law and are consonant with its underlying purpose. Fiduciary law's concern is with conscience. Any legitimate application of the fiduciary principle must have this as its motivating purpose.

136 For a comprehensive analysis, see Finn P, "The Fiduciary Principle" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1988), p 1. For an analysis of Canadian precedents, see Parkinson P, "Fiduciary Law and Access to Medical Records" (1995) 17 *Sydney Law Review* 433.

CHAPTER ELEVEN

UNDUE INFLUENCE

Anthony J Duggan

INTRODUCTION

The elements of undue influence

[1101] In *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (at 189-190), the House of Lords summarised the doctrine of undue influence as follows:

> "A person who has been induced to enter into a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed. In *Bank of Credit and Commerce International SA v Aboody* [[1990] 1 QB 923 at 953] the Court of Appeal helpfully adopted the following classification.
>
> *Class 1: Actual undue influence*. In these cases it is necessary for the complainant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> *Class 2: Presumed undue influence*. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases, therefore, there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:

> *Class 2A*: Certain relationships (for example, solicitor and client, medical adviser and patient) as a matter of law raise the presumption that undue influence has been exercised.
>
> *Class 2B*: Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case, therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."[1]

According to Dixon J in *Johnson v Buttress* (1936) 56 CLR 113 (at 134-135), cases of presumed undue influence rest upon a principle which

> "applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no-one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position. He may be taken to possess a peculiar knowledge not only of the disposition itself but of the circumstances which should affect its validity; he has chosen to accept a benefit which may well proceed from an abuse of the authority conceded to him, or the confidence reposed in him; and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour."

1 In *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, the House of Lords questioned the utility of the class 2B category. Lord Nicholls said (at 1031) it is a "little confusing" because it obscures the point that the plaintiff has to prove her case. There is no more than an evidentiary presumption in the plaintiff's favour in the case to which the class 2b category applies: see further, paras [1111]-[1115], below.

The justification for reversing the onus of proof, in other words, lies in the evidentiary difficulties that the complainant is likely to encounter if undue influence had to be proved affirmatively. These difficulties will be particularly acute in a case where the complainant is the estate of a deceased donor, which lacks precise details of the circumstances surrounding the disposition.[2] However, for the reasons Dixon J gives, evidentiary difficulties might also arise even where the claim for relief is made by the disponor.

Undue influence is a species of equitable fraud. This proposition deserves some elaboration.

The concept of fraud

[1102] The common law maintains the tradition, firmly established during the 19th century, of upholding dispositions that have been freely made. By and large, it does not concern itself with whether the outcomes of dealings between parties are fair. The qualification to this proposition, implied by the adverb "freely", lies in the rules governing fraud, duress, *non est factum* and capacity, which are all directed to particular circumstances affecting the quality of a party's consent to the disposition.

[1103] The common law grounds for intervention are supplemented by equitable doctrines concerned with prevention of fraud. In *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 124 (at 154); 28 ER 82, Lord Hardwicke LC, in the course of enumerating the various species of fraud against which equity granted relief, said:

> "A third kind of fraud is that which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is that it must be proved, not presumed; but it is wisely established in this Court, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance."

As Lord Selborne pointed out in *Earl of Aylesford v Morris* (1873) 8 Ch App 484 (at 490), fraud in this context does not mean "deceit or circumvention; it means an unconscientious use of the power arising out of" the circumstances referred to. This is equitable fraud. The modern tendency is to speak not of fraud but of unconscionable conduct.

2 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1502].

The equitable doctrines referred to in the passage just quoted include the doctrines of unconscientious dealing and undue influence. They differ from the common law in the following principal respects:

- they apply in a wider range of circumstances;
- whereas, at common law, the plaintiff would always have to prove the relevant facts, equity will recognise a presumption in favour of the plaintiff with the burden of rebuttal lying on the defendant; and
- the primary legal remedy for fraud is damages, whereas in equity the traditional form of relief is rescission or denial of specific performance at the suit of the advantage-taker.[3]

It is important not to overstate the differences between common law and equity. For instance, in equity, as at common law, the emphasis is in favour of upholding dispositions, not striking them down. In *Brusewitz v Brown* [1923] NZLR 1106, Salmond J said (at 1109):

> "[T]he mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable, or unjust is not in itself any ground on which this Court can set it aside as invalid. Nor is such a circumstance in itself even a sufficient ground for a presumption that the transaction was the result of fraud, misrepresentation, mistake or undue influence, so as to place the burden of supporting the transaction upon the person who profits by it. The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognised invalidating circumstances, such as fraud or undue influence."

As this statement indicates, the focus in equity, as at common law, is on the process of transacting, not the outcome. The concern is with abuse of the former ("procedural unconscionability"), not the quality of the latter ("substantive unconscionability").[4] In *Allcard v Skinner* (1887) 36 Ch Div 145, Lindley LJ said (at 182-183) in relation to the doctrine of undue influence:

3 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1501].

4 Arthur Leff coined the expressions "procedural unconscionability" and "substantive unconscionability" to describe the two approaches to judicial intervention under the unconscionability provision (section 2-302) of the United States *Uniform Commercial Code*. They now have a considerably wider currency: Leff A A, "Unconscionability and the Code — the Emperor's New Clause" (1967) 115 *University of Pennsylvania Law Review* 485.

> "[T]he principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? In my opinion, the doctrine of undue influence is founded on the second of these two principles ... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with ... On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."

Applications of the doctrine

Gifts

[1104] The doctrine of undue influence is particularly important in relation to gifts. In many cases, a substantial gift or settlement is easily understandable or can readily be explained. Sometimes, however, there may be circumstances which arouse suspicion that the donor (A) was imposed upon. This might be the case if, for example:

- A and the donee (B) are in a relationship where substantial gifts of property would not naturally be expected;
- A is physically, intellectually or emotionally impaired, so that A's capacity for independent judgment is called into question; or
- A relationship of trust has developed between A and B, so that A relies on B for advice concerning the management and disposition of assets.

These circumstances may be sufficient to attract the doctrine of presumed undue influence. There are older authorities to the effect that a presumption of undue influence arises in any case where a substantial gift is made, without the need for further proof by A. In such cases, it was said, the burden lies on B to prove that A fully understood the transaction and that the gift was fairly and honestly obtained.[5] This is Lord Romilly's heresy,[6] and as the epithet implies, the view has since been discredited.

5 For example *Hoghton v Hoghton* (1852) 15 Beav 275; 51 ER 545.

6 See *Hoghton v Hoghton* (1852) 15 Beav 275; 51 ER 545.

Pollock dismissed it as "the expression of an individual and on this point eccentric opinion".[7] Pollock's verdict has been endorsed subsequently in the case law.[8] Accordingly, proof that a gift is improvident, in the sense that it accounts for a substantial part of A's assets or means of livelihood, is not itself sufficient to create a presumption of invalidity. However, B may rely on proof that a transaction was improvident in combination with other factors as tending to show that the gift was not fairly and honestly obtained. Correspondingly, B may rely on proof that a transaction was not improvident to rebut a presumption of undue influence arising on some other account (see below, para [1118]).

[1105] For historical reasons, the equitable doctrine of undue influence is limited to inter vivos transactions. Testamentary dispositions resulting from undue influence fell within the exclusive jurisdiction of the probate court. In probate, there is no presumption of influence and the burden of proof remains throughout on the party alleging undue influence (*Winter v Crichton* (1991) 23 NSWLR 116 at 121-122). Furthermore, "the mental state of the testator is not so delicately considered as that of the disponor in equity, for the `natural' influence of a parent or guardian or solicitor may be exerted to obtain a will and the testator might be led, if not driven".[9] There are no longer separate courts of probate and equity in England, but the doctrinal distinctions survive. Australia has inherited these distinctions.[10]

Contracts generally

[1106] The doctrine of undue influence is not limited to voluntary dispositions, but can apply also to contracts. For example, in *Clark v Malpas* (1862) 4 De GF & J 401,[11] a poor and illiterate man sold three cottages to the defendant in exchange for an inadequate consideration which consisted of a residence for himself for life, 12 shillings per week for life and a sum of money after his death. He died within 48 hours. The transaction was set aside. Similarly, in *Brusewitz v Brown* [1923] NZLR 1106, Salmond J set aside a transfer of property in exchange for a small

7 Preface to Vol XCII of the *Revised Reports* (1907).

8 *Yerkey v Jones* (1939) 63 CLR 649, Dixon J at 678-679; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, Lord Browne-Wilkinson at 193.

9 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1508].

10 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1508].

11 See also *Baker v Monk* (1864) 4 De GJ & S 388.

annuity payable monthly. The transferor was aged 66, a chronic alcoholic and dying of cirrhosis of the liver. He was living apart from his wife in cheap hotel accommodation. The transferee was a close friend and daily drinking companion. Salmond J held that a presumed relationship of influence existed between the parties and that the transferee had failed to rebut the presumption that the transaction had been improperly procured.

According to Dixon J in *Johnson v Buttress* (1936) 56 CLR 113 (at 135-136), different considerations apply when the transaction in issue is a contract rather than a gift:

> "[A]dequacy of consideration becomes a material question. Instead of inquiring how the subordinate party came to confer a benefit, the court examines the propriety of what wears the appearance of a business dealing."

Adequacy of consideration may be a material question, but it is probably not decisive.[12] Proof that the transferor received full value for the subject property may not always be sufficient to rebut a presumption of undue influence (see below, paras [1110], [1116]). Conversely, proof that the consideration was inadequate is not itself sufficient to warrant intervention. As mentioned earlier, the focus of the undue influence doctrine is on the bargaining process, not the bargaining outcome. By and large, the courts try to avoid making substantive judgments about the fairness of contractual outcomes.

Contracts of guarantee

[1107] The doctrine of undue influence can be used to attack a contract of guarantee, particularly where the borrower and the guarantor are related to one another.[13] There are various reasons why this kind of transaction has attracted judicial intervention:

- The guarantor usually does not benefit directly from the transaction, but the cost to the guarantor if things go wrong may be very high (the cost may include loss of the guarantor's home in cases where a mortgage has been given to secure obligations arising under the contract of guarantee).[14]

12 Compare *National Westminster Bank plc v Morgan* [1985] AC 686 as reinterpreted in *Royal Bank of Sotland v Etridge* [2001] 3 WLR 1021.

13 Or where the debtor is a company controlled by a close relative — usually the husband — of the guarantor.

14 Where the debtor and guarantor are husband and wife and the loan is taken out for the husband's business purposes, if the husband's business venture is successful the guarantor-wife may benefit through an improved standard of living: see further below, para [1110]. Compare *Beneficial Finance Corp Ltd v Comer* (1991) ASC s 56-042, Rogers CJ Com D at 56,686 (SC NSW).

- The guarantor will often be under considerable pressure from the borrower to agree to the transaction. This may take many forms: bullying, cajoling, whining, flattery, threats and the other persuasive tactics family members use against one another.
- Sometimes it may be in the interests of the borrower or the financier to conceal relevant facts from the guarantor. This is what happened in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. There, the guarantors (an elderly Italian couple) assumed liability in respect of their son's business overdraft, unaware that at the time the bank was already selectively dishonouring the son's cheques.

In *Amadio,* the doctrine of unconscientious dealing was used to set aside the transaction. Undue influence was not pleaded, but it probably should have been (see above, para [506]). If the borrower and guarantor are a married couple, the rule in *Yerkey v Jones* (1939) 63 CLR 649[15] may apply.[16]

ACTUAL UNDUE INFLUENCE

Introduction

[1108] In cases where actual undue influence is alleged, A must prove affirmatively that B used undue influence on A to enter into the transaction (*Barclays Bank plc v O'Brien* [1994] 1 AC 180, Lord Browne-Wilkinson at 189). Facts must be proved showing that the transaction was the outcome of such an actual influence over A's mind that it cannot be considered a free act (*Johnson v Buttress* (1936) 56 CLR 113, Dixon J at 134). More particularly, A has to prove that:[17]

> "(a) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (b) the influence was exercised; (c) its exercise was undue; (d) its exercise brought about the transaction".

Applications

[1109] There are two main kinds of case where actual undue influence may be pleaded. The first is where A's consent to the transaction

15 The rule in *Yerkey v Jones* is a particular application of the undue influence doctrine: see further, paras [1123]-[1128], below.

16 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. Statutory grounds are also commonly pleaded, in particular the *Contracts Review Act* 1980 (NSW): see para [515], above.

17 *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, Slade LJ at 967.

is procured by threats to prosecute.[18] This is a form of duress. It is not actionable at common law, because duress, at least as traditionally conceived by courts of law, is limited to acts or threats of physical violence. However, courts of equity were able to grant relief in a wider range of cases by treating forms of duress not actionable at law under the heading of undue influence.

The second kind of case involves abuse of a position of influence. For example, in *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, a case involving a contract of guarantee, the guarantor-wife had led a sheltered existence and had limited business knowledge. She was accustomed to following her husband's instructions. She was a director of the company which ran the family business, and, in this capacity, she habitually signed documents at her husband's request without reading them. The evidence established that:

- the husband intended and knew that she would sign security documents without reading them or considering the risk;
- he never offered her any choice of her own; and
- he never mentioned risk at all, and deliberately concealed matters from her so that she was prevented from exercising any independent judgment in relation to the transaction.

On this basis, it was held that there had been actual undue influence.[19]

In *Coldunell Ltd v Gallon* [1986] 1 QB 1184, a son was held to have exercised actual undue influence over his parents to obtain from them security for a loan he needed for business purposes. The finding (at 1195) was based on the following factors:

- the discrepancy between the ages and education of the son and his parents;
- the son's overbearing behaviour towards his parents before the transaction was concluded;
- evidence of the son's prior overreaching;
- various misrepresentations by the son; and
- the father's lack of knowledge of the interest payments.

18 For example *Williams v Bayley* (1866) LR 1 HL 200; *Davies v London & Provincial Marine Insurance Co* (1878) 8 Ch Div 469; *Public Service Employees Credit Union Co-operative Ltd v Campion* (1984) 75 FLR 131.

19 However, the wife failed because she had not established manifest disadvantage. This requirement no longer applies in cases of actual undue influence: see below, para [1110].

In cases like this, A may rely alternatively on the doctrine of presumed undue influence. There is an overlap between actual undue influence and what was referred to in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (see above, para [1101]) as "class 2B" presumed undue influence. For example, in *Johnson v Buttress* (1936) 56 CLR 113, a voluntary transfer was challenged on the grounds that: the donor was elderly, illiterate and intellectually impaired; he was emotionally dependent on the donee; and the subject matter of the gift, the donor's house, was virtually his only asset. Starke J doubted whether the facts disclosed any relationship between the donor and donee sufficient to attract a presumption of influence. However, he held (at 126) that there was sufficient evidence from which it could be inferred that actual undue influence had been exercised. By contrast, Dixon J thought that there was insufficient evidence to establish actual undue influence, but that the facts disclosed "an antecedent relation of influence" sufficient to attract the presumption (at 133-134, 138).[20] There are other cases where the court has found for the claimant on both grounds.[21]

Manifest disadvantage

[1110] In *National Westminster Bank plc v Morgan* [1985] AC 686, the House of Lords held that A has to do more than just establish a relationship of influence. A also has to lead evidence showing that the transaction was manifestly disadvantageous. The requirement for proof of manifest disadvantage is a controversial one. The trouble is that it seems to leave out of account the case of a transferor who receives full value under a contract but who, without undue influence on the transferor's part, might not have entered into the contract at all.[22] The requirement has also led to confusion in the guarantees context. A guarantor will often not benefit directly from the transaction. However, assume the debtor and guarantor are husband and wife and the loan is taken out for the husband's business purposes. If the husband's business venture is successful, the guarantor-wife is likely to benefit indirectly through the family's increased material wealth.

20 The divergent approaches in *Johnson v Buttress* to the same outcome reinforce the point made in *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021 that class 2B undue influence is in substance the same as class 1.

21 For example *Re Craig (deceased)* [1971] Ch 95; *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399. See also *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, Slade LJ at 964.

22 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths Sydney, 1992), para [1524].

This prospect may be enough to negate manifest disadvantage.[23] If so, the requirement for proof of manifest disadvantage would significantly limit the undue influence doctrine in its application to guarantees.

In *CIBC Mortgages plc v Pitt* [1994] 1 AC 200,[24] it was held (at 207-209) that the requirement for proof of manifest disadvantage does not apply in cases of actual undue influence. Lord Browne-Wilkinson said (at 209):

> "Whatever the merits of requiring a complainant to show manifest disadvantage in order to raise a class 2 presumption of undue influence, in my judgment there is no logic in imposing such a requirement where actual undue influence has been exercised and proved. Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right … A man guilty of fraud is no more entitled to argue that the transaction was beneficial to the person defrauded than is a man who has procured a transaction by misrepresentation. The effect of the wrongdoer's conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice."

Most recently, in *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, the House of Lords reaffirmed the requirement for proof of manifest disadvantage, but only, it seems, for presumed undue influence cases. It also reformulated the requirement to avoid confusion over its application and to address criticisms that had been made of the requirement in its old form (see further, para [1116]).

In Australia, there have been some first instance decisions where the court applied *Morgan's* case without question.[25] However, it

23 *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, Slade LJ at 966-967. Compare *Beneficial Finance Corp Ltd v Comer* (1991) ASC s 56-042, Rogers CJ Comm D at 56,686: "this is not the sort of benefit to which the law looks when it is concerned with matters of [this] kind".

24 Overruling *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923. This is not to be confused with Lord Romilly's heresy: see above, para [1104]. The issue presently under consideration is whether proof of manifest disadvantage is required even where there are other factors pointing to undue influence. By contrast, Lord Romilly's heresy was to the effect that manifest disadvantage (improvidence) is itself evidence of undue influence.

25 For example *James v Australia & New Zealand Banking Group Ltd* (1986) 64 ALR 347 (Fed Ct); *Farmers' Co-operative Executors' & Trustees Ltd v Perks* (1989) 52 SASR 399; *Budget Nominees Pty Ltd v Registrar of Titles* (1988) Vic Conv Rep s 54-311.

is doubtful whether the requirement for proof of manifest disadvantage was ever a requirement in this country.[26] In any event, the correctness of these first instance decisions must now be reassessed in the light of *Pitt* and *Etridge*.

PRESUMED UNDUE INFLUENCE

Introduction

[1111] According to *Barclays Bank plc v O'Brien* [1994] 1 AC 180, there are two categories of presumed undue influence, class 2A and class 2B. Certain relationships as a matter of course raise a presumption of undue influence (class 2A). In other cases, there will be a presumption if A can point to features of the relationship with B which suggest trust and confidence on A's part (class 2B). In *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, the House of Lords questioned this classification, saying that it runs together two different kinds of presumption. The presumption the class 2A statement refers to is a rule of law and it is irrebuttable (see further, para [1112]). The presumption the class 2B statement refers to is no more than an evidentiary one and it is rebuttable (see further, para [1115]).

Established relations of influence (class 2A)

[1112] The established relationships of influence are as follows:[27]

- parent (B) and child (A);
- guardian (B) and ward (A);
- religious leader (B) and adherent (A);
- solicitor (B) and client (A); and
- doctor (B) and patient (A).

In these cases, A does not have to prove affirmatively that B used undue influence. All A has to do is prove the relationship. This

26 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1524].

27 See *Johnson v Buttress* (1936) 56 CLR 113, Latham CJ at 119; Dixon J at 134; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, Gillard J at 577; *Louth v Diprose* (1992) 175 CLR 621, Brennan J at 628. For a detailed discussion of the cases in relation to each category, see Cope M, Subtitle 35.8 "Undue Influence" *The Laws of Australia* (Law Book Co, Sydney, 1993), paras [25]-[30].

creates an irrebuttable presumption that B was in a position to influence A. On this basis, the court will set aside the transaction unless B can prove there was no undue influence.[28] The common thread running through these different relationships is that in none of them would it be natural to expect A to give property to B. In other words, "the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused" (*Yerkey v Jones* (1939) 63 CLR 649, Dixon J at 675).

This is the reason why, for example, a child's disposition in favour of a parent falls within class 2A, but not a parent's disposition in favour of a child. Generosity in parents towards their children is predictable, but generosity in a child towards a parent is not (at least before the child reaches adulthood). A parent's disposition in favour of a child, though outside class 2A, may be open to challenge on other grounds, such as:

- actual undue influence ("class 1");[29]
- class 2B presumed undue influence;[30] or
- unconscientious dealing.[31]

[1113] Dispositions between husband and wife, similarly, fall outside class 2A: "there is nothing unusual or strange in a wife from motives of affection or even prudence conferring a large proprietary or even pecuniary benefit upon her husband" (*Yerkey v Jones* (1939) 63 CLR 649, Dixon J at 675). On the other hand, such dispositions may fall within either class 1 (actual undue influence),[32] or class 2B (Dixon J at 675-676). Furthermore, in cases involving contracts of guarantee, special rules apply where the debtor and guarantor are husband and wife (see below, paras [1123]-[1128]).

There is some authority to suggest that the presumption arises between a woman and her fiancé.[33] However, this view derives

28 *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls at 1031. In the case of the parent–child relationship, the presumption ceases to apply upon proof by the parent that the child has been emancipated from the relationship: *West v Public Trustee* [1942] SASR 109. Emancipation is a question of fact in each case, and the ages of the parties is only one factor to be taken into account: Cope M, Subtitle 35.8 "Undue Influence" *The Laws of Australia* (Law Book Co, Sydney, 1993), para [26].

29 For example *Coldunell Ltd v Gallon* [1986] QB 1184.

30 For example *Brown v Brown* (1901) 20 NZLR 40; *Brett v Brett* [1938] 3 DLR 539.

31 For example *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

32 For example *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399.

33 *Johnson v Buttress* (1936) 56 CLR 113 at 134, Dixon J; *Yerkey v Jones* (1939) 63 CLR 649, Dixon J at 675.

from a series of 19th century English cases and changed social conditions make it unlikely that a modern court would agree.[34] On the other hand, undue influence may still be established in such a case either by affirmative proof (class 1) or by pointing to special features of the particular relationship which suggest undue influence (class 2B).

[1114] It is sometimes said that the relationship of trustee and beneficiary is an established relationship of influence.[35] However, that could only be right if trustees, by virtue of the trust relationship, were *invariably* in a position to exercise domination or control over the minds of their beneficiaries.[36] Trustees do not necessarily occupy a position of ascendancy. The relationship between trustee and beneficiary is a fiduciary one, and, while it may be plausible to suggest that all relationships of influence are fiduciary relationships,[37] the converse does not necessarily follow. Nevertheless, a beneficiary may be entitled as against a trustee to have a disposition set aside for:[38]

- class 2A undue influence (where the trustee also happens to be, for example, the beneficiary's parent or guardian and a relationship of influence can be presumed on that account);
- class 2B undue influence (where the beneficiary is able to identify special features of the trust relationship which justify a presumption of influence); or
- breach of fiduciary duty (where the disposition involves trust property, rather than other assets belonging to the beneficiary).

De facto relations of influence (so-called[39] class 2B)

[1115] Outside the special cases referred to in para [1112], there may be a presumption of undue influence but only in the limited sense

34 *Zamet v Hyman* [1961] 1 WLR 1442. See also *Louth v Diprose* (1992) 175 CLR 621, Brennan J at 630.

35 *Johnson v Buttress* (1936) 56 CLR 113, Latham CJ at 119; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, Gillard J at 577.

36 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1519].

37 See, for example, *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428. For further discussion of the relationship between the fiduciary principle and the doctrine of undue influence, see below, para [1130].

38 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1519].

39 The epithet is in deference to *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021: see above, n 1.

that A does not have to rely on direct evidence of undue influence to succeed. It is enough if A points to circumstances that suggest B's undue influence. In the absence of a satisfactory explanation from B, the court will infer that B used undue influence to procure the transaction. The presumption is no more than an evidentiary one. It shifts the evidentiary burden from A to B, but it does not relieve A of the need to prove her case overall. Cases in the so-called class 2B category are "the equitable counterpart of common law cases where the principle of *res ipsa loquitur* is invoked" (*Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls at 1031). Seen in this light, class 2B cases are in substance the same as class 1 cases. Hence the House of Lords' scepticism in *Etridge* about the usefulness of class 2B as a forensic tool.

In a class 2B case, A has to establish that the relationship with B allowed B "to exercise dominion over the former by reason of the trust and confidence reposed in the latter" (*Johnson v Buttress* (1936) 56 CLR 113, Latham CJ at 119). The relationship must be one "whereby at the material time of the gift the donor reposed complete trust and confidence in the donee and thereby placed the donee in a position to exercise ascendancy or dominion over the will or mind of the donor" (*Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, Gillard J at 576).

For the purpose of establishing such a relationship, Gillard J (at 577) stated:

> "The standard of intelligence and education, and the character and personality of the donor, are relevant matters. Age, state of health, blood relationship, experience, or lack of it, in business affairs of the donor, length of friendship or acquaintanceship between the donor and donee and the intricacy of their business affairs may be factors to influence a donor to depend upon the donee. Equally, the relative strength of character and personality of the donee, the period and closeness of the relationship and the opportunity afforded the donee to influence the donor in his business affairs are correlative considerations to the foregoing."

In the same connection, Sir Eric Sachs said in *Lloyds Bank Ltd v Bundy* [1975] QB 326 (at 341) that:

> "Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of

course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case."

Examples of cases where a relationship of influence has been found on the facts to exist include:

- *Johnson v Buttress* (1936) 56 CLR 113 (the disponor was an elderly, illiterate and intellectually impaired man who, after the death of his wife, had become emotionally dependent on the disponee. He transferred his house to her, this being virtually his only asset);
- *Lloyds Bank Ltd v Bundy* [1975] QB 326 (a bank manager who, for a long period, had acted as a customer's financial adviser was held to have abused a relationship of influence when he encouraged the customer to execute a guarantee in favour of the bank);
- *Bank of New South Wales Ltd v Rogers* (1941) 65 CLR 42 (the plaintiff, who was a single woman, had lived with her uncle for 41 years after the death of her parents and was dependent upon him for advice in business matters. She was induced to charge her property by way of security for her uncle's debt to the bank, and the transaction was later set aside on the ground of presumed undue influence on the uncle's part).

Manifest disadvantage

[1116] In *National Westminster Bank plc v Morgan* [1985] AC 686, the House of Lords held that a claim for relief based on undue influence could not succeed without proof that the transaction was manifestly disadvantageous to A. The court has since had second thoughts. In *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, it said that the *Morgan* ruling did not apply to actual undue influence. It said nothing expressly about presumed undue influence, but implied that in a future case it might reconsider the issue. *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021 provided the occasion. In *Etridge*, the court declined to abolish the requirement for proof of manifest disadvantage altogether, but it restated the requirement in an attenuated form. The relevant part of the case can be summarised as follows:

- There are two pre-requisites for a presumption of undue influence, first that A reposed trust and confidence in B and secondly, that the transaction is not readily explicable by the relationship between the parties.

- The requirement for proof of manifest disadvantage goes to the second pre-requisite, and it is a necessary limitation on the first pre-requisite.[40]
- To avoid confusion, the "manifest disadvantage" label should be discarded in favour of a return to the underlying principles. In other words, for future cases, the relevant questions to ask are: first, did A repose trust and confidence in B? and secondly, is the transaction not readily explicable by the parties' relationship?

The requirement for proof of manifest disadvantage, as stated in *Morgan's* case has been widely criticised in Australia. For example, Meagher, Gummow and Lehane argue strongly against it[41] and their case is supported by the considerations referred to above. In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Deane J said (at 475), in relation to the doctrine of unconscientious dealing:

> "In most cases where equity courts have granted relief against unconscionable dealing, there has been an inadequacy of consideration moving from the stronger party. It is not, however, essential that that should be so … Notwithstanding that adequate consideration may have moved from the stronger party, a transaction may be unfair, unreasonable and unjust from the view point of the parties under the disability."

It is hard to see why the rule should be different for undue influence. In *Baburin v Baburin* [1990] 2 Qd R 101, Kelly SPJ declined to follow the English authorities, holding that a transaction could be set aside for undue influence without proof of manifest disadvantage.

However, this is not to say that manifest disadvantage, or the lack of it, is irrelevant in undue influence cases. In a commercial transaction, the fact that A received adequate consideration may be taken into account in determining whether a presumption of undue influence has been rebutted. In short, it is a relevant, but not a decisive, consideration (*Johnson v Buttress* (1936) 56 CLR 113, Dixon J at 135-136). Correspondingly, proof that a transaction is based on an inadequate consideration, or is otherwise

40 In *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls said (at 1033): "It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or a patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable".

41 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1524].

improvident, is not itself sufficient to establish undue influence.[42] On the other hand, if the transaction is improvident, B may find it difficult to rebut a presumption of undue influence raised by other factors.[43] The new, attenuated version of the requirement for proof of manifest disadvantage, as stated in *Etridge*, appears to move English law closer to the Australian position on this point.

Rebutting the presumption

Introduction

[1117] In *Johnson v Buttress* (1936) 56 CLR 113,[44] the following statements were made about what is needed to rebut a presumption of undue influence:

> "The party in the position of influence [must satisfy] the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee."
>
> "It is incumbent upon the donor to show that [the gift] cannot be ascribed to the inequality between [the parties] which must arise from his special position."
>
> "It must be affirmatively shown by the donee that the gift was ... 'the pure, voluntary, well-understood act of the mind' of the donor."

These statements speak in terms of a gift, but they are equally applicable to other kinds of transaction. They identify two critical matters which B's evidence has to address: first, that A was fully informed at the time of transacting; and secondly, that A's decision was an independent one, uninfluenced by B.

Both these conditions must be satisfied if A is "to exercise a free judgment". Consequently, it will not necessarily be enough for B to prove that A understood the transaction.[45] The problem may be not lack of understanding, but lack of independence. The two

42 *Brusewitz v Brown* [1923] NZLR 1106; and see above, para [1103].

43 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1525].

44 *Johnson v Buttress* (1936) 56 CLR 113, Dixon J at 134, 135, and Latham CJ at 119 respectively (Latham CJ quoting from *Huguenin v Baseley* (1807) 14 Ves 273; 33 ER 526).

45 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1525].

methods most commonly relied on to rebut the presumption are proof that the disposition was not improvident and proof that A was independently advised before transacting.

Improvidence

[1118] Proof that a disposition is not improvident is relevant because it tends to show that A exercised a free judgment in the sense just mentioned.

In the case of a gift or settlement, the disposition is likely to be considered improvident if it represents a substantial part of A's assets,[46] at least if there is no power of recall (*Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWLR 30). In *Bester v Perpetual Trustee Co Ltd*, a settlement made by a 21-year-old single woman of all her property was set aside. Street J referred (at 35) to the following features of the settlement as indicating improvidence:

- the absence of any power of revocation;
- the absence of any power of removal and appointment of trustees;
- the discretionary nature of the trustees' power;
- the absence of any right of resort to the corpus; and
- the absence of any right to intervene in the activities of the trustees.

In the case of a contract, the main factor determining improvidence will usually be the adequacy or otherwise of the consideration moving from B.

In assessing the improvidence of a guarantee, other factors need to be considered. A guarantee is a contract where the consideration moves from B (the financier), not to A (the guarantor) but to a third party (the borrower). Any benefits to the guarantor will usually be indirect. The main factors relevant to the improvidence or otherwise of a contract of guarantee are first, the nature and extent of these indirect benefits, and secondly, the risk of loss to the guarantor. The second factor is in turn a function of the amount that is at stake relative to the guarantor's total wealth, and the probability of the guarantor being called upon to pay.

In cases where the borrower and guarantor are, for example, company and shareholder respectively, the indirect benefits

46 For example *Johnson v Buttress* (1936) 56 CLR 113, Latham CJ at 121, Starke J at 125, Dixon J at 138.

flowing to the guarantor from the transaction may well be substantial enough to outweigh the risk of loss to the guarantor. On the other hand, where the borrower and guarantor are family members — child and parent for example, or (more problematically), husband and wife — the benefit accruing to the guarantor may be no more than a warm inner glow.[47] This may be insufficient to offset the risk of loss particularly where, as is often the case, the guarantor has put up the family home by way of security. If so, the financier will have to find another way of rebutting the presumption.[48] This is why the issue of independent advice has come to loom so large in guarantee cases.

Independent advice

[1119] Evidence that A received adequate independent advice before transacting is the most obvious way of rebutting a presumption of undue influence. Correspondingly, as Latham CJ pointed out in *Johnson v Buttress* (1936) 56 CLR 113 (at 120), the absence of such advice is an important factor in determining whether the disposition was freely and independently made.

Proof that independent advice was obtained is a sufficient but not a necessary requirement for rebutting the presumption.[49] If independent advice was not obtained, B may rely on other methods of rebuttal. In some cases, it may be enough to show that A was urged to seek independent advice even if A did not act on the invitation. In others, proof that the transaction was fully explained by B may be sufficient. As Dixon J pointed out in *Johnson v Buttress* (1936) 56 CLR 113 (at 134), the requirements are likely to vary depending on the nature of the relationship in issue and the degree of influence involved.

Proof that independent advice was obtained may be sufficient to rebut the presumption even if the advice was disregarded (*Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 135). As a general rule, the courts leave "adult persons of competent mind" free to

47 The case where borrower and guarantor are husband and wife is more problematical because if the loan is for the husband's business purposes and the venture is successful, the wife will recoup benefits in the form of lifestyle improvements: see also above, n 14.

48 In the United Kingdom, following *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, where the borrower and guarantor are in a marital or analogous relationship, proof that the transaction was not improvident from the guarantor's perspective is no longer sufficient to rebut a presumption of undue influence. Instead, the financier must prove that steps were taken to ensure that the guarantor understood the transaction and its attendant risks. The same is true in Australia by virtue of the rule in *Yerkey v Jones* (1939) 63 CLR 649: see paras [1123]-[1128], below.

49 *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 135. See also *Johnson v Buttress* (1936) 56 CLR 113, Latham CJ at 120; *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, Gillard J at 578.

make their own decisions, and they do not equate "independent and competent advice" with "independent and competent approval" (*Re Coomber* [1911] 1 Ch 723). However, the position may be different if A's decision to disregard unfavourable independent advice can itself be attributed to B's influence (*Powell v Powell* [1900] 1 Ch 243). In that event, it will be pointless to have sought the advice in the first place, and it is unlikely that a court would be persuaded by the parties merely going through the motions.[50]

The advice must be both independent and adequate. If B knows it is not, then B will not be entitled to rely on it. What are the requirements for independent advice? The cases establish the following points.

- A should normally have her own solicitor.[51]
- The fact that B nominates a solicitor does not itself prevent the advice from being independent.[52]
- The advice will probably not be independent if it is given at A's home or office or in B's presence.[53]
- In the guarantee context, the adviser should be independent not only of the financier,[54] but also of the borrower and the borrower should not be present when the advice is given.[55]
- The adviser's responsibility cannot be limited by having A sign a piece of paper unless there is a clear statement to A that the advice is not comprehensive and may not be enough for A's needs.[56]

What are the requirements for adequate advice? The cases establish the following points.

- The adviser must be informed of all the material facts, and must have the opportunity of making further inquiries.[57]

50 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1527].

51 *McNamara v Commonwealth Trading Bank of Australia Ltd* (1984) 37 SASR 232; *Beneficial Finance Corporation Ltd v Comer* (1991) ASC s 56-042 (SC(NSW)). But see *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021: in the spousal guarantee context, a solicitor may act for both husband and wife so long as there is no conflict of interest and it is in the wife's interests to do so.

52 *Collier v Morlend Finance Corporation (Vic) Pty Ltd* (1989) ASC s 55-716 (CA(NSW)).

53 *Nolan v Westpac Banking Corporation Ltd* (1989) ASC s 55-930.

54 But see *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021: in the spousal guarantee context. A solicitor may act for both parties, provided there is no conflict of interest.

55 *McNamara v Commonwealth Trading Bank of Australia Ltd* (1984) 37 SASR 232.

56 *Collier v Morlend Finance Corporation (Vic) Pty Ltd* (1989) ASC s 55-716 (CA(NSW)).

57 *Brusewitz v Brown* [1923] NZLR 1106, Salmond J at 1116; *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls at 1043.

- The advice should be directed not only to making sure that A understands the transaction, but also to whether the transaction is in A's best interests.[58]
- It may be necessary to give A time to reconsider the transaction in the light of the advice that has been given, rather than allowing the transaction to be concluded on the spot.[59]

In relation specifically to contracts of guarantee, it has been held that the adviser has essentially three duties:[60]

- to advise on the legal effects of the guarantee;
- to ask if the guarantor wants advice on the wisdom of entering into the guarantee and, if so, to give that advice; and
- to make sure that the guarantor is not acting under the undue influence of the borrower or any other person.

It has been held in a number of cases that these duties extend beyond discussing the legal aspects of the transaction. The solicitor must also advise on relevant financial aspects, for example:

58 *Brusewitz v Brown* [1923] NZLR 1106, Salmond J at 1116; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30. In *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls, speaking of the solicitor's duties in the spousal guarantee context, said (at 1042-1043):

> "Typically, the advice a solicitor can be expected to give should cover the following matters as a core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction … The solicitor should not give any confirmation to the bank without the wife's authority".

59 *Bullock v Lloyds Bank Ltd* [1955] Ch 317, Vaisey J at 325.

60 *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, Debelle and Wicks JJ at 145, summarising *McNamara v Commonwealth Trading Bank of Australia Ltd* (1984) 37 SASR 232.

- the borrower's financial situation;
- where the guarantee is given as security for a loan to finance a business venture and the plan is for the loan repayments to be made from the profits, the viability of the venture; and
- the guarantor's financial position.[61]

The leading case in support of this position is *McNamara v Commonwealth Trading Bank of Australia Ltd* (1984) 37 SASR 232, a decision of the Full Court of the Supreme Court of South Australia. In *Micarone v Perpetual Trustees of Australia Ltd* (1999) 75 SASR 1, a later South Australian Full Court decision, Debelle and Wicks JJ disapproved *McNamara's* case. They said that it is not part of a solicitor's function to give commercial or financial advice unless the solicitor is retained to do so and agrees to take on the responsibility. They noted (at 142) that:

> "Solicitors may not be qualified to assess the financial risks or proffer financial advice. In addition, the solicitor may be placed at a disadvantage because he is not provided with all necessary information and documents to give the financial advice. In addition, ... a long enquiry into complex dealings may be involved, dealings where the financial issues may not readily be apparent. The obvious consequence is that, if the solicitor is wrong and the client has relied on the financial advice, the solicitor is liable in negligence."

Later they said (at 146):

> "Not infrequently, advice is given in respect of a transaction involving a very substantial sum of money. If a solicitor is found to have acted negligently, he may well be liable to one or other of the parties. If the duty imposed on solicitors is too onerous, they will refuse to advise, with the consequence that many who need advice will not receive it."

In other words, a requirement that solicitors must give financial advice will have a chilling effect on the provision of legal services to prospective borrowers and guarantors.

61 See, eg: *McNamara v Commonwealth Trading Bank of Australia Ltd* (1984) 37 SASR 232; *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256; *Westwill Pty Ltd v Heath* (1989) 52 SASR 461; *Guthrie v ANZ Banking Group Ltd* (1989) NSW Conv Rep s 55-463; *Tarzia v National Australia Bank Ltd* (unreported, Federal Court, Full Court, No 907 of 1995, 12 October 1995); *Ribchenkov v Sunway-Metcorp Ltd* (2000) 175 ALR 650.

Third parties

Introduction

[1120] The doctrine of undue influence is not limited to the case where the transaction results from the exercise of influence on A by B. It applies also where the transaction between A and B results from the exercise of influence on A by a third party. For example, in *Bullock v Lloyds Bank Ltd* [1955] Ch 317, the plaintiff, having come into an inheritance, was induced by her father to execute a deed of settlement assigning her interest to the trustee without power of revocation. The deed of settlement was set aside on the ground of the father's undue influence.[62]

Guarantee cases are another example. Where undue influence is pleaded in relation to a contract of guarantee, while sometimes it may be the financier's own conduct that is in issue,[63] more often the focus will be on the borrower's conduct vis-a-vis the guarantor. In these cases, the guarantor (A) will be seeking to have the contract set aside as against the financier (B) on the basis of actual or presumed undue influence exercised by the borrower. There are two approaches to fixing the financier with liability for the borrower's wrongdoing. The first is to say that, where the financier entrusts the borrower with the guarantee documents and leaves it to the borrower to procure the guarantor's consent and signature, the consequence is that the borrower becomes the financier's agent for the purposes of obtaining the guarantee. The financier is then liable for the borrower's wrongdoing on that footing.[64] The point is not that the financier becomes vicariously liable for the wrongs of its agent, but rather that it would be unconscientious for the financier not to be affected by the wrongdoings of the person it has appointed to be its agent.[65] In *Barclays Bank plc v O'Brien* [1994] 1 AC 180,[66] the House of Lords doubted the correctness of some of these cases, pointing out (at 193-194) that it is often artificial to regard the borrower as the financier's agent in

62 For a similar case, see *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30.

63 For example *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326; *National Australia Bank Ltd v Nobile* (1988) ASC s 55-657 (Fed Ct).

64 For example *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281; *Kingsnorth Trust Ltd v Bell* [1986] 1 WLR 119; *Coldunell Ltd v Gallon* [1986] 1 QB 1184; *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923; *Budget Nominees Pty Ltd v Registrar of Titles* (1988) Vic Conv Rep s 54-311; *Challenge Bank Ltd v Pandya* (1993) 60 SASR 330; *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266.

65 *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923 at 972. See also *Challenge Bank Ltd v Pandya* (1993) 60 SASR 330.

66 Disapproving *Turnbull v Duval* [1902] AC 429.

procuring the guarantor's signature — more often than not, borrowers act on their own account.

The alternative approach to fixing the financier with liability for the borrower's wrongdoing rests on notice. If the financier has notice, actual or constructive, of the borrower's wrongdoing it will take subject to the guarantor's equitable right to have the transaction set aside.[67] The financier will be fixed with constructive notice if it knows facts sufficient to put it on inquiry as to the possibility of wrongdoing by the borrower and it fails to inquire. For example, in *Bank of New South Wales Ltd v Rogers* (1941) 65 CLR 42, the borrower was the guarantor's uncle, and she was in a longstanding relationship of dependency with him. It was held that the bank knew enough about their relationship to put it on inquiry as to the circumstances in which the guarantee was given. More recently, in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, the House of Lords held that, in a case where the borrower and guarantor are husband and wife, respectively, the financier will be fixed with constructive notice of the borrower-husband's influence upon proof that it was aware they were married unless it takes steps at the outset of the transaction to ensure that the guarantor-wife is properly informed about the risks and given the opportunity to obtain independent advice. The financier is held liable not because it has acted dishonestly in relation to the wife, but because it has acquired rights against the wife under the security agreement with notice of the wife's countervailing equity against the husband. It has been suggested that this gives rise to a kind of priority dispute so that, by analogy with property cases, the bona fide purchaser rule applies.[68] However, in *Barclays Bank plc v Boulter* [1999] 1 WLR 1919,Lord Hoffmann said that a better analogy is "the case of the purchaser of a chattel whose vendor's title is vitiated by fraud" (at 1925). The difference matters because, as Lord Hoffmann stated (at 1925):

> "In such a case the defrauded owner retains no proprietary interest in the chattel and it is therefore not for the purchaser to establish a defence which would defeat it. Instead it is for the owner to prove that the purchaser had actual or constructive knowledge of the fraud."

Translated to the guarantee context, what this statement means is that the wife bears the burden of proving the financier had

67 For example *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Bank of New South Wales Ltd v Rogers* (1941) 65 CLR 42; *Budget Nominees Pty Ltd v Registrar of Titles* (1988) Vic Conv Rep s 54-311.

68 Battersby G, "Equitable Fraud Committed by Third Parties" (1995) 15 *Legal Studies* 35.

constructive notice of the husband's wrongdoing. The financier does not have to prove that it lacked notice. In the typical case, the wife's burden is easily discharged. All she has to do is show the financier knew she was a married woman living with her husband and the transaction was not on its face to her financial advantage. The burden is then on the financier to prove it took reasonable steps to satisfy itself that her consent was properly obtained[69] (see further, paras [1123]-[1127], below). In any event, the policy justification for holding the financier liable is that as between itself and the wife, the financier is better placed to avoid the wife's loss. The rule gives financiers an incentive to take the appropriate precautions (for example, making sure that the wife obtains independent advice) (see further, below, para [1127]).

The role of independent advice

[1121] In two party cases, proof of independent advice goes to the question whether any undue influence of A by B has been effectively remedied. In this context, B has to show that A actually obtained the advice and that the advice was sufficient to allow A to exercise a free judgment (see above, para [1117]). For this purpose, it is not enough for the adviser to be sure that A understands the transaction. The adviser also has to be sure that A is free of B's influence. In three party cases, the role of independent advice is different. In these cases, independent advice typically goes to the question of notice. Proof that, to B's knowledge, A obtained independent advice overrides constructive notice on B's part of the third party's undue influence. In this context, the issue is not so much what the adviser said to A, as what B is entitled to assume the adviser said. This means that, in the usual case, B does not have to question the adequacy of the advice. "The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly" (*Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls at 1045). "Deficiencies in the advice given are a matter between the wife and her solicitor" (Lord Nicholls at 1045).

Liability of solicitors

[1122] If a solicitor, to the financier's knowledge, gives a guarantor inadequate advice, the financier will not be allowed to rely on the advice. The likely result is that the guarantee will be set aside.

69 *Barclays Bank plc v Boulter* [1999] 1 WLR 1919 at 1925. On the differences between constructive notice in the conventional sense and constructive notice in the *O'Brien* sense, see further *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls at 1036 and Lord Scott at 1072.

The usual practice is for the solicitor to give the financier a certificate of independent advice stating that the solicitor has advised the guarantor in relation to the transaction and that the guarantor appeared to have understood. The financier is entitled to rely on the certificate. In the absence of actual knowledge to the contrary, it may assume that the solicitor has acted competently.[70] The financier can rely on the certificate even if, unknown to it, the solicitor's advice is not competent or is given in an inappropriate manner (for example, if the borrower is in the room at the time). In that case, the likely outcome is that the guarantee will stand, but the guarantor may have a separate right of action against the solicitor in tort for negligence.

Solicitors and law societies around the country have been worried about this prospect. In July 1992, the New South Wales Law Society made a rule to govern solicitors advising on loan and security documents ("Rule 45").[71] Among other things, Rule 45 limited matters on which a solicitor was allowed to give advice to prospective borrowers and guarantors, required the solicitor to disclaim financial expertise and regulated certificates of independent advice. Rule 45 was revised in 2000. Revised Rule 45 does away with certificates of independent advice altogether. Instead, it requires the borrower or guarantor to make a statutory declaration that attests to the adequacy of the solicitor's advice. The solicitor has to make it clear to the borrower or guarantor at the outset that the solicitor is not offering financial advice. Other law societies have taken similar initiatives. For example, the Victorian Law Institute, in consultation with the Australian Bankers' Association, has developed guidelines for solicitors advising prospective borrowers and guarantors, including a pro forma certificate of independent advice.[72] The South Australian Law Society has told its members that they should not provide certificates of independent advice at all. *Micarone v Perpetual Trustees of Australia Ltd* (1999) 75 SASR 1 gives worried lawyers consolation on two fronts. It affirms that:

- the solicitor's duty of care to the client does not extend to giving financial advice unless the retainer says otherwise; and
- the client must prove in any event that the solicitor's breach of duty was the cause of the client's loss (in other words, that the client would not have gone ahead with the transaction if properly advised).

70 *Micarone v Perpetual Trustees of Australia Ltd* (1999) 75 SASR 1, Debelle and Wicks JJ at 130.

71 Solicitors Rule 45 made pursuant to *Legal Profession Practice Act* 1987 (NSW), s 57B.

72 Note, "Independent Solicitors' Certificates" (1994) 68 *Law Institute Journal* 907.

THE RULE IN YERKEY v JONES

[1123] The rule in *Yerkey v Jones* (1939) 63 CLR 649 is a particular application of the undue influence doctrine. It is relevant to the case where a married woman gives a guarantee or mortgage in support of a debt contracted by her husband or by a company her husband controls. A typical case is where husband and wife jointly own the matrimonial home and the husband asks the wife to co-sign a mortgage so that the property can be offered as security for a loan to the husband or the husband's company.

The rule in *Yerkey v Jones* applies where the financier relies on the husband to obtain his wife's consent to the mortgage or guarantee. It is not limited to the case where the financier gives the husband the documents for his wife to sign. It is enough if the financier leaves it to the husband to persuade his wife to sign, even if the documents are executed later under the financier's supervision (*Peters v Commonwealth Bank of Australia* (1992) ASC s 56-135 (SC(NSW)). If the loan is made to a company, the rule will not apply if the wife has a substantial interest (*Warburton v Whiteley* (1989) NSW Conv Rep s 55-453 (CA(NSW)).

The rule in *Yerkey v Jones* has two limbs:

- if the wife's consent is procured by the husband's undue influence, the wife will be entitled as against the financier to have the mortgage or guarantee set aside unless the financier can show that she received independent advice; and
- if the wife fails to understand the effect of the document and the significance of giving a guarantee, she may be entitled as against the financier to have the transaction set aside unless the financier took steps to inform her about the transaction and reasonably supposed that she understood.

To succeed under the first limb, the wife must either prove the husband's undue influence (actual undue influence) or point to features of the relationship which make the existence of undue influence likely (class 2B presumed undue influence). The courts will not presume undue influence simply on the basis of the marital relationship (see above, para [1113]). On the other hand, there is no need for the wife to prove that the financier knew about the special facts. In effect the financier is fixed with constructive notice of the husband's actual or presumed undue influence by virtue of knowing the parties were married. To succeed under the second limb, the financier does not necessarily have to show the wife was independently advised.

[1124] In *Barclays Bank plc v O'Brien* [1994] 1 AC 180, the House of Lords disapproved *Yerkey v Jones*. The rule reflects a paternalistic concern to protect women who are vulnerable to their husbands' influence, but according to the House of Lords, this consideration needs to be balanced against freedom of contract concerns (the need to ensure that the wealth tied up in the matrimonial home does not become economically sterile). The court concluded that the doctrine of undue influence is sufficient protection and there is no need for a special rule favouring spouses.

The New South Wales Court of Appeal in a series of cases made similar criticisms of the rule in *Yerkey v Jones*. In *Warburton v Whiteley* (1989) NSW Conv Rep s 55-453, Kirby P said (at 58,286-58,287) the rule was "anachronistic" and an affront to respect for the equality of women. In *Akins v National Australia Bank* (1994) 34 NSWLR 155 and again in *National Australia Bank Ltd v Garcia* (1995) 39 NSWLR 377 and *Teachers Health Investments Pty Ltd v Wynne* (1996) ASC s 56-356 the court held that *Yerkey v Jones* was no longer good law in New South Wales and that the wife's special equity had been overtaken by the general doctrine of unconscionable conduct as developed in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 477.

However, in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, the High Court rejected the New South Wales Court of Appeal's views and reaffirmed *Yerkey v Jones*.[73] According to the majority joint judgment (at 408), the rationale for the first limb of the rule is that the wife receives no benefit from the guarantee and "to enforce a voluntary transaction against her when in fact she did not bring a free will to its execution would be unconscionable". The rationale for the second limb of the rule (stated at 409).

> "depends on the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport and effect".

73 The following is a selection of commentaries on *Garcia*: Santow G R K, "Sex, Lies and Sureties — Touching the Conscience of the Creditors" (1999) 10 *Journal of Banking and Finance Law* 7; Hii S-K, "From Yerkey to Garcia: 60 Years On and Still as Confused as Ever" (1999) 7 *Australian Property Law Journal* 47; Haigh R and Hepburn S, "The Bank Manager Always Rings Twice: Stereotyping in Equity after Garcia" (2000) 26 *Monash Law Review* 275; Fehlberg B, "Australian Law and Surety Wives: Garcia v National Australia Bank" (1999) 15 *Banking and Finance Law Review* 163; Barkehall-Thomas S, "Garcia v NAB: Would the Real Volunteer Please Stand Up?" [1999] *Journal of International Banking Law* 319; Bryan M, "Reviving an Old Equity" [1999] *Lloyds Commercial and Maritime Law Quarterly* 327.

As presently stated, the rule in *Yerkey v Jones* is limited to wives. However, the court in *Garcia* flagged the possibility (at 404) that in future cases the rule might be extended to all "long term and public declared relationships short of marriage between members of the same or opposite sex". Later cases have given this statement a limiting function. The courts have read it as meaning that for the rule in *Yerkey v Jones* to apply, the parties must be in a relationship of "intimacy"[74] or "emotional dependence".[75] In *State Bank of New South Wales v Hibbert* [2000] NSWSC 628, Bryson J refused to apply the rule as between de facto spouses, suggesting that this would be an unrealistic development.

[1125] The rule in *Yerkey v Jones* is limited to guarantees. Does it apply if the parties are co-borrowers? As a general rule, the answer is "no". The reason is that if the wife is a co-borrower it can normally be assumed that she shares the benefit of the transaction and so there is less cause for suspicion that she was manipulated into giving her consent. To require the financier to take precautions in that case would be wasteful and potentially harmful to married couples' borrowing opportunities.[76] However, it is the substance, not the form, of the agreement that matters. If it turns out that the wife is to receive no benefit under the loan contract after all, but was joined solely for the purpose of being made liable, then the courts will treat her as a guarantor (*Permanent Trustee Co of NSW Ltd v Hinks* (1934) 34 SR (NSW) 130). Then the rule in *Yerkey v Jones* may apply. Extrinsic evidence is admissible to show that a party named as a co-borrower in a loan agreement is in truth only a guarantor.[77]

[1126] What precautions should a financier take in the light of *Garcia*? Given the first limb of the rule in *Yerkey v Jones*, the financier should insist that the wife receives independent advice. Otherwise the financier will be at risk if the wife is later able to establish actual or presumed undue influence on the husband's part. The problem for the financier, of course, is that at the time of transacting it will usually have no way of knowing whether there has been undue influence or not. Therefore, it is better to take the precautions. Where the second limb of the rule applies,

74 *National Australia Bank v Starbronze Pty Ltd* [2000] VSC 325 (rule does not apply as between brothers in law).

75 *Equitiloan Securities v Mulrine* (unreported, SC ACT, 16 June 2000) (rule does not apply as between long term friends).

76 *CIBC Mortgages plc v Pitt* [1991] 1 AC 200, Lord Browne-Wilkinson at 211, speaking of the undue influence doctrine in its application to such cases.

77 *AGC (Advances) Ltd v West* (1984) 5 NSWLR 590, Hodgson J at 603; (affirmed on other grounds (1984) 5 NSWLR 610 (CA (NSW)).

it may not be necessary for the financier to show that the wife was independently advised. In other words, the burden on the financier in this kind of case, outwardly at any rate, is not as heavy as in the case where undue influence is involved. In practice, however, this concession is unlikely to make much difference to the financier. Again, the reason is that at the time of transacting the financier will usually have no way of knowing whether the husband has been guilty of undue influence. Therefore, to be on the safe side the financier should assume the worst and make sure the wife is independently advised. Given the possible future extension of the rule in *Yerkey v Jones* flagged in *Garcia*, similar precautions should be taken in all cases where the financier knows the parties are co-habiting partners whether they are married or not.

[1127] Trebilcock and Elliott state the policy reasons behind cases like *Garcia* as follows:[78]

> "It is enough to state the communal ideal of family life to recognise that it is rarely achieved. Particularly where families are characterised by a sharp division of labour and a high degree of dependency between members, intra-familial contracting can be rife with abuse. The law reports are replete with cases in which a vulnerable spouse, parent or child claims that they have been taken advantage of financially by another family member concerned primarily with personal gain … It may seem rational for a family member to delegate financial decision making to a family leader as an efficient division of labour. Unfortunately, having placed their financial affairs in the hands of that family leader, their interests may be ignored to their detriment.
>
> The difficulties of intra-familial contract regulation arise out of the fact that no family is a perfect unity. The communality of family life is never absolute — even in the most harmonious households, family members have several as well as mutual ends. These differences of interest are accentuated by the possibility of family breakdown. The high incidence of divorce in most western societies and the prevalence of elder abandonment mean that the prospect of breakdown should usually weigh in the making of intra-familial financial arrangements. Prudent family members will want to protect their personal position in light of this contingency. The trust and informality that result from family communality can easily be abused by a member seeking to favour their own severable

78 Trebilcock M J and Elliott S B, "The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements" in Benson P (ed), *The Theory of Contract Law* (Cambridge University Press, 2001), p 45 at pp 52-53.

> interests at the expense of their family. The purpose of regulating intra-familial arrangements is to put safeguards in place to prevent this from happening."

Statistics show that the average standard of living for women who do not repartner following divorce declines at a more rapid rate than for men.[79] The reason is partly women's lack of earning power due to the time they have to spend at home and out of the work force. The risk of divorce therefore makes the conservation of family assets a relatively more important issue for women than it is for men. In many cases, the probability is that the wife will take insufficient account of this consideration in agreeing to mortgage the family home as security for the husband's debts.[80] In other cases, the husband may use the threat of divorce as a weapon to secure the wife's agreement.[81]

The justification for invalidating the financier's security in spousal guarantee cases is not that the financier itself is guilty of exploiting the wife's dependency. Rather, it has to do with what Trebilcock and Elliott describe as a "gatekeeper function".[82] The financier is in a position to prevent the husband from exploiting the wife by refusing the husband co-operation or support. As between the wife and the financier, the financier is the party best placed to avoid the wife's loss. If the husband has exercised undue influence over the wife, her capacity for self-help will be limited. She may not even be aware of the need for action. On the other hand the financier is relatively well placed, by virtue of its relationship with both the husband and the wife, to check for signs of the husband's misconduct and take appropriate steps. By invalidating the financier's security in the event of the husband's misconduct, the courts give lending institutions the incentive to take such steps in future. The challenge for the courts is to set the financier's gatekeeping obligations at a level that minimises the sum of compliance costs and the costs of contract failure. Excessively stringent gatekeeping obligations may deliver a high level of protection to the wife, but at the cost of discouraging

79 McDonald P (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall of Australia, Sydney, 1986); Funder K, Harrison M and Weston R, *Settling Down: Pathways of Parents After Divorce* (Australian Institute of Family Studies, Melbourne, 1993). See also Weston R and Smyth B, "Financial Living Standards After Divorce" [2000] *Family Matters*, No 55, 11-15.

80 Trebilock M J and Elliott S B, "The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements" in Benson P (ed), The Theory of Contract Law (Cambridge University Press, 2001), pp 60-61.

81 As happened, for example, in *Teachers Health Investments Pty Ltd v Wynne* (1996) ASC s 56-356 (CA(NSW)).

82 Trebilock M J and Elliott S B, "The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements" in Benson P (ed), The Theory of Contract Law (Cambridge University Press, 2001), pp 67ff.

legitimate lending activity. Conversely, excessively lenient obligations may involve low transactions costs, but deliver a less than optimal level of protection to the wife.

[1128] The rule in *Yerkey v Jones* is a peculiarly Australian development. English law has taken a different path. The leading English cases on spousal guarantees are *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021. These cases can be summarised as follows.

- There is no special equity favouring wives and spousal guarantee cases are subject to the same general principles governing undue influence as apply in other cases.
- Nevertheless, the general principles governing undue influence should be applied generously in favour of A (the wife) in recognition of the facts that:
  - — the transaction is on its face not to A's financial advantage; and
  - — there is a substantial risk of undue influence on the husband's part.
- If A establishes undue influence or misrepresentation against her husband, B (the bank) will be fixed with constructive notice, and will be unable to enforce the guarantee, if it is proved B knew about the relationship.
- B can avoid being fixed with constructive notice by taking reasonable steps to satisfy itself that A entered into the transaction freely and with knowledge of the true facts.
- Unless there are exceptional circumstances, B will have taken such reasonable steps if it:
  - — warns A (at a meeting not attended by the husband) of the amount of her potential liability and the risks involved; and
  - — advises A to obtain independent advice.
- Instead of taking these steps, B may insist that A obtains independent advice.[83]

83 In *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls said (at 1045):

> "the bank should take steps to check *directly with the wife* the name of the solicitor she wishes to act for her. To this end … the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor.
>
> The bank should not proceed with the transaction until it has received an appropriate response directly from the wife".

- In providing independent advice, the solicitor's duty will usually be to make sure A understands the transaction. The solicitor does not have to go further and make sure A is free from her husband's influence.[84]
- B must obtain written confirmation from the solicitor that the solicitor has advised A and that she appeared to understand the transaction. In the usual case, B will be entitled to rely on the solicitor's confirmation and need not enquire into the quality of the advice.
- B must provide the solicitor will all the information the solicitor will need to advise A properly.

In *O'Brien*, it was held that these rules are not limited to marital relationships, but that they apply also to analogous relationships, including de facto relationships and homosexual relationships between cohabiting partners. However, in *Etridge*, the court decided that cohabitation was not essential after all, so long as B was aware of the relationship (Lord Nicholls at 1038). It then went on to state (at 1048) a "wider principle", namely that B is put on inquiry in every case where the relationship between the guarantor and the debtor is a non-commercial one. The justification is that there can be "no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not" (at 1048). On this basis, the principle extends, for example, to cases where the guarantor and borrower are parent and child, respectively, or *vice versa*. It also covers non-family relationships, for example where the guarantor is the borrower's employee. In Australia, the High Court before *Garcia* appeared to have been moving the law in the same general direction, but *via* an expansive application of the unconscientious dealing doctrine rather than undue influence. The challenge for the court now, in the light of *Etridge*, is to explain why there needs to be a special rule for wives.

REMEDIES

[1129] Traditionally, the relief available in a case of undue influence is limited. Equity would either set aside the affected transaction at the suit of A or refuse specific performance at the suit of B.[85] The

84 In exceptional cases, where it is "glaringly obvious" that A is being "grievously wronged", the solicitor should decline to act further: *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, Lord Nicholls, at 1041-1042.

85 For detailed discussion of these remedies, see below, Chapter 17: "Specific Performance", and Chapter 25: "Rescission".

underlying objective is a restitutionary one: to restore to A property wrongfully misappropriated by B. In some cases, the setting aside of the whole transaction may give A a windfall at B's expense. Then the court has jurisdiction to achieve "practical justice" between the parties (*Vadasz v Pioneer Concrete Pty Ltd* (1995) 184 CLR 102). For example, it may set aside only part of the transaction, or it may set aside the whole transaction subject to the making of an allowance in B's favour. The aim is to balance the parties' respective entitlements (*Bridgewater v Leahy* (1999) 194 CLR 457).

The orthodox view is that other forms of relief, in particular damages, are not available.[86] Given the restitutionary basis of the undue influence doctrine, it is easy enough to see why compensatory (or loss-based) damages should be excluded. However, damages may also serve a restitutionary function — as in the case where an order for payment of compensation is made in lieu of rescission. It is difficult to see why this form of relief should not be available in a case of undue influence. Rescission will be precluded where, for example, a third party has acquired rights in the subject property for value and without notice of A's interest. In Canada, there are cases like this where the courts have been prepared to award damages instead.[87] Some commentators have urged Australian courts to take a similar approach.[88] Others deprecate it.[89]

There is no reason in principle to limit the remedies for undue influence. It may be true that rescission or refusal of specific performance will be a sufficient remedy in most cases. However, it does not follow that no other remedy can ever be appropriate. In the related area of fiduciary obligations, a wide range of remedies is available for the purpose of achieving restitution. The same should be true for undue influence. Artificial restrictions on the availability of remedies interfere with the court's discretion and limit its capacity to do justice in individual cases.

86 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1531].

87 *Treadwell v Martin* (1976) 67 DLR (3d) 493; *Dusik v Newton* (1985) 62 BCLR 1.

88 For example Finn P, "The Fiduciary Principle" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 1 at p 56.

89 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1531].

RELATED EQUITABLE DOCTRINES

Introduction

[1130] The doctrine of undue influence has points of similarity to the fiduciary principle and also to the doctrine of unconscientious dealing. It has been argued that undue influence should be treated as simply a subcategory of fiduciary law.[90] On the other hand, it has been argued that the doctrines of undue influence and unconscientious dealing should be merged.[91] What these arguments overlook is that the concept of undue influence covers two discrete kinds of case:

- the use of actual pressure or unfair dealing to secure the other party's consent to a transaction (actual undue influence); and
- abuse of a relationship of trust in order to obtain an advantage (presumed undue influence).[92]

Recommendations to equate undue influence with fiduciary law leave the first kind of case out of account, while recommendations to merge undue influence with unconscientious dealing fail to account for the second kind of case. A better suggestion would be for the merger of actual undue influence with unconscientious dealing and presumed undue influence with fiduciary law, as the following discussion shows.

Fiduciary law

[1131] The conventional analysis runs as follows. While some relationships attract both fiduciary law and the doctrine of undue influence (for example, solicitor and client), there are many relationships of influence which, at least in Anglo-Australian law, are not fiduciary (for example, parent and child). Correspondingly, there are many fiduciary relationships which are not also recognised relationships of influence (for example, agent and principal). Therefore, the two areas of doctrine are

90 For example Flannigan R, "The Fiduciary Obligation" (1988) 9 *Oxford Journal of Legal Studies* 286. See also *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, Lord Browne-Wilkinson at 209; *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428.

91 Hardingham I, "Unconscionable Dealing" in Finn P (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 1 at p 18.

92 Finn P, "The Fiduciary Principle" in Youdan T (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 1 at pp 43-44.

distinct.[93] This is a purely formal argument, and it is essentially question-begging. It fails to explain where the real points of similarity and difference lie.

Some relationships give rise to obligations requiring one party to safeguard the other party's interest.[94] Contract is the standard mechanism for limiting self-interested behaviour in favour of another party. However, the availability of the contract mechanism depends on the parties being able to spell out the obligor's duties at the time of transacting. In the usual case, this can be done in terms of either outcomes (an agreed result) or inputs (steps to be taken by the obligor or processes to be applied). In some cases, neither of these alternatives will be feasible. Specification of the obligor's duties in terms of outcomes will be unattractive to the obligor if the outcome may be subject to chance events or unanticipated contingencies. In that case, the obligor will probably be unwilling to accept the risk that would be involved in promising definite results. Specification of the obligor's duties in terms of inputs will be unattractive to the obligee if the obligee is likely to have trouble monitoring the obligor's conduct during the period of the relationship. Where high specification and monitoring costs foreclose an explicit contractual solution, the obligor will have an incentive to cheat on the obligee (to prefer self-interest to the obligee's interest). These are the conditions which attract fiduciary law. The function of fiduciary law is to act as a deterrent against cheating in cases where explicit contractual controls are foreclosed.

The paradigm fiduciary relationship (trustee/beneficiary, company/director) involves the transfer to the obligor of assets to control or manage on the obligee's behalf.[95] The separation of asset ownership from management and control creates an incentive for the obligor to cheat by misappropriating assets. High specification and monitoring costs foreclose an explicit contractual solution. Fiduciary law fills the gap. It entitles the obligee (beneficiary) to sue for restitution of misappropriated assets. Furthermore, the law reverses the onus of proof. Once the beneficiary has established certain basic facts, the burden shifts to the obligor (fiduciary) to justify the conduct that has been

93 For example Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1520].

94 The following analysis draws on Easterbrook F and Fischel D, "Contract and Fiduciary Duty" (1993) 36 *Journal of Law and Economics* 425 and Cooter R and Freedman B, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 *New York University Law Review* 1045.

95 On fiduciary law generally, see above, Chapter 10: "Fiduciary Obligations".

complained of. So, for example, a fiduciary who makes gains in the course of office is presumed to have breached the duty of loyalty; the fiduciary must account for the gains to the beneficiary unless the fiduciary can prove that the transaction took place with the fully informed consent of the beneficiary. The purpose of this reverse onus rule is to address the beneficiary's monitoring costs problem. In the absence of such a rule, the beneficiary would be likely to encounter difficulties proving that the loss of an asset was due to misappropriation by the fiduciary, rather than, for example, legitimate business misfortune.[96] The reverse onus rule increases the probability of a successful restitution action, and the high probability of such an action provides a deterrent against misappropriation in the first place.

The doctrine of undue influence performs exactly the same function in cases where the obligee is in a position of dependency on the obligor. Where, because of this dependency, the obligee is accustomed to follow the obligor's instructions in business and other matters, the obligor will have an incentive to misappropriate the obligee's assets. As in the case of the paradigm fiduciary relationship, high specification and monitoring costs foreclose contractual arrangements to counter this incentive. The undue influence doctrine fills the gap. The primary remedy for misappropriation in the context of undue influence is rescission. Rescission can be viewed as a form of disgorgement, and in this respect it is analogous to the standard remedies for breach of fiduciary duty. As in the case of the fiduciary relationship, evidentiary problems in establishing misappropriation represent an obstacle to litigation and a threat to effective deterrence. In the case of the relationship of influence, the evidentiary problems arise out of the obligee's inability "to disentangle the inducements which led to the transaction" (*Johnson v Buttress* (1936) 56 CLR 113, Dixon J at 135). As in the fiduciary case, the courts address the evidentiary problem by reversing the onus of proof.

These considerations explain Dixon J's observation in *Johnson v Buttress* that presumed relationships of influence give rise to duties "in which fiduciary characteristics can be seen" (Dixon J at 135). In both cases:

96 Misappropriation will be easier to detect in some cases than others. For example, the outright theft of an asset may sometimes come to light quite quickly. On the other hand, there will be cases where the disappearance of an asset is attributable to either misappropriation by the fiduciary or to legitimate business misfortune, and it may be impossible to tell as a matter of inference which of these alternative explanations is the correct one: Cooter R and Freedman B, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 *New York University Law Review* 1045 at 1049-1051.

- there is a relationship which provides opportunities for the obligor to misappropriate the obligee's assets;
- high specification and monitoring costs preclude an explicit contract to control the problem; and
- the law responds by making restitutionary remedies available combined with substantial evidentiary concessions in the obligee's favour.

The difference is that, in the case of the paradigm fiduciary relationship, the opportunity for misappropriation arises out of the separation of asset ownership from control and management, while in the case of undue influence, it is a function of the obligor's ability to influence the obligee's decisions. However, the difference is a purely formal one. The real identifying characteristic of the fiduciary relationship is not the transfer of asset management and control, but the opportunity for cheating arising out of the parties' inability to bargain for effective contractual sanctions. In recognition of this, the courts have started to take a more expansive view of what amounts to a fiduciary relationship. If this trend continues, the doctrine of presumed undue influence will eventually be absorbed by fiduciary law. In the United States, the two doctrines have already merged. Posner[97] describes the fiduciary relationship in terms which clearly include undue influence as well:

> "In the type of relationship that the law calls fiduciary or confidential, the duty to disclose is much greater. Most agents (lawyers, accountants, brokers, trustees, etc.) are fiduciaries toward their principals … The agent is paid to treat the principal as he would treat himself; to be his alter ego. The fiduciary principle is the law's answer to the problem of unequal costs of information. It allows you to hire someone with superior information to deal on your behalf with others having superior information. The principle does more. By imposing a duty of utmost good faith rather than the standard contractual duty of ordinary good faith, it minimises the costs of self-protection to the fiduciary's principal. This is especially important in settings where the principal is quite helpless to protect himself — he might be a child, for example. The imposition of fiduciary duties is common in that setting; a guardian is a classic fiduciary."

In *CIBC Mortgages plc v Pitt* [1994] 1 AC 200,[98] there is a hint that English courts might be coming around to the same view.

97 Posner R A, *Economic Analysis of Law* (5th ed, Aspen Law and Business, 1998), s 4.6 (reprinted with permission).

98 Lord Browne-Wilkinson (at 209) queries whether there is any difference between the fiduciary principle and presumed undue influence. Contrast *National Westminster Bank plc v Morgan* [1985] AC 686.

Unconscientious dealing

[1132] There is a substantial overlap between the doctrines of undue influence and unconscientious dealing and they are commonly pleaded in the alternative. In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J attempted the following distinction (at 461):

> "In the latter, the will of the innocent party is not independent and voluntary because it is overborne. In the former, the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the party unconscientiously taking advantage of that position."

This explanation is unconvincing. If the will of the innocent party is the result of unconscientious advantage-taking by the stronger party, it is hard to see how it can nevertheless be characterised as "independent and voluntary".

In the same case, Deane J said (at 474):[99]

> "Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party … Unconscientious dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so."

This explanation is also strained. In undue influence cases the concern is with the quality of the weaker party's consent not at large, but only in so far as it is affected by the stronger party's influence. Ultimately, therefore, the focus of both doctrines is on the stronger party's conduct.

As Hardingham[100] has pointed out, the parallels between the two doctrines are significant:

> "[B]oth doctrines require sufficient awareness or perception on the part of the stronger party and, it is suggested, the test for sufficient awareness should be the same in both cases. Both doctrines impose a similar duty: to take reasonable steps to ensure that the weaker party has formed an independent and

99 See also *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 477-479.

100 Hardingham I, "Unconscionable Dealing" in Finn P (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 1 at p 18.

> informed judgment … Both doctrines apply despite the fact that the transaction may not be manifestly disadvantageous to the weaker party. And, most importantly, both doctrines are designed to mitigate the risk of abuse by the stronger party of his position of special advantage. Abuse of a perceived position of special advantage is the thread that links the two equitable doctrines."

On this basis, it is tempting to suggest that the two doctrines should be merged. However, the two classes of undue influence need to be kept in mind. Given that in Australia the doctrine of unconscientious dealing has so firmly taken hold, it is questionable whether there is a need any longer for a separate doctrine of actual (class 1) undue influence. On the other hand, class 2 undue influence covers a different kind of case. It is concerned with abuse of a relationship of influence, rather than with ad hoc exploitation of a position of advantage. The merger of class 2 undue influence with unconscientious dealing would tend to obscure its fiduciary characteristics.

RELATED STATUTORY MEASURES

[1133] Various statutes provide relief against unjust contracts. These statutory remedies overlap with the doctrines of undue influence and unconscientious dealing. They are discussed in Chapter 5: "Unconscientious Dealing".

CHAPTER TWELVE

BREACH OF CONFIDENCE

Megan Richardson

INTRODUCTION

[1201] The doctrine of breach of confidence protects the confidentiality of information in a wide variety of circumstances. It is potentially a doctrine of great significance given the importance of the social values it represents: commercial secrecy, the innovation process, personal privacy and (as we have recently learnt) national security can be rare and precious commodities in today's society. But the doctrine developed in a haphazard way and there are still areas of confusion and uncertainty in its nature, scope and operation. In fact, there were few breach of confidence cases before the mid-20th century and even now then the numbers are small compared to other equitable doctrines. Nevertheless there are smatterings of judgments dating back to the 18th century, and through these we can trace the doctrine's tentative emergence and later growth.

Scope and jurisdictional basis of the doctrine

[1202] Curiously, the breach of confidence doctrine's precise jurisdictional basis was originally quite uncertain, something the courts seemed remarkably sanguine about, often relying on more than one jurisdictional basis at the same time to support their decisions.[1] Throughout its history, the doctrine was variously classified as equitable, proprietary (sometimes little differentiated from common law copyright before that was abolished) or even

1 See generally Gurry F, *Breach of Confidence* (Clarendon Press, 1984), pp 25-28.

contractual[2] before its predominately equitable character was finally confirmed in 1969 in the leading (UK) case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.[3] There Megarry J (at 46) noted that:

> "The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of 'use, confidence or trust;' and a couplet, attributed to Sir Thomas More, Lord Chancellor avers that:
>
> Three things are to be helpt in Conscience;
>
> Fraud, Accident and things of Confidence.
>
> (See 1 Rolle's Abridgement 374)."

Acceptance of this position gradually increased in the Anglo-Australian courts until some 15 years later in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414. Deane J in the High Court (at 438) pronounced equity as the sole jurisdictional basis of the doctrine. Deane J said the obligation is, "like most heads of exclusive equitable jurisdiction", an "obligation of conscience arising from the circumstances in or through which the information was communicated or obtained" rather than any proprietary right in the information *per se* (at 438). That view has since prevailed in the Australian courts. Confidential information is sometimes acknowledged to be proprietary for certain purposes (for instance, it can be freely assigned).[4] Nevertheless, this is not seen as undermining the equitable jurisdictional basis of the breach of confidence doctrine itself.

In *Moorgate Tobacco* Deane J noted that a contractual obligation of confidentiality can exist in addition to, and separate from, any equitable obligation[5] and this has also been long

2 See, for instance, *Pope v Curl* (1741) 2 Atk 342; 26 ER 608, Lord Hardwicke LC at 342 (property identified as the basis); *Abernethy v Hutchinson* (1824) 1 H & Tw 28; 47 ER 1313, Lord Eldon at 39-40 (the judge's vague comments supporting an equitable as well as a proprietary analysis); *Prince Albert v Strange* (1849) 1 H & Tw 1; 47 ER 1302, Lord Cottenham LC at 21-23 (stating that the grounds of property and trust "[b]oth appear to me to exist in this case"); *Morison v Moat* (1851) 9 Hare 241; 68 ER 492, Turner VC at 255 (equity, property and contract all seen as potentially relevant); *Pollard v Photographic Company* (1888) 40 Ch 345, North J at 349-352 (equity and contract treated as analogous); *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Gowans J at 40 ("[the equitable doctrine] has been applied to many different conceptions of property").

3 See also *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene MR at 213; *Seager v Copydex Ltd (No 1)* [1967] 2 ALL ER 415, Lord Denning MR at 417.

4 See *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 120-121.

5 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, Deane J at 438.

accepted.[6] In principle, the contract may if the parties choose displace the equitable obligation, effectively covering the field.[7] In practice, however, it seems from the cases that the equitable obligation often plays an important residual role, as a matter of construction dictating the scope of any contractual obligation.[8] Even when the contract would clearly give broader protection than the equitable doctrine, courts may be reluctant to give it full effect.[9] This is especially so as far as ex-employees are concerned, as they are traditionally seen as warranting special protection.[10] But a recent and potentially significant development is the Australian High Court decision in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2002) 185 ALR 152. There it was suggested by Gleeson CJ and Gummow and Hayne JJ that the restraint of trade doctrine might be invoked by a commercial party with respect to a trade secrecy contract on the basis that the party is "in trade" and "the activities restrained are part of that trade", putting the onus on the party seeking to enforce the restraint to show it was "reasonable in the interests of the public and the parties" (a challenge the plaintiff in that case apparently had failed to meet) (at 167-168).[11] Nevertheless, a narrow reading of the majority judgment reveals the particular restraint there went to the very basis of the contract, since it entailed a perpetual confidentiality clause which the plaintiff argued should continue to bind the defendant even after the information reached the public domain (something not generally accepted for

6 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene at 211; *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Fullagar J at 40; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 47; *Alfa Laval Cheese Systems Ltd v Wincaton Engineering Ltd* [1990] FSR 583, Morrit J at 590.

7 For the special situation of employees subject to an employment contract, see Richardson M, Subtitle 23.6 "Intellectual Property" *The Laws of Australia* (Lawbook Co., Sydney, 1993–), paras [63]-[68].

8 See, for instance, *O Mustad & Son v Dosen* (unreported judgment of Atkin LJ in the Court of Appeal (UK)) quoted in *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293 at 1314-5 (a contractual confidentiality obligation construed as extending only so long as the information concerned was secret on the ground that otherwise there "is no longer any subject-matter upon which the agreement could operate"); *Silvercrest Sales Pty Ltd v Gainsborough Printing Co Ltd* (1985) 5 IPR 123, Vautier J at 129 ("The plaintiff can clearly ... rely upon the wider principle of equity and I do not think it makes much difference which of the causes of action pleaded is considered because the same necessity arises of it being shown that the information was in fact confidential and imparted as such and that the defendant is in fact seeking to use for his own purposes information which he obtained only on such a basis"). See also generally *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

9 See, for instance, suggesting (although obiter and in vague terms), that there is limited scope for express contractual prohibitions to override the freedom to reverse engineer that exists under the equitable doctrine, *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138, Jacob J at 151. But contrast *Alfa Laval Cheese Systems Ltd v Wincanton Engineering Ltd* [1990] FSR 583, Morritt J at 591. See also further. nn 11ff.

10 For the operation of the restraint of trade doctrine in the ex-employee context, see below, para [1222].

11 Contrast Kirby J at 171-172, Callinan J at 178-179.

the equitable doctrine). As such, it is difficult to see how there could be any subject matter upon which the contract could continue to operate. Hopefully, the case will not be taken to support any broad rejection of contracting for confidentiality protection as far as trade secrets are concerned.[12]

[1203] There is still occasional debate about the proper classification of breach of confidence, especially in academic circles with various proposals made for rethinking the current equitable jurisdictional basis. It is sometimes thought that the equitable doctrine should be viewed as "restitutionary" rather than equitable in a broader sense.[13] Alternatively, it has been proposed that confidential information should now be acknowledged as proprietary with the obligation not to breach confidence simply following from that. That is, there is no role for equity at all.[14] A third and equally radical line of argument is that contract (including implied contract) should be accepted in the future as the sole basis for protecting confidential information (or at least trade secrets).[15] And a fourth and quite influential suggestion to date has been that that the jurisdictional basis of the action for breach of confidence is properly to be regarded as *sui generis*, combining property, equity and also contract together in an action that straddles the established fields.[16]

Is it possible to resolve these apparently conflicting ideas or at least to draw on them to find a solution to the jurisdictional issue? One answer, recently proposed, is to accept that parties may by contract choose to delineate rights and obligations with respect to confidential information but otherwise the equitable

12 Curiously, the House of Lords appears to have accepted that, where government secrets are concerned, a confidentiality contract might continue in effect indefinitely: see *Attorney-General v Blake* [2001] 1 AC 268. If anything one might have thought the use of private information and government secrets should be less likely to be able to be regulated by contract, given the nature of the interests involved (and the possibility of third party interests, in the second case especially). But note that in that case the defendant, a senior member of the British secret service, was viewed as akin to a fiduciary: Lord Nicholls at 287.

13 See, for instance, Jones G, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 *Law Quarterly Review* 463.

14 See, for instance, McKeough J and Stewart A, *Intellectual Property in Australia* (2nd ed, Butterworths, 1997), pp 67-73; and for an earlier argument Ricketson S, "Confidential Information — A New Proprietary Interest?" (1977) 11 *Melbourne University Law Review* 223. See also Mitchell A, "The Jurisdictional Basis of Trade Secret Actions: Economic and Doctrinal Considerations" (1997) 8 *Australian Intellectual Property Journal* 134.

15 See for instance, Bone R, "A New Look at Trade Secret Law: Doctrine in Search of Justification" (1998) 86 *Calif L. Rev* 241.

16 See Gurry F, *Breach of Confidence* (Clarendon Press, 1984), c 3, pp 58-61 — a classification accepted by the Canadian courts: *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, La Forest J at 35-36; Sopinka J at 74; see also *Cadbury-Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577, Binnie J at 588-591.

doctrine governs, reflecting the idea that (even in the absence of a contractual agreement) the conduct of those who would wish to use confidential information should accord with the standards of good conscience.[17] The "proprietary" character of confidential information can also be acknowledged, at least for trade secrets and confidential ideas (categories discussed further below) provided this is understood essentially to record that the information "belongs to" an owner and can be traded in the market.[18] That is, the property characterisation does not in itself define the scope of any obligation not to use another's confidential information. Query on this analysis whether any "proprietary" classification is desirable for private information and government secrets, also protected under the equitable doctrine. In these cases, as elaborated below, the purpose of seeking protection is to keep the information out of the public domain not reserving the ability to commercially exploit it on the owner's terms. The various categories of confidential information and the interests they reflect are discussed further below.

Relevant interests and policies

[1204] The equitable doctrine, the main focus of this chapter, protects a range of important social interests where often no other legal recourse is available. Notable among these are interests in commercial/trade secrecy, in confidential ideas not yet in the public domain (a subcategory of the first but with its own distinct properties), and in privacy and government secrecy. In the first case, the doctrine provides a mechanism for protecting the security of confidential information of value to a commercial enterprise (including non-patented technical information, information about the enterprise's method of operation, customer lists and other data used for marketing purposes),[19] supplementing or (in the case of information that would otherwise be patented and disclosed) offering an alternative to

17 Richardson M, "Breach of Confidence: Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law" (1994) 19 *Melbourne University Law Review* 673. See also *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Gummow and Hayne JJ at 28.

18 Richardson M, "Confidential Information" in A Christie (ed), *Intellectual Property* 23/6 *Laws of Australia* (Law Book Co Ltd) 1999 at 10, drawing on economic notion of "property" as a bundle of exclusive rights which can be traded in the market. Cf also US trade secrecy law (see *Restatement of the Law Third on Unfair Competition* ¶39 comment b).

19 See, for instance, (design drawings for leather tools) *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; (equipment and manufacture of rubber gloves) *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37; (moped design) *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. See also (marketing information to be used for low tar cigarettes) *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 — although, in absence of confidentiality, the claim did not succeed.

the protection offered under the statutory intellectual property regimes. Such protection may serve a useful economic purpose since if those responsible for developing valuable information can appropriate the benefits and exploit the information on their own terms in the market, the incentives for information to be developed and disseminated should be greater.[20] The reasoning can be extended to confidential ideas notwithstanding their commercial value may be rather uncertain, only fully realised at some stage in the future as their practical implications are worked out.[21] Here as well the incentive for the information to be developed and disseminated on a commercial basis may depend on the enforcement of legal rights (and copyright law, the most obvious source of protection for creative material of a literary, dramatic, musical or artistic nature does not extend to ideas *per se*). In the third case the doctrine, allowing the keeping secret of personal biographical information[22] or commercially sensitive information (especially as claimed by individuals or groups of individuals),[23] establishes and enforces a personal "zone of privacy" free from public scrutiny, supplementing the limited scope of privacy regulation that exists in Australia. In the fourth case the doctrine, which may be invoked to restrain the publication of secrets about the functioning of government (including its institutions, agencies and employees acting in the course of their employment),[24] is designed specifically to serve

20 See further Friedman D, Landes W and Posner R, "Some Economics of Trade Secret Law" (1991) 5 *Journal of Economic Perspectives* 61.

21 As, for instance, (proposal for a television program) *Talbot v General Television Corp Pty Ltd* [1980] VR 224; see also *Fraser v Thames Television Ltd* [1984] QB 44; *Concept Television Productions Pty Ltd v Australian Broadcasting Corp* (1989) 12 IPR 129.

22 For instance private family etchings (*Prince Albert v Strange* (1849) 18 LJ Ch 120); marriage secrets (*Argyll v Argyll* [1967] Ch 302); secret Aboriginal stories (*Foster v Mountford & Rigby Ltd* [1977] 14 ALR 71); identity of a police informant (*G v Day* [1982] 1 NSWLR 24); story told to friend in confidence about lesbian relationship and the murder by the confidant's lover's husband (*Stephens v Avery* [1988] 2 All ER 477); celebrity's drug problem (*Campbell v MGN Ltd* [2002] EWHC 499 (QB).

23 This seems particularly to be accepted in the United Kingdom: for instance, commercial position of a company under a takeover bid (*Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143); side-effects of a drug now off the market (*Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1); promotional film for the pop group Oasis (*Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1); sensitive commercial information (*Bolkiah v KPMG* [1999] 2 AC 222). In a recent Australia High Court decision, it was questioned whether corporate interests in privacy could generally be protected — or whether the information should rather in most cases be viewed as protected, if at all, as trade secrets which could be commercially exploited: *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 per Gummow and Hayne JJ (Gaudron J concurring). The case is discussed further below, paras [1205] and [1210].

24 See, for instance, *Attorney-General v Jonathan Cape Pty Ltd* [1976] QB 754; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; and the "Spycatcher" cases *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 180 and *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. See too (also involving the British secret service) *Attorney-General v Blake* [2001] 1 AC 268.

the public interest, although outside of the United Kingdom the use of the doctrine for this purpose is still relatively rare.[25]

[1205] In principle, the categories of information protected under the breach of confidence doctrine are not closed. In practice, however, these categories have remained essentially the same for at least the last 30 years (although the fact that each may be interpreted in a broad and flexible way may explain their resilience in the face of modern situations and circumstances). Further, as indicated at various points throughout the chapter, the doctrine has a rather different operation with respect to trade secrets, confidential ideas, private information and government secrets. Whether the doctrine will ultimately fragment into sub-doctrines of trade secrecy, confidential idea protection, privacy and government secrecy, as it struggles to accommodate the different social interests and policies concerned, is an interesting question. The fact that Australia is a party to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs 1994) and must therefore ensure its minimum standards of legal protection for "undisclosed information" (trade secrets and confidential ideas) are available,[26] while at the same time government secrecy and privacy-breach of confidence claims continue to be vigorously litigated in the courts may add to the pressure for further divisions to emerge. Indeed, in the recent case of *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 there was some suggestion in the High Court that Australia might yet see development of tort or equitable wrong of privacy in the future (albeit not to the benefit of the corporate claimant in that case) — at least, the possibility was not foreclosed (Gummow and Hayne JJ at 38 (Gaudron J concurring)).[27] That said, in general it will be seen that there are some common elements to the breach of confidence doctrine as it currently operates, whatever the field of its particular application might be. Ultimately it may be these common elements that continue to bind the doctrine together into one loosely cohesive whole.

25 See, however, *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, although the claim based on breach of confidence did not succeed.

26 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Appendix 1B, Agreement of the GATT Uruguay Round, 1994, Article 39.

27 See also Kirby J at 55, Callinan J at 93-94. Cf *Douglas v Hello! Ltd* [2001] 2 WLR 992, Sedley LJ at 1025. Later UK cases have supported reliance on the breach of confidence doctrine to protect information privacy interests: see, for instance, *A v B (a company)* [2002] 2 All ER 545; *Campbell v MGN Ltd* [2002] EWHC 499 (QB). See also *ABC v Lenah Game Meats*, Gleeson CJ at 12 ("If the activities filmed were private, the law of breach of confidence is adequate to cover the case").

Elements of the Modern Action

[1206] The elements of (equitable) breach of confidence have been variously defined in the Anglo-Australian courts but, on a close analysis, certain common principles emerge. A useful starting point is the statement of Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 438 that the obligation arises from "the circumstances in or through which the information was communicated or obtained". The statement resonates with the principles identified by Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 213:

> "If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."

Saltman was decided in 1948 but was largely overlooked until it was cited in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. There, in a famous and oft-quoted statement, Megarry J elaborated as follows (at 47):

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR in the *Saltman* case on page 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

Later cases have suggested that the obligation may extend beyond information imparted in confidence to encompass at least information that is "surreptitiously" obtained, and it is accepted that third parties can be subject to obligations arising out of another's breach.[28] (Both positions are consistent with the general principle accepted in *Saltman* and *Moorgate Tobacco* that the obligation arises out of the circumstances under which information was imparted *or obtained*.) The need to show detriment has, except in the case of government secrets where the standard is strict, also now been lessened to a point where subjective assessments of harm seem to be sufficient.[29] On the

28 See further below, paras [1216]-[1217].

29 See further below, para [1221].

other hand, threshold standards of non-triviality or commercial value, specification of confidential information, and development of ideas may impose other limits on the ability to claim breach of confidence.[30] It would also seem that there is a public interest exception to breach of confidence, although its scope is unclear and its existence is still a matter of controversy in Australia.[31] Subject to these comments, the "normal" requirements given in *Coco* above are a useful statement of the elements of the action. They form the basis, therefore, of the more detailed discussion that follows.

Confidential information

[1207] The first requirement stated in *Coco* is that the information has the necessary "quality of confidence" (Megarry J at 47). As Lord Greene MR said In *Saltman*,[32] the information must not be something that is "public property and public knowledge".[33] The requirement is one of "relative secrecy", meaning it is sufficient that the information is not fully in the public domain (*Franchi v Franchi* [1967] RPC 149, Cross J at 151-152.). The extent to which the information has been published, both on a non-confidential basis and on a confidential basis, will be relevant to this assessment (although it is only in extreme cases that the latter will destroy confidentiality);[34] and the focus is a local one: prior publications overseas, or in another region in Australia if the claimed confidentiality is confined to a particular region, will only be relevant if they affect confidentiality in the locality for which it is claimed.[35] But as to *how much* confidentiality is required and the more precise tests for confidentiality, reference needs to be made to the particular kind of information in question.

30 See further below, para [1211]. For a possible additional requirement that the information must not reveal wrong or iniquity, see below, para [1211].

31 See further below, para [1223].

32 (1948) 65 RPC 203 , Lord Greene MR at 215.

33 See similarly *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 47-48.

34 See, in particular, *Dunford & Elliot Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143 (company report previously circulated "in confidence" to persons holding 43% of the shares). Normally confidential communications do not destroy confidentiality: *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Gowans J at 50.

35 See, for instance, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 56 RPC 203, Sommerwell LJ at 216 (the information known in Germany but held confidential in the UK); and *Franchi v Franchi* [1967] RPC 149 (publication in a Belgian patent specification destroyed confidentiality in the UK because UK patent attorneys would read overseas patents); *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 (fact that information well known in the US meant it was likely it would be known in Australia as well). See also *Wigginton v Brisbane TV Ltd* (1993) 25 IPR 58 (information held confidential in Queensland notwithstanding a prior publication outside the State).

Trade secrets and confidential ideas

[1208] If the information is a claimed trade secret, then according to Lord Greene in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215, a relevant consideration is whether "the maker … has used his brain and thus produced a result which can only be produced by somebody who goes through the same process". This suggests that a degree of labour and effort must be involved — as in that case, involving a new design for leather tools developed by the plaintiff. There was no suggestion, however, that novelty or ingenuity would be a condition of trade secrecy and it has not been suggested since *Saltman* that it should be. (On the other hand, it has been held that non-obviousness is a requirement for protection as a confidential idea, although in other respects confidential ideas are treated the same as trade secrets for the purposes of assessing confidentiality.)[36]

As to the amount of secrecy required, consistent with the notion that confidentiality requires only that information not be "public property and public knowledge", *Saltman* established that a trade secret is not lost merely because a finished product is on the market that can be reverse engineered to work out the information (it is only when the process has been completed and the information is fully published that it can be regarded as in the public domain) (Lord Greene MR at 215).[37] Later cases have also indicated that public knowledge of part of the information does not destroy the secrecy of the remainder — as for instance where pamphlets describing aspects of the information have been published,[38] or a patent has been obtained which reveals some of its elements.[39] It has also been said that "something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality" (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 47). However, in practice, confidentiality can be difficult to establish in marginal cases and sometimes the decisions of courts may be questioned as being, seemingly, less than sympathetic to the interests of

36 See, for instance, *Concept Television Productions Pty Ltd v Australian Broadcasting Corp* (1989) 12 IPR 129, Gummow J at 134.

37 See similarly *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd (1959)* [1967] RPC 375, Roxburgh J at 391-392, affd *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128 (CA); *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Gowans J at 44-45. But see *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138, Jacob J at 149 (the plaintiff's EEPROMs which the defendant accessed by reverse engineering its coin-changing machines held not confidential even *ex ante*).

38 *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375, Roxburgh J at 391.

39 *Seager v Copydex Ltd* [1967] 1 WLR 923 (part of the information about the plaintiffs was a carpet grip design published in the plaintiff's patent for a different product).

innovators than to those prepared to commercially exploit the information.[40]

[1209] A number of factors may be considered in assessing whether a claimed trade secret is actually secret and by analogy most of these can be applied to confidential ideas as well. Gowans J said in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at 49-50:[41]

> "Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

TRIPs Article 39(2)[42] more generally identifies the "undisclosed information" to be protected against dishonest commercial practice as information that is:

- "secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question";
- has "commercial value because it is secret"; and
- "has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret".

But it is really the first part of the definition that is most directly concerned with setting the standard of secrecy to be met (and the first, second and sixth in the *Ansell Rubber* list).

40 See, for instance, *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, albeit an interlocutory application, where the fact that the components of the plaintiff's moped design were "available to anyone on the open market" was sufficient to deny confidentiality (without asking whether the combination was publicly available) in a claim brought against a defendant who had begun manufacturing mopeds based in part on the design: see Megarry J at 51-52.

41 Citing the *Restatement of the Law First on Torts* (American Law Institute, 1939) 757, comment. Compare the *Restatement of the Law Third on Unfair Competition* (American Law Institute, 1995) 39 and comment.

42 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Appendix 1B, Agreement of the GATT Uruguay Round, 1994, Article 39(2).

Privacy and government secrets

[1210] If the issue is one of privacy or government secrecy, the factors identified in *Ansell Rubber* and TRIPs are of more limited relevance. In particular, for these categories of information the persons against whose knowledge the confidentiality of the information is assessed would generally constitute the general public, rather than a trader's business competitors (*Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, Lord Goff at 281). Here some differences also emerge in the degree of secrecy required. For instance, the requirement for confidentiality often seems to be applied very strictly in the case of claimed government secrets, and can be raised again when it comes to assessing "detriment".[43] On the one hand, courts sometimes seem to apply a rather lenient standard of confidentiality in personal privacy cases at least where human claimants are concerned.[44] For instance, in *Foster v Mountford & Rigby Ltd* (1976) 29 FLR 233, a case concerning the publication of Aboriginal tribal secrets in a book written by the defendant, the confidentiality of the information did not appear to be in question, even though the secrets were known to initiated male members of the tribe throughout a long period. As far as Muirhead J was concerned, they still remained secret as far as other members of the tribe were concerned. Similarly, in *G v Day* [1982] 1 NSWLR 24 at 40, that a prior television broadcast had disclosed a police informant's identity was held not to preclude the information's confidentiality *vis-à-vis* a later publication. Yeldham J said that the disclosure was "transitory and brief" and would not have been remembered by "anyone who did not already know the plaintiff". The same cannot be assumed for commercial privacy-confidentiality claims. In the UK case of *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321 at 338,[45] that the confidential information revealing that a drug manufactured by the company (which had been taken off the market) had potentially dangerous effects was not "ever present in the minds of the public" was sufficient for Shaw LJ to treat it as still confidential in the face of an attempted publication by a journalist. But in the Australian case of *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Gleeson CJ held that confidentiality

43 Prior publication was the main reason the government plaintiffs did not succeed (except against one defendant) in *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109. See also *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, Kirby P at 161-168, McHugh JA at 194 (Court of Appeal — the High Court on appeal based its conclusions on the fact that the UK government was seeking enforcement of a foreign public law: *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd:* (1988) 165 CLR 30).

44 Compare Dean R, *The Law of Trade Secrets* (Law Book Co, Sydney, 1990), p 125.

45 See also Templeman LJ at 345.

could not be claimed in information about the operation of the plaintiff's abattoir after this had been surreptitiously filmed by an animal rights organisation and passed on to the ABC for public airing. The information was not private and confidential in the sense that its "disclosure or observation — would be highly offensive to a reasonable person of ordinary sensibilities" (at 13). The statement seems to set a very high standard. However, the fact that the absence of confidentiality had been conceded by the parties in that case (and it had never apparently been treated as confidential) (at 9) means its authority in cases where the concession is not made might justifiably be questioned.

Another potential constraint on the ability to protect commercial privacy interests can be found in the judgment of Gummow and Hayne (Gaudron J concurring) in the last case. There it was questioned whether Lenah Game Meats as a commercial corporation could claim privacy interests in the information concerned simply because its interests would inevitably have to be commercial exploitation ("pocket book" sensitivity) (at 30-38).[46] The reasoning suggests that the proper classification of the interests of such corporate claimants (assuming confidentiality was and could be claimed) would have to be trade secrecy, not privacy. The implications of this are still to be worked out but the reasoning might seem to leave little scope for corporate privacy claims under the *aegis* of breach of confidence.[47]

Threshold standards going beyond confidentiality

[1211] What other standards apply for the information to qualify for protection as "confidential information" seems to depend largely on the nature of the information — or, at least, this may be relevant to their significance in practice. For instance, in the confidential idea cases it has been stressed that the ideas must be sufficiently developed to be capable of being realised in actuality, something of more doubtful relevance in other contexts.[48] And in the trade secrecy cases more generally it is often laboured that the secret information must be identified with sufficient specificity — that is, distinguished from other information that

46 See also Gleeson CJ and Kirby J at 13-14 and 55-56 (expressing doubt without deciding the issue) but contrast Callinan J (dissenting) at 93-94 (refusing to rule out the possibility that corporations could claim protection for privacy interests).

47 For possible implications see, for instance, paras [1208]-[1209], [1211], [1225]-[1227].

48 See *Talbott v General Television Corp Pty Ltd* [1980] VR 224, Harris J at 231; *Fraser v Thames Television Ltd* [1984] QB 44, Hirst J at 66.

is public domain — to make an order as to confidentiality practicable for the recipient.[49] The issue of triviality, identified by Megarry J in *Coco* as a consideration,[50] seems most often to arise in the privacy cases, albeit only rarely with any success. One example is *Church of Scientology of California v Kaufman* [1973] RPC 635, where Goff J (at 658) held that information as to the teaching and practice of Scientology was "pernicious nonsense" in the face of the Church's claim for confidentiality. (It was alternatively held that the public interest exception applied to permit publication (Goff J at 653).)[51] In the trade secrecy and confidential idea cases commercial value, no matter how remote the potential that this will be realised in practice, would seem to suffice (*Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Gowans J at 49-50).[52] More significant is the requirement for government secrecy claimants that detriment to the public interest be demonstrated in order to make out a claim but this will be further discussed under breach.[53] Finally, although some Australian judges have identified as a further requirement for protection of confidential information that information cannot be protected if it reveals "iniquity",[54] such matters can also be dealt with under the general public interest exception to breach of confidence.[55] That approach is the one preferred in this chapter.

Incurring the obligation

[1212] The second general requirement established in *Saltman*, *Coco* (although in a rather more circumscribed way, given the focus there on information imparted in confidence) and *Moorgate Tobacco*, is that the information must be imparted or obtained in

49 The requirement is strict: see, for instance *Amway Corp v Eurway International Ltd* [1974] RPC 82, Brightman J at 86-87; *G D Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, Cumming-Bruce LJ at 104; Templeman J at 104; *O'Brien v Komesaroff* (1982) 150 CLR 310, Mason J at 327-328; *Secton Pty Ltd v Delawood Pty Ltd* (1991) 21 IPR 136, King J at 155-156, 16; *CMI-Centres for Medical Innovation GmbH v Phytopharm plc* [1999] FSR 235, Laddie J at 243.

50 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 48.

51 For the public interest exception see below, para [1223].

52 See also, for a case where the issue was raised, *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272, Harman J at 273 (a pig-rearing incubator which had not succeeded in saving a single pig nevertheless held protected); affirmed [1957] RPC 207.

53 See below, para [1221].

54 See especially comments of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, at 443 and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, at 111.

55 See further below, para [1223].

circumstances importing an obligation of confidence.[56] Here notice is all-important, a concept that appears to encompass not only actual knowledge and wilful closing of eyes but also "reasonable knowledge" in the sense that a reasonable person would understand they were being notified in the circumstances.[57] Notice of the confidentiality of the information and of the obligation being imposed (specifically, the uses permitted versus those that are not) is required.[58] The obligation must, of course, be owed to the plaintiff and owed by the defendant and occasionally, a plaintiff's standing to bring an action for breach of confidence may be questioned on this basis — as in *Fraser v Evans* [1969] 1 QB 349, Lord Denning MR at 361 (CA) where a consultant to the Greek Government was unable to claim breach of confidence against a third party when his confidential report was leaked to a newspaper: Lord Denning held that under the terms of the consultancy agreement the rights belonged to the Greek Government. Beyond these basic propositions, the situations of

(a) information imparted in the context of a "relationship of confidence",

(b) surreptitiously or improperly obtained information, and

(c) third party obligations arising when information is obtained in breach of another's obligation,

need to be addressed separately.

Information imparted in confidence

[1213] If the question is whether information has been imparted in confidence, the test generally used is whether the information is disclosed on the basis of confidentiality and for limited purposes (if it may be used for any purposes at all),[59] generally but not necessarily something to be assessed at the time the information

56 See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 56 RPC 203, Lord Greene MR at 213; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 47-48; *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, Deane J at 438 and further discussion above, para [1206].

57 The fourth category in *Baden, Delvaux & Lecuit v Societé Générale Pour Favouriser le Développment du Commerce et de l'Industrie en France SA* [1983] BCLC 325.

58 See especially (where the scope of the limited purposes was directly in issue) *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291 discussed further below, paras [1213]-[1214].

59 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 ([1963] 3 ALL ER 413, note), Lord Greene MR at 213. See also *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1991) 28 FCR 291, discussed further below.

is imparted and received.[60] The test is an objective one. Thus, in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41,[61] Megarry J said (at 48):

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

In *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 28 FCR 291, Sheppard, Wilcox and Pincus JJ at 302-303, the Full Federal Court suggested that the test should also take into account the recipient's purposes if these are different from the discloser's and known to be so. But the appropriateness of the recipient's different purposes as a determinative reason for refusing to find, or narrowly construing, an obligation of confidence is questionable. It may be that an obligation should not be imposed unless this would be "reasonable" (noting here Megarry J's reference in *Coco* to "upon reasonable grounds").[62] But the circumstances in which it is unreasonable to impose an obligation on a recipient in the absence of apparent consensus[63] — need to be more precisely explained and justified.

[1214] In fact the *Smith Kline* variation on the *Coco* test does not seem to have come to much. In that case, involving the submission of test data to a Government Department in order to obtain marketing approval for a pharmaceutical product (Cimetidine) and the later use of the information by the Department for the

60 Although in *Seager v Copydex Ltd* [1967] 1 WLR 923 information blurted out by a rather, by all accounts, eccentric inventor in a meeting about another product was nevertheless protected, this is the exception rather than the norm. Contrast, for instance (the obligation held not to arise when notice only came after the information was revealed and the defendant had expended resources) *Fractionated Cane Technology Ltd v Ruiz-Avila* [1988] 1 Qd R 51. These were trade secrecy cases. For a suggestion that in the privacy context later notice perhaps should suffice, see Richardson M, "Breach of Confidence: Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law" (1994) 19 *Melbourne University Law Review* 673 at 699.

61 Compare *Attorney-General v Heineman Publishers Australia Pty Ltd* (1987) 19 NSWLR 86, McHugh JA at 189-190.

62 As suggested in *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143, Lord Denning MR at 148, although receiving scant support in later cases. But see *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1991) 28 FCR 291, Sheppard, Wilcox and Pincus JJ at 304.

63 See, for instance, information blurted out (*Seager v Copydex Ltd* [1967] 1 WLR 923 (the obligation was found)); and above, n 60.

purposes of assessing a competitor's generic product, the defendant's purposes prevailed over the plaintiff's claimed interest to prevent the use. But, since the plaintiff had apparently not been clear that the use was precluded,[64] the result could be explained on the basis of what "the reasonable person standing in the shoes of the recipient" would have understood: that is, the Megarry J test in *Coco*.[65] In any event, there was a clear public interest here in facilitating efficient processes within the Department and an absence of any overriding public interest in support of the plaintiff whose patent protection had expired: arguably the issue should have been dealt with under the public interest exception to breach of confidence.[66] (But Gummow J at first instance had ruled this out on the basis that the exception did not exist.)[67] A third possibility is that the case should be narrowly confined to its facts, involving the submission of confidential test data to a government authority pursuant to a statutory obligation. This seems to have been the approach of the Australian Government, which recently passed legislation delineating the scope of security of such submissions, implementing terms of the TRIPS Agreement.[68]

[1215] Subject to those comments, the circumstances in which information can be imparted "in confidence" (and the scope of the obligation) are many and various. Whether an obligation is agreed, or can reasonably be imposed, depends on all the circumstances of the disclosure — including what the parties said, or did not say, their conduct in dealing with the information and each other, as well as the broader factual context.[69] The nature of the information and the relationship between the parties can be very important here. For instance, in *Coco* Megarry J gave the example of information revealed in the context of proceeding

64 See *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1991) 28 FCR 291, Sheppard, Wilcox and Pincus JJ at 304.

65 Compare Gummow J at first instance: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 at 95.

66 See further, for this argument, Voon T, "Breach of Confidence by Government, Smith Kline and the TRIPs Agreement: Public Interest to the Rescue" (1998) 9 *Australian Intellectual Property Journal* 66.

67 *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 110-111.

68 See *Therapeutic Goods Legislation Amendment Act* 1998 (Cth), Sched 1; *Primary Industries and Energy Legislation Amendment Act* 1998 (Cth), Sched 1 (amending the *Agricultural and Veterinary Chemical Codes Act* 1994 (Cth)), both implementing the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Appendix 1B, Agreement of the GATT Uruguay Round, 1994, Article 39(3).

69 See, generally, *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, McHugh JA at 189.

towards an "avowed common object" (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 48). This seems especially relevant to in the trade secrecy and confidential idea context, since there information is often disclosed in order to negotiate a contractual licence or joint venture arrangement.[70] *Talbot v General Television Corp Pty Ltd* [1980] VR 224, where the plaintiff submitted his proposal for a television series (about millionaires acquiring their wealth) to executives of the Channel 9 television network and met with them about it, only later to find the idea used without, as he intended, involving him is a case in point. The information was treated as disclosed (and received) in confidence (Harris J at 230-231). An equitable obligation may also readily be found when the defendant came to know the information as a result of her or his previous employment,[71] or the information was obtained in the context of a fiduciary relationship (although fiduciary obligations — being stricter than any confidentiality obligation when they apply — mostly cover the field).[72]

More generally, claims of imparting "in confidence" with respect to private information seem to be readily accepted *vis-à-vis* recipients of disclosures. Here, both the special nature of the information as "private" and the social value placed on the types of relationship in which the information is typically revealed (friendship, familial relationships, professional including fiduciary relationships of trust, and so on)[73] would appear to be important.[74]

70 See, for instance, information disclosed in order to arrange contract for manufacture (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 ([1963] 3 ALL ER 413, note)); information disclosed in hope of commercial scale production contract, although in the end held non-confidential (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41); information disclosed for commercial patenting purposes (*Seager v Copydex Ltd* [1967] 1 WLR 923); information disclosed to prospective Australian licensee; (*Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414) (marketing information disclosed to a prospective Australian licensee — although in the end this seemed to be insufficiently confidential for protection nor really disclosed on that basis). See also *Talbot v General Television Corp Pty Ltd* [1980] VR 224, discussed next.

71 Although this is subject to countervailing considerations of the ex-employee's entitlement to draw on her or his "skill, experience or knowledge": see below, para [1222].

72 See, for instance, company director (*Boardman v Phipps* [1967] 2 AC 46); professional adviser (*Bolkiah v KPMG* [1999] 2 AC 222) discussed further below, para [1219].

73 See, for instance, marriage secrets and the sanctity of the marriage relationship (*Argyll v Argyll* [1967] 2 Ch 302); Aboriginal tribal secrets and the tribal nexus (*Foster v Mountford & Rigby Ltd* (1976) 29 FLR 233); and deeply personal revelations, concerning a lesbian relationship and the murder of one of the parties by the husband of the other, disclosed in the context of a friendship (*Stephens v Avery* [1988] 2 ALL ER 477).

74 Compare Wright S, "Confidentiality and the Public/Private Dichotomy" [1993] 7 *European Intellectual Property Review* 237.

Surreptitiously or improperly obtained information

[1216] As already noted,[75] the scope for an obligation to arise outside the scenario of information imparted in confidence is a matter of some controversy. In the early case of *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475, Swinfen Eady LJ identified surreptitious or improper obtaining as giving rise to an obligation of confidence, a statement echoed recently by Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at 11.[76] And in *Saltman Engineering* (1948) 65 RPC 203 Lord Greene MR (at 213) referred broadly to information "directly or indirectly obtained from a plaintiff" as the basis for the obligation, a notion reflected also in Deane J's reference in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 438[77] to the obligation of conscience arising "from circumstances in which the information was communicated or obtained". By contrast, Megarry J's formulation of the "normal" elements of the doctrine in *Coco* [1969] RPC 41 at 47 could be taken to imply that the information must almost invariably be imparted in confidence in order for an obligation to arise. The latter interpretation was further reinforced by *Malone v Metropolitan Police Commissioner* [1979] Ch 344 where Megarry VC dismissed the plaintiff's claim for breach of confidence brought against the police who had mounted a lawful telephone tap, in the process making clear that (in his view) any protection the doctrine might offer against eavesdropping would be limited at best (Megarry VC at 376). Nevertheless, some five years later in *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 the UK Court of Appeal made it clear that breach of confidence could be claimed on the basis of surreptitious obtaining, with *Malone* distinguished on the basis that in the case at hand the telephone tap (instigated by a newspaper) was unlawful. And in the earlier Australian case of *Franklin v Giddins* [1978] Qd R 72[78] (a case of some authority, notwithstanding it was decided on an interlocutory application by a single judge Queensland court)[79] breach of confidence was found after nectarine budwoods were stolen from the plaintiffs' orchard and then developed for commercial use in competition with the plaintiff. Dunn J said:[80]

75 See especially discussion above, paras [1206] and [1212].

76 See also *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J at 50.

77 See also; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 86.

78 Compare *Linda Chih Ling Koo v Lam Tai Hing* (1992) 23 IPR 607.

79 The case, although curiously rarely cited, is noted with approval in *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Callinan J at 86.

80 For a critical analysis, see Stuckey J, "The Equitable Action for Breach of Confidence: Is Information Ever Property?" (1981) 9 *Sydney Law Review* 402 at 429-430.

> "I find myself quite unable to accept that a thief who steals a trade secret, knowing it to be a trade secret, with the intention of using it in commercial competition with its owner, to the detriment of the latter, and so uses it, is less unconscionable than a traitorous servant. The thief is unconscionable because he plans to use and does use his own wrong conduct to better his position in competition with the owner, and also to place himself in a better position than that of a person who deals consensually with the owner."

Should *Francome* and *Franklin* be taken to imply that liability for unauthorised obtaining (and use) may exist only where some other law is breached?[81] Alternatively, must the focus be on the surreptitious, in the sense of secretive, character of the obtaining — as Jacob J suggested in the recent case of *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138? Or might the concept of surreptitious *or improper* obtaining (Swinfen Eady J's expression in *Lord Ashburton v Pape*) cover more than either of those situations? The issue is not yet resolved. But the formulation in *Franklin*, where Dunn J's particular objection was the "unconscionability" of the defendant's conduct, may be taken to support a flexible rather than narrowly circumscribed approach.[82] A flexible approach is also consistent with Australia's compliance with the TRIPs standard for protection of "undisclosed information", which mandates "honest commercial practice" as the legal benchmark for the treatment of trade secrets and confidential ideas.[83] Whether it goes as far as may be suggested by Lord Goff's obiter statement in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281 that a confidentiality obligation may arise when confidential information "comes to the knowledge of a person — in circumstances where he has notice, or is held to have agreed" that it is confidential, with the effect that the obligation "would be just in all the circumstances" is another question. Lord Goff added (at 281):

81 See Wei G, "Surreptitious Taking of Confidential Information" (1992) 12 *Legal Studies* 302. This seems unlikely given the recent developments: see n 84.

82 See also references to conscience in cases cited above, n 77 and para [1202] (and for a suggestion that "unconscientiousness" rather than "unconscionability" may be the preferable term see *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Gummow and Hayne JJ at 28). See also generally Richardson M, "Breach of Confidence: Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law" (1994) 19 *Melbourne University Law Review* 67.

83 See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Appendix 1B, Agreement of the GATT Uruguay Round, 1994, Article 39(2) and especially n 10 (for examples of honest commercial practices (including, but not restricted to, breach of contract and confidence with respect to information imparted in confidence)).

> "I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties … [But] a duty of confidence may arise in equity independently in such cases, and I have expressed the circumstances in which the duty arises in broad terms … to include certain situations, beloved of law teachers ... where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in some public place, and then picked up by some passer-by."

Certainly, these examples would seem to encompass more than simply unlawful or surreptitious obtaining.[84]

Third party obligations

[1217] Third parties may find themselves subject to confidentiality obligations in several ways[85] — for instance, because of their direct contribution and participation in another's breach of confidence;[86] or as the employer or principal of the breaching party (making them vicariously liable for the breach); or simply because they obtain confidential information in breach of another's obligation. In the last case notice is all-important to establishing the third party's obligation.[87] But even later notice will suffice if it occurs before the information is used. So, for instance, in *Talbot v General Television Corp Pty Ltd* [1980] VR 224, Harris J at 239-241 it was held that the third party defendant, the Melbourne company in the Channel 9 television network, could be prevented from airing a television program the theme of which was based on the plaintiff's idea disclosed to the New South Wales company in the network, even though it was only notified of the plaintiff's claim when the proceedings were

84 Compare Fenwick H and Philipson G, "Confidence and Privacy: A Re-examination" (1996) 55 *Cambridge Law Journal* 447. In practice, however, successful claims have involved an element of surreptitiousness in the obtaining: see, for instance, surreptitious photographing of promotional film shoot involving the popular musical group Oasis (*Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1, Lloyd J at 7-8). See also surreptitious photographing of a celebrity wedding — although on the interlocutory application the balance of convenience favoured the defendant (*Douglas v Hello! Ltd* [2001] 2 WLR 992); "surreptitious ... covert photography" of a supermodel leaving a Narcotics Anonymous meeting (*Campbell v MGN Ltd* [2002] EWHC 499 (QB).

85 See generally Gurry F, *Breach of Confidence* (Clarendon Press, Oxford, 1984), ch 14.

86 For a recent case, see *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1976] FSR 629.

87 See, for instance, *Fraser v Evans* [1969] 1 QB 349, Denning LJ at 361; *Butler v Board of Trade* [1971] Ch 680, Goff J at 690; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, Megarry VC at 361; *Talbot v General Television Corp Pty Ltd* [1980] VR 224, Harris J at 239-240; *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, Lord Griffiths at 272; Lord Goff at 281; *John v Australian Securities Commission* (1993) 178 CLR 408, Gaudron J at 460.

instituted. Such results are sometimes thought to be insensitive to third party arguments that they were innocent at the time they acquired information, and may have incurred costs in doing so — as in *Wheatly v Bell* [1982] 2 NSWLR 544, Yeldham J at 549-550 where the third party had paid valuable consideration for the information under a franchise contracts without suspecting the information had been given in breach of confidence: the obligation was still found once notice was given. It has been suggested that the solution lies with a flexible approach to the equitable remedies, which can be modified to take account of the defendant's hardship.[88]

Continuation of the obligation and the "springboard doctrine"

[1218] How long an obligation of confidence, once established, may last depends on the terms of the obligation as incurred, whether there is a subsequent release (which must be given by the person to whom the obligation is owned),[89] and the extent to which the information remains confidential.

The last is often particularly important in practice. Sometimes it is said that the obligation functions to prevent the defendant gaining a "springboard",[90] implying that once confidentiality ends so naturally does any obligation to respect confidentiality. In *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 Roxburgh J argued (at 392), to the contrary, that a confidentiality obligation might continue, "even when all the features have been published or can be ascertained by actual inspection by any member of the public". But the legal basis of that conclusion is questionable. Certainly, there is nothing in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, the case on which Roxburgh J relied in *Terrapin*, to support the conclusion (in fact, there it was accepted that, had the defendant reverse engineered the plaintiff's tools which were on the market to discover the secrets, that would have been the end of its obligation) (Lord Greene MR at 215). And post-*Terrapin*, it is quite commonly accepted that the ability to claim continuing rights and obligations with respect to confidential information lasts only so long as the information is secret except

88 Stuckey J, "The Liability of Innocent Third Parties Implicated in Another's Breach of Confidence" (1981) 4 *University of New South Wales Law Journal* 73 at 75-80.

89 See *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752 where the obligation was purportedly released, but not by the Crown to whom it was owed

90 See *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 47 referring to *Seager v Copydex Ltd* [1967] 1 WLR 923.

in very special circumstances,[91] and this is particularly the case for trade secrets and confidential ideas where generally pragmatic commercial considerations govern.[92]

Breach of confidence

[1219] Normally, as Megarry J said in *Coco*, breach of confidence is premised on unauthorised use (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48). Likely use would also suffice in a *quia timet* action.[93] (In the UK case of *Bolkiah v KPMG* [1999] 2 AC 222 simply a "real risk" of unauthorised use was considered enough by the House of Lords, but the fact that the defendant was a former professional adviser in a fiduciary relationship with the plaintiff appears to have been central to that conclusion. (especially Lord Millett at 236-237))[94] The broad principle is that a person "who has received information in confidence shall not take unfair advantage of it" (*Seager v Copydex Ltd* [1967] 2 All ER 415, Lord Denning at 417).[95] Use of a material part will therefore suffice: it is not necessary that the whole or even the essential elements should be taken.[96] Further, even preliminary investments or preparatory steps taken to exploit the information will be sufficient: as, for example, in *Speed Seal Products Ltd v Paddington* [1986] 1 ALL ER 91, where a patent

91 As, for instance, in *Speed Seal Products Ltd v Paddington* [1986] 1 ALL ER 91 where the defendant, who published the information by applying for a patent, was the plaintiff's main competitor. *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289 is a further exception: third party patent publication did not protect the defendant, a senior company employee (and possible fiduciary?) who had kept that from his employer, from liability for breach. Similarly the nefarious conduct of Peter Wright, the author of *The Spycatcher* led at least some members of the House of Lords to suggest (obiter) that he should be subject to a life-long obligation of confidence: *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, Lord Keith at 264; Lord Brightman at 265; Lord Griffiths at 280; Lord Jauncy at 293 (Lord Goff dubitante at 288): the House of Lords confirmed the position in the case of another British secret service employee, termed a "quasi-fiduciary" and subject to an indefinite confidentiality contract in *Attorney-General v Blake* [2001] 1 AC 268. The remedy granted was an account of profits (not the injunction sought by the plaintiff).

92 See, for instance, publication in a patent: *O Mustad & Son v Dosen* [1963] 3 ALL ER 416 and *Franchi v Franchi* [1967] RPC 149. See also *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, Laddie J at 401 (suggesting that if there is an unfair benefit to a defendant, this can generally be compensated through the remedies). As to remedies, see further below, paras [1224]-[1227].

93 See also *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 87.

94 The Australian position is less clear: see, for instance, *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 207, Gummow J at 230; *Carindale Country Estate Pty Ltd v Astill* (1993) 42 FCR 307, Drummond J at 118-119. For a New Zealand approach (the Court of Appeal finding no breach) see *Russell McVeagh McKensie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641.

95 See also (Privy Council of New Zealand) *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594, Henry J at 599-600.

96 See, for instance, *Amber Size & Chemical Co Ltd v Menzel* [1913] 2 Ch 239.

application became the basis of the successful claim, and *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 16 IPR 27, where the purchase of property to establish a mine after the plaintiff's report showing the presence of gold reserves was sufficient for breach to be found. Nor need the use entail publication of the information. Publication may have been Lord Goff's focus in *Guardian Newspapers*,[97] when it was observed that the effect of the duty of confidence is that the party subject to the obligation "should be precluded from disclosing the information to others". But Lord Goff's particular interest in the doctrine was with respect to private information and government secrets, where avoiding publication is generally the plaintiff's concern. In the trade secrecy and confidential idea context, preventing unauthorised exploitation is more likely to be the plaintiff's concern and even a defendant may prefer that the information does not fully reach the public domain (so can be exploited as confidential information).[98]

Can the circumstances in which confidential information is acquired give rise to an action for breach of confidence, irrespective of use? The standard formulations of the doctrine do not account for this and it is certainly not within the "normal" scenario presented in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, Megarry J at 48. Yet it is conceivable that an action could be brought on this basis. TRIPs, for instance, talks of protection extending within its domain against any acquisition, disclosure or use of "undisclosed information" that is contrary to honest commercial practice;[99] and if trade secrets and confidential ideas have that protection so logically should private information and government secrets.

Independent development and reverse engineering

[1220] There is no breach of confidence if the same or equivalent information is independently developed and then used. Reverse engineering of a product on the market to determine its "secrets" seems also not to be covered.[100] The second is a potentially

97 [1990] 1 AC 109, Lord Goff at 281.

98 As, for instance, in trade secret cases *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Seager v Copydex Ltd* [1967] 1 WLR 923; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; and the confidential idea case *Talbot v General Television Corporation* [1980] VR 224. The facts are discussed above.

99 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Appendix 1B, Agreement of the GATT Uruguay Round, 1994, Article 39(2).

100 See, for instance, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, Lord Greene MR at 215) (reverse engineering would be permitted of tools on the market); *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138, Jacob J at 148-151 (de-encryption of the plaintiff's EEPROM used in its coin-changing machines not a breach of confidence).

significant restriction on the scope of protection available to trade secrets in particular.[101] However, arguments that there has been independent development are often viewed with scepticism. For instance, in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*,[102] the claim was that the defendant's manager had, after viewing the plaintiff's confidential design drawings, developed his own design independently. Roxburgh J said that his mind "must have been saturated with every detail of [the] design, features and methods of construction" (at 390).[103] Again, in *Talbot v General Television Corp Pty Ltd* [1980] VR 224, the defendant claimed it had not used the plaintiff's idea for a television program, but developed its own similar idea. This, again, seemed quite implausible. The program (about how millionaires made their money) embodied the plaintiff's detailed proposal, the proposal had been discussed with executives at the television network, and there had been communication with those involved in the so-called independent project. In the circumstances, the defendant could only argue that the plaintiff's idea had been "forgotten", an argument that Harris J held was insufficient to avoid liability for breach of confidence (even assuming it to be true in the case) (at 238-239).

The need to show detriment

[1221] In *Coco*, Megarry J suggested that "normally" detriment should be shown in addition to unauthorised use, although subsequently doubting whether the requirement should be regarded as absolute (*Coco v A N Clark (Engineers) Ltd* [1969] 41 at 48). In fact, as already indicated, there is no objective "detriment requirement" (outside the context of government secrets, as noted below). In effect, detriment seems to be something to be subjectively assessed and experienced and is easily found to exist, once the other elements of the action are established, from the fact of the claim brought by the plaintiff. This became clear in Australia after *Moorgate Tobacco*[104] where Deane J indicated that any "substantial concern" the plaintiff might feel would be sufficient to ground an action for breach of confidence. In *Smith*

101 See generally Reichman J, "Legal Hybrids Between the Patent and Copyright Paradigms" (1994) 94 Col L Rev 2432.

102 (1959) [1967] RPC 375, affd *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128 (CA).

103 See also *Seager v Copydex Ltd* [1967] 1 WLR 923 (recipient of confidence unable to argue that information had been independently developed, given the very specific nature of the confidence and the circumstances of disclosure).

104 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2) (*1984) 156 CLR 414, Deane J at 438.

105 *Smith Kline & French Laboratories v Secretary, Department of Community Services & Health* (1990) 22 FCR 73 at 111-112; judgment affd on appeal (1991) 28 FCR 291.

Kline & French Laboratories[105] Gummow J arguably went further, suggesting "the obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his right to observation of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss."

Where the alleged breach of confidence concerns government secrets the plaintiff must show that detriment (or likely detriment), in an objective sense of harm to the public interest, would follow from the publication.[106] As Mason J explained in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51-52:[107]

> "The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to the standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles."

It was also held in that case that preventing public discussion and criticism can "scarcely be a relevant detriment" although prejudice to "national security, relations with foreign countries or the ordinary business of government" might be.[108] Subsequent cases indicate that, even if publication would result in a relevant detriment, this may be outweighed by the public interest in knowing the information (facilitating informed public discussion and debate as to the workings of government).[109] The issue of countervailing public interest, and the balance of interests, may also be raised under the *aegis* of the public interest exception.[110]

106 See further, observing that the policy for government secrets should be "openness, not — burgeoning secrecy", Finn P, "Confidentiality and the Public Interest" (1984) 58 *Australian Law Journal* 497 at 505.

107 See also *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752, Lord Widgery CJ at 770; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, Street CJ at 101-102; Kirby P at 152; McHugh JA at 191-192; *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, Lord Keith at 256; Lord Brightman at 267; Lord Griffiths at 270; Lord Goff at 282; Lord Jauncey at 293.

108 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J at 54-59.

109 See, for instance, information regarding the process for determining gas prices through arbitration (*Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, Mason CJ at 31-32).

110 See further below, para [1223].

Defences and Exceptions

Sui generis defences/exceptions

[1222] There are various defences and exceptions to breach of confidence. Many are quite closely tailored in their scope and operation[111] and serve specific policy ends. For instance, the fact that there is no special privilege for confidential information in the context of court proceedings (although the normal privileges may apply)[112] is intended to promote the interests of justice in full and fair resolution of civil disputes and criminal matters. Similarly, the recognition of an ex-employee's right, under certain circumstances, to make use of the "skill, experience and knowledge" gained through the past employment in her or his future work,[113] can be explained in terms of a policy supporting mobility of labour and freedom of competition as something, at least, to be balanced against the ex-employer's interests in maintaining confidentiality.[114] (Here even a contractual stipulation for confidentiality may be revisited or read down on the basis of restraint of trade.)[115]

The public interest exception

[1223] The controversial "public interest exception" has a more general character than the defences/exceptions discussed above.[116] Its origins are found in the statement of Wood VC in *Gartside v Outram* (1856) 26 LJ Ch 113 at 114 that "there is no confidence as to the disclosure of iniquity". Some Australian courts have questioned whether the exception is (or should be) any broader than that, and even whether there properly is an exception (as opposed to a threshold requirement for information to be

111 See further Richardson M, Subtitle 23.6, "Intellectual Property" *The Laws of Australia* (Law Book Co, Sydney, 1993-) , paras [39]-[44].

112 See, for instance, the public interest privilege relied on in a case concerning the confidentiality of an informant's identity, on the basis that the Society relied on confidential informants (*D v National Society for the Prevention of Cruelty to Children* [1978] AC 171).

113 Per Goulding J in *Faccenda Chicken Ltd v Fowler* [1985] 1 ALL ER 724 at 731; appr on appeal [1987] 1 Ch 117, Neill LJ at 133-134. See also *Printers & Finishers Ltd v Holloway* [1964] 3 ALL ER 731, Cross J at 734-735; *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, Gleeson CJ at 329, Kirby P at 333-334, Samuels JA at 339-340; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, Laddie J at 370.

114 See generally Richardson M, Subtitle 23.6, "Intellectual Property" *The Laws of Australia* (Lawbook Co, Sydney, 1993) , paras [42]-[44].

115 See *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 (covenant written down under the *Restraint of Trades Act* 1976 (NSW)); and generally Stewart A, "Confidential Information and the Departing Employee: The Employer's Options" [1989] 11 *European Intellectual Property Review* 88.

116 See further Cripps Y, *The Legal Implications of Disclosure in the Public Interest* (2nd ed, Sweet & Maxwell, London, 1994).

protected).[117] But others, including Mason J in the High Court, have followed the UK courts in treating it as now extending beyond misconduct to cover other circumstances in which there is an overriding "public interest" in public disclosure.[118] As Mason J observed in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 57:

> "It makes legitimate the publication of confidential information ... so as to protect the community from destruction, damage or harm. It has been acknowledged that the defence applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public."

That there is now High Court authority for an implied constitutional freedom of political discussion, providing a basis for construing (and if necessary superseding) the "unwritten law" to operate in conformity, may ultimately help resolve the residual uncertainty as to a public interest exception to breach of confidence.[119] For instance, in the *Lenah Game Meats* case Gleeson CJ not only referred to the implied freedom as mandatory, but also cited with agreement Laws J's statement in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807 that "it is, of course, elementary" that (in a case involving a picture taken with a telescopic lens of someone engaged in a private act) a defence based on the public interest could be available (*ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 11-12).

Less clear, though, is the public interest exception's possible application, if any, to the use of information not entailing

117 See especially *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, Gummow J at 452; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 110-111; affd on appeal without discussion of the issue: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1991) 28 FCR 291. For the so-called iniquity threshold requirement see the brief reference above, para [1211].

118 See, for instance, *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J at 57 and, for a broader approach still (favouring the UK approach of the 1970s-1980s), *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, Kirby P at 170-171. See also (although less clearly) *Esso Australia Resources Ltd v Plowman (Minister for Energy and Resources)* (1995) 183 CLR 10, Mason CJ at 31-32 For the current UK authorities, which have moved away from the high period of the 1970s-1980s in insisting that a demonstrable public interest in favour of publication be established, see, for instance, *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, Templeman LJ at 347; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, Donaldson MR at 413; *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417, Stephenson LJ at 422-423.

119 See further Richardson M, "Freedom of Political Discussion and Intellectual Property Law in Australia" [1997] 11 *European Intellectual property Review* 631.

publication where deemed to be in the public interest. To date the issue has not been considered, suggesting the defence may be of limited relevance outside the privacy and government secrets domains. On the other hand remedies for breach provide an alternative mechanism for balancing interests.[120]

Remedies

[1224] The general principles that apply to equitable remedies are discussed in other chapters of this book (see especially Part V), so will not be repeated here. However, some brief comments are warranted regarding aspects of particular relevance to breach of confidence: first, flexibility of remedies to take into information falling into the public domain and partly public, partly private information; secondly, distinctions between the various monetary remedies for breach of confidence; and, thirdly, the constructive trust remedy for breach of confidence.

Flexibility of remedies: information falling into the public domain and partly public, partly private information

[1225] In most breach of confidence cases an injunction will be sought to prevent any future breaches and, if the claim is made out, normally this will be granted.[121] However, there is exception for cases where the information is no longer confidential (then it normally is considered impracticable to order an injunction for the future — the plaintiff left only with the possibility of monetary remedies being awarded).[122] Also, as Megarry J said in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 49, courts may adopt a flexible approach to remedies where information is likely to remain confidential for a limited time only, or the information used by the defendant is "partly public, partly private". Here, an injunction on limited terms or even simply a monetary remedy may be preferable to an open-ended injunction (especially where purely commercial interests are concerned).[123] An example is *Seager v Copydex Ltd* [1967] 1 WLR 923. The plaintiff was able to

120 See especially below, para [1225].

121 Interestingly, this seems to be assumed even for breach of contract (ie, a specific performance remedy, equivalent to an injunction, identified as appropriate where damages are inadequate): see *Attorney-General v Blake* [2001] 1 AC 268, Lord Nicholls at 282.

122 See above, para [1218].

123 So as Megarry J said, in these cases "the essence of the duty seems more likely to be that of not using without paying rather than not paying at all": *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41at 50.

claim breach of confidence, albeit part of the information used by the defendant came from the public domain but the remedy was limited to "damages" calculated on the basis of "reasonable" compensation for the use of the confidential information.[124] Lord Denning MR suggested this remedy would be sufficient to prevent the defendant gaining any unfair advantage:

> "At any rate he should not get a start [over others] without paying for it. It may not be a case for injunction but only for damages, depending on the worth of the confidential information to him [for example, the defendant] in saving him time and trouble." (*Seager v Copydex Ltd* [1967] 1 WLR 923 at 932 (CA))

Another example is the recent Canadian case of *Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 577 where a former licensee of the plaintiff was held in breach of confidence in using the plaintiff's secret recipe to develop a competing Canadian product but the remedy was restricted to "equitable compensation" calculated on the basis of a year's licence fee, on the assumption it would have taken only a year for the information to be independently developed.[125]

Although the principles for the monetary award of compensation appear to be consistent as between the above two cases,[126] the different language of, on the one hand, "damages" and "equitable compensation" raises the question of the precise basis of such an award in equitable breach of confidence cases.

Characterisation and calculation of monetary remedies

[1226] It has been suggested that, although common law damages are not available for breach of the equitable obligation of confidence, equitable damages are available under the *Lord Cairns*

124 For the assessment see further *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, especially Lord Denning MR at 919-920.

125 Note especially the discussion of Binnie J at 605-607 and 609.

126 See also obiter comments of Lord Nicholls in *Attorney-General v Blake* [2001] 1 AC 268 at 281: "The measure of damages awarded in this type of case is often analysed as loss of bargaining opportunity or, which comes down to the same, the price payable for the compulsory acquisition of the right". In both *Seager v Copydex* and *Cadbury-Schweppes* a distinction was drawn between "special" and "not very special" information, in the second case entailing a standard consultants' fee only, in the first case necessitating closer attention to what a willing buyer and willing seller might have agreed. But in fact both tests seem designed to calculate the plaintiff's "loss of bargaining opportunity", as Lord Nicholls points out.

Act.[127] The alternative view is that equitable compensation is the more appropriate award.[128] However, as noted before, the principles of assessment appear to be much the same regardless of the precise characterisation. As Lord Browne-Wilkinson pointed out in *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 438-439, compensatory remedies are "designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered ... and which, using hindsight and common sense, can be seen to have been caused by the breach". More specifically, at least in breach of trade secret and confidential idea cases, the amount of appropriate compensation is to be determined by reference to the plaintiff's loss of bargaining opportunity.[129] The passing comment by Lord Denning MR in *Seager v Copydex Ltd (No 2)* that compensation should be assessed by analogy with common law damages for conversion of chattels[130] need not be overstressed. Given that the analogy between information and physical property is a weak one (in particular, unlike physical property, information is not used up when it is "used"), the notion that the loss of the value of information is equivalent to loss of a chattel is not entirely accurate.

As an alternative to seeking compensation for loss, a plaintiff may instead turn to an account of profits as the desired remedy. It is accepted that the purpose of the account is to strip the defendant of its ill-gotten gains. But the practical issues of how to take an account when much of the relevant information may be under the defendant's control and the appropriate accounting method to be used means that this remedy is less commonly sought in practice than might otherwise be supposed.[131] *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101, a patent infringement case, provides some limited guidance on the latter issue. The High Court held that the account should encompass profit arising from the defendant's use of the information after deduction of marginal costs as well as a

127 See *Talbot v General Television Corporation* [1980[VR 224, Harris J at 250-253; *Attorney-General v Blake* [2001] 1 AC 268, Lord Nicholls at 281. "Damages" also seems to have been assumed to the term for the remedy in *Seager v Copydex Ltd* [1967] 1 WLR 923 and *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718. Although query whether any real thought was given by Lord Denning MR in that case to the precise jurisdictional basis for the award.

128 See, for instance, (although the arguments are not exactly the same) Stuckey-Clark J, "'Damages' for Breach of Purely Equitable Rights: The Breach of Confidence Example" in P Finn (ed), *Essays on Damages* (Law Book Co, 1992), ch 4; Gronow M, "Damages for Breach of Confidence" (1994) 5 *Australian Intellectual Property Journal* 94. For some judicial support see *Cadbury Schweppes Inc v FBI Foods* (1999) 167 DLR (4th) 577.

129 See above, para [1225].

130 See *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, Lord Denning MR at 719.

131 See further Gronow M, "Restitution for Breach of Confidence" (1996) 10 *Intellectual Property Journal* 219.

proportion of general overheads directly attributable to the activity of using the information (at 110-114).[132]

Methods of calculation aimed at quantifying lost profit or recovering profit gained seem most appropriate where the information has a quantifiable commercial value. This is not to say that their value is restricted to the trade secret and confidential idea cases: even the privacy and government secret cases may entail a notional commercial loss or else a commercial profit on the part of the defendant which can be recovered through an account.[133] But, given that the plaintiff's interests here may have more to do with preventing publication than with reaping any reward from it, compensation for the plaintiff's "loss" calculated by analogy with tortious damages for personal injury, including allowance for pain and suffering, may be considered appropriate.[134] In turn, awards of account of profits may take on a more punitive air.[135]

Proprietary remedies and breach of confidence

[1227] The normal proprietary remedy for breach of confidence is injunction. But the constructive trust has been much discussed in breach of confidence cases (although not yet applied in Australia):[136] its precise basis and justification is still a matter of debate. One of the leading authorities is the Canadian case *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, where a constructive trust was imposed over a mine purchased and developed by the defendant after receiving (and using) confidential information from the plaintiff showing the presence of gold reserves. In the Canadian Supreme Court, La Forest J said (at 44-45):

132 For a comment see Blayney P and Wyburn M, 'The Remedy of Account of Profits in a Patent Infringement Action: The Difficulties of Determining a 'True' Product Cost" (1994) 5 *Australian Intellectual Property Journal* 81.

133 See, for instance, *Attorney-General v Blake* [2001] 1 AC 268 where an account of profits was awarded for breach of a government secrecy contract by a former spy. For a similar result in a case involving a former member of the British UK Special Forces, see also *Attorney-General for England and Wales v R* (unreported, NZCA, 29 November 2001) (but an appeal to the Privy Council has been lodged).

134 See further Stuckey J, "The Equitable Action for Breach of Confidence" (1981) 9 *Sydney Law Review* 402.

135 Query whether this was a consideration for the awards in the cases noted above, n 133.

136 Although the possibility has been accepted: see, for instance, *Franklin v Giddins* [1978] Qd SR 78, Dunn J at 81; *Attorney-General v Guardian Newspapers* [1990] 1 AC 109, Lord Goff at 288; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, Laddie J at 401; *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Gummow and Hayne JJ at 29-30.

> "The issue then is this. If it is established that one party (here Lac), has been enriched by the acquisition of an asset, the Williams property, that would have, but for actions of that party been acquired by the plaintiff (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here … a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view, the constructive trust is one available remedy and in this case it is the only appropriate remedy."

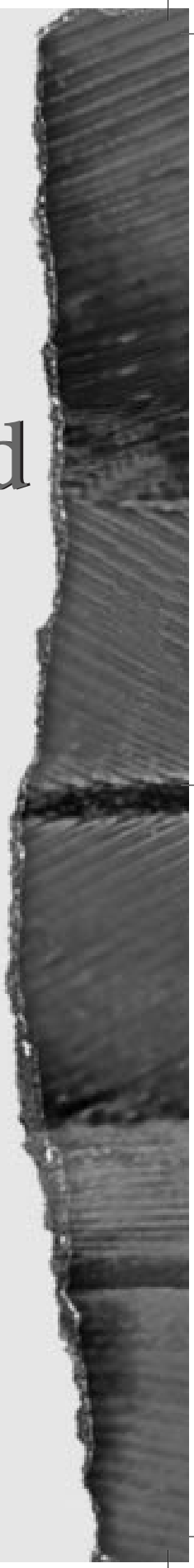
The constructive trust could potentially develop as a significant remedy in the future, especially where valuable assets are concerned. Nor is its application necessarily restricted to tangible property, albeit this was the application in the *Lac Minerals* case. In *ABC v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, Gummow and Hayne JJ (at 29-30) suggested that a cinematographic film made in breach of confidence may be the subject of a constructive trust as "an item of personal (albeit intangible) property, namely the copyright conferred by … the *Copyright Act* [1968 (Cth)]".[137] But the trust's unwieldy character, fixing over the entire property,[138] limits its appropriateness in cases where plaintiff and defendant interests are finely balanced.

137 Note, however, there was no suggestion here that confidential information itself could be the subject of a constructive trust, notwithstanding Gummow J's acknowledgment that confidential information could be treated as property for certain purposes in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73, Gummow J at 121.

138 Although in the *Lac Minerals* case Lac was permitted a lien on the "property to the extent that Corona was saved a necessary expenditure": (1989) 61 DLR (4th) 14, La Forrest at 53.

PART IV

Assurances and Assignments



CHAPTER THIRTEEN

EQUITABLE ASSIGNMENTS

Diane Skapinker

INTRODUCTION

[1301] There are many situations in which it is important to ascertain whether an owner has effectively assigned property, or an interest in property. Under the law of succession, it may be necessary to determine whether a deceased person assigned an item of property during her or his lifetime, or whether that property remains part of the deceased's estate. The law relating to bankruptcy or insolvency may require a determination as to whether a bankrupt person or an insolvent company effectively assigned property before the date of the bankruptcy or insolvency, or whether that property is still available for the benefit of creditors. In determining whether stamp duty is payable, it may be necessary to determine whether or not title to property has effectively passed. Or, it may be relevant for income tax or capital gains tax purposes to decide whether or not a taxpayer has effectively assigned property.

Before a determination can be made as to whether property or an interest in property has been effectively assigned, it is necessary to characterise the type of property in a number of ways. At the outset, it must be ascertained whether the relevant property is capable of being assigned at all. Although most property can be assigned legally, some property cannot. Examples of the latter include public pay, bare rights to litigate and rights under contracts for personal services.

This chapter will consider first, property which is capable of assignment, and, secondly, property which is incapable of assignment.[1]

Then, assuming the property is capable of assignment, the next step is to ascertain whether the property is recognised at common law (referred to as "legal property") or is recognised only in equity (referred to as "equitable property").[2] If the property is legal property, the common law or statute will lay down requirements for its assignment.[3] If those requirements are complied with, the property will be assigned legally and the legal title to the property will pass from the assignor to the assignee. It is, however, possible for an ineffective assignment of legal property nevertheless to be effective in equity. This means that, even though legal property may not have been properly assigned according to the common law or statutory rules, that assignment may still be recognised and enforced in equity.[4] The effect of such an assignment is that, although the original owner retains the legal title to the property, in equity, that legal title is seen as being held on trust for the transferee.

Conversely, if the property is equitable property, there obviously will be no common law formalities laid down for its assignment, since this type of property is not recognised by the common law. Rather, the requirements for a valid assignment of equitable property will be those imposed by courts of equity and, in certain circumstances, by statute. These requirements generally will be less onerous than those imposed by the common law for the assignment of legal property, equity being concerned more with the intent of a transaction than its form. If the assignment of equitable property complies with these equitable requirements, the assignment will be effective in equity.[5] The effect of

1 Assignments of property legally capable of assignment are discussed below, paras [1302]-[1356]. Property incapable of assignment is discussed below, paras [1372]-[1376]. As assignability is an essential characteristic of property, the question arises whether a right or interest that by its nature is not assignable can be characterised as property: *R v Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342; *Hepples v Federal Commissioner of Taxation* (1990) 22 FCR 1 at 25-26; *Best v Best* (1993) FLC 92-118; *B v B* (2000) FLC 93-002. In the last-mentioned case Moss J in the Family Court classified the non-assignable interest of a partner in a partnership as a personal right only. The Full Court of the Family Court declined to comment on this issue: [2000] FamCA 734. See also *Don King Productions Inc v Warren* [1999] 3 WLR 276 and *McGowan v Commissioner of Stamp Duties (Qld)* [2001] QCA 236.

2 Examples of equitable property include the interest of a beneficiary under a fixed trust, the interest of partners in a partnership, the equity of redemption of a mortgagor of old system title land, a purchaser of land's lien over property pending completion of the purchase, and a vendor of land's lien for the unpaid purchase price.

3 The legal assignment of legal property is discussed below, paras [1304]-[1308].

4 The equitable assignment of legal property is discussed below, paras [1309]-[1318].

5 Equitable assignments of equitable property are discussed below, paras [1319]-[1356].

this type of assignment is that, although the legal title to the property remains unchanged, equitable ownership in that property is transferred from the assignor to the assignee and the legal owner's ability to deal with the property is constrained by the existence of the equitable interest in the property.

There is also property that, although *legally* incapable of assignment, is assignable in equity. Parts of legal choses in action are examples of this type of property.[6]

A third form of property is known as future property. The common law does not recognise property which does not presently exist but which may only come into existence at some time in the future, or may only be acquired at some future date. However, equity recognises and enforces contracts dealing with such property. For this reason, future property is only capable of being assigned in equity.[7]

[1302] The assignment of property may take place consensually (for example, by contract or by will) or by operation of law (for example, according to the law of intestate succession, and, exceptionally, on frustration of a contract). It may also occur either for valuable consideration or by way of gift. Property may be assigned absolutely (where the owner parts with the full extent of her or his interest in the property), in part only (which occurs where the owner carves, out of her or his general ownership of the property, some lesser interest in the property) or by way of charge only (as security for a debt or obligation).

The term "transfer" is customarily used to describe the disposition of land and chattels, while the term "assignment" is used in relation to the disposition of choses in action. This chapter is primarily concerned with consensual transfers of personal property and, in particular, choses in action.

LEGAL PROPERTY CAPABLE OF ASSIGNMENT

[1303] The common law distinguishes between real property (land, realty) and personal property (chattels, personalty). Historically, leases were referred to as chattels real, a term that both reflects

6 Equitable assignments of parts of legal choses in action are discussed below, para [1357].

7 Assignments of future property are discussed below, paras [1358]-[1371].

the fact that leases were regarded by the common law as personal contracts (or chattels) only, rather than as interests in land, and simultaneously acknowledges their connection with land.

Personal property consists of either choses in possession (tangibles, corporeal property) or choses in action (intangibles, incorporeal property). Choses in possession are physical chattels such as books, motor vehicles and boats. On the other hand, a chose in action has been defined as:

> "a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession" (*Torkington v Magee* [1902] 2 KB 427, Channell J at 430).

Examples of choses in action include the right to receive performance of a contract, debts, shares in a company, copyrights and patents.

This chapter deals only with unilateral assignments of the benefits of contracts. Burdens of contractual obligations cannot be assigned without the consent of the other contracting party. As a general rule, where a third party assumes the contractual obligation of a contracting party, the appropriate mechanism is a novation of the contract.[8]

Legal assignments of legal property

[1304] Although this chapter is concerned primarily with equitable assignments of choses in action, the legal formalities for the assignment of all types of legal property are briefly discussed for the sake of completeness. For a detailed analysis of the legal rules relating to the assignment of legal property, real and personal, reference should be made to the standard works in those particular areas.

8 Novation is discussed below, n 21. See also *Don King Productions Inc v Warren* [1998] 2 All ER 608 at 631, affirmed on appeal: [1999] 3 WLR 276; *Konstas v Southern Cross Pumps and Irrigation Pty Ltd* (unreported, Fed Ct, Tamberlin J, 3 July 1996); *Riseda Nominees Pty Ltd v St Vincent's Hospital (Melbourne) Ltd* (unreported, SC Vic, Balmford J, 25 July 1996). An exception to this rule is found in the law of landlord and tenant which allows certain lease obligations to be assigned to third parties under the doctrine of privity of estate or by statute (for example, *Conveyancing Act* 1919 (NSW), ss 117 and 188). The principles relating to the assignment of leases are discussed by the New South Wales Court of Appeal in *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313. Leave to appeal to the High Court has been granted in this case.

Real property

[1305] All Australian States have statutory rules governing the transfer of real property (land).[9] Historically, because of the importance of land as a symbol of wealth and power, strict legal rules were developed for its transfer. Not only does the law require transfers of land to be in writing,[10] it goes further and requires that writing to take a particular form. As a general rule, where land is held under old system (or, common law) title, a conveyance[11] of that land, or an interest in that land, requires the delivery of a deed of conveyance from the assignor to the assignee.[12] In fact, formal words of assurance in the conveyance were also once required legally to convey a legal estate or interest in old system title land. Today, however, any words indicating an intention to convey land are sufficient for this purpose.[13] The legal interest in the land passes to the assignee upon delivery to the assignee of the deed of conveyance. A voluntary[14] conveyance of old system title land, in deed form, while not conferring upon the donee the protection of the doctrine of the bona fide purchaser for value (for the purposes of determining priorities between competing interests in the land), nevertheless conveys the legal interest in the land to the donee.

On the other hand, where the title to land is Torrens title, a legal transfer of the land, or an interest in the land, requires registration of an approved form of transfer.[15] With this type of land, the transferee acquires a legal interest in the land only upon registration of the transfer in the appropriate register established under the relevant Torrens statute. The nature of the

9 See below, n 12.

10 *Conveyancing Act* 1919 (NSW), s 23C; *Property Law Act* 1974 (Qld), ss 5, 9; *Law of Property Act* 1936 (SA), s 29; *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Property Law Act* 1958 (Vic), s 53; *Property Law Act* 1969 (WA), s 34. There is no equivalent legislation in the Territories.

11 The term "conveyance" is used to describe the transfer of old system title land.

12 *Conveyancing Act* 1919 (NSW), s 23B(1); *Property Law Act* 1936 (SA), s 28(1); *Conveyancing and Law of Property Act* 1884 (Tas), s 60(1); *Property Law Act* 1958 (Vic), s 52(1); *Property Law Act* 1969 (WA), s 33(1). In Queensland, the deed requirement has been replaced by the rule that there must be merely a written document signed by the person making an "assurance of land": *Property Law Act* 1974, s 10(1).

13 See, for example, *Conveyancing Act* 1919 (NSW), s 46.

14 "Voluntary" is used to mean without valuable consideration. The requirement of valuable consideration is discussed below, para [1310].

15 *Real Property Act* 1925 (ACT), ss 52, 57 and 58; *Real Property Act* 1900 (NSW), ss 40(1), 41 and 42; *Land Title Act* 1994 (Qld), ss 37, 60 and 62; *Real Property Act* 1886 (SA), ss 80, 67 and 69; *Land Titles Act* 1980 (Tas), ss 39 and 40; *Transfer of Land Act* 1958 (Vic), ss 41, 40(1) and 42; *Transfer of Land Act* 1893 (WA), ss 63, 58 and 68.

title of a registered volunteer of Torrens title land depends upon the construction of the relevant Torrens statute.[16]

Personal property (choses in possession)

[1306] The legal rules for the transfer of personal property are not as stringent as those for the transfer of land. In considering these rules, a distinction must be drawn between choses in possession (chattels) and choses in action.

Choses in possession may be alienated at law by any of the following methods:

- orally and by way of gift (without consideration), provided the gift is accompanied by delivery of possession of the chattel. Delivery in this context means actual or constructive delivery of the chattels; or
- by deed, without delivery of the chattels themselves, either for consideration or by way of gift; or
- by sale.[17]

Personal property (choses in action)

[1307] Unlike a chose in possession which is capable of physical possession, a chose in action is an abstract form of property. In order to understand the nature of a chose in action, it is important to draw a distinction between an incorporeal right to property and the corporeal property itself. For example, a bankbook, in one sense, is a chose in possession because it is corporeal and capable of being possessed. However, the bankbook also represents a debt that the bank owes to its customer, and it is this debt which is the incorporeal chose in action. Similarly, a share certificate is a chose in possession because it is capable of being possessed by a shareholder. But a

16 For example, in New South Wales, it has been held that upon registration of a transfer, even a donee acquires an immediately indefeasible title: *Bogdanovic v Koteff* (1988) 12 NSWLR 472. In Victoria, it would seem that registration confers upon a volunteer no better title than that possessed by her or his predecessor: *King v Smail* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613. Finkelstein J in the Federal Court in *Valoutin Pty Ltd v Furst* (1998) 154 ALR 119 at 136 noted in passing that in his view *King v Smail* correctly states the law. In Queensland, the controversy has been settled by s 165 of the *Land Title Act* 1994, which provides that the benefits of indefeasibility of title apply to all registered dealings, regardless of whether or not valuable consideration has been given. For an overview of this issue see Radan P, "Volunteers and Indefeasibility" (1999) 7 *Australian Property Law Journal* 197.

17 The requirements for the sale of chattels are contained in the Sale of Goods statutes in each of the Australian States and Territories: *Sale of Goods Act* 1954 (ACT), s 21; *Sale of Goods Act* 1923 (NSW), s 21; *Sale of Goods Act* 1972 (NT), s 21; *Sale of Goods Act* 1896 (Qld), s 19; *Sale of Goods Act* 1895 (SA), s 16; *Sale of Goods Act* 1896 (Tas), s 21; *Sale of Goods Act* 1958 (Vic), s 21; *Sale of Goods Act* 1895 (WA), s 16.

share certificate also represents a shareholder's interest in a company's assets. That interest, being incorporeal, is a chose in action.[18]

Unlike the position in relation to the transfer of choses in possession, originally the common law did not recognise the assignment of choses in action, treating them as mere possibilities (or future property).[19] This meant that if a creditor (C) wished to assign to a third person (A) a debt payable to C by a debtor (D), C would have to appoint A (by a power of attorney) as her or his agent to receive payment of the debt from D. If D defaulted in the payment of the debt to C, A could not sue D directly, there being no privity of contract between A and D: any action against D would have to be brought in the name of C. The common law, however, did permit a novation of the contract between C and D.[20]

It was not until the passage of s 25(6) of the *Judicature Act* 1873 (UK) that it became possible for choses in action to be assigned at law. This allowed A to sue D at law for the recovery of the debt. Today, all Australian States and Territories have statutory provisions permitting the assignment of choses in action.[21] Typical of these provisions is s 12 of the *Conveyancing Act* 1919 (NSW),[22] which allows an assignee of a legal chose in action to sue an assignor's debtor for breach of the chose in the assignee's own name.

Section 12 provides that:

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person

18 Other examples of choses in actions include the right of a patentee of a patent: *Stack v Brisbane City Council* (1996) 67 FCR 510 and the right of a contracting party to require another contracting party to renew the contract: *Riseda Nominees Pty Ltd v St Vincent's Hospital (Melbourne) Ltd* (unreported, SC Vic, Balmford J, 25 July 1996).

19 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J (dissenting) at 26.

20 Novation occurs when the contract between C and D is discharged and replaced by a new contract between A and D; it does not transfer D's liability to C with one owed to A but replaces D's liability from C to A. Windeyer J in *Olsson v Dyson* (1969) 120 CLR 365 at 388 noted that novation requires the three parties involved all to be parties to the transaction, whereas an assignment generally is effective without the assent or co-operation of the debtor.

21 *Conveyancing Act* 1919 (NSW), s 12; *Property Law Act* 1974 (Qld), ss 199, 200; *Law of Property Act* 1936 (SA), s 15; *Conveyancing and Law of Property Act* 1884 (Tas), s 86; *Property Law Act* 1958 (Vic), s 134; *Property Law Act* 1969 (WA), s 20. The *Law of Property (Miscellaneous Provisions) Ordinance* 1958 (ACT), s 3 applies the New South Wales provision to the Territory, while, in the Northern Territory, the *Property Act* 1860 (SA), s 19 is still in force.

22 Hereafter referred to as "s 12".

> from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor …"

If the formalities in s 12 are observed (namely, the absolute assignment is in writing, is signed by the assignor personally and notice of the assignment is given to the debtor or trustee), no consideration is required for a valid assignment of the chose in action.

[1308] There are, however, a number of qualifications relating to the assignment of choses in action under s 12. First, the assignee gets no better title to the chose in action than was possessed by the assignor. There is no scope for the doctrine of the bona fide purchaser of the legal estate for value and without notice in this context. Secondly, s 12 does not permit the legal assignment of *part only* of a chose in action. A part of a chose in action, however, may be assigned in equity.[23] Thirdly, the assignment must be absolute, in the sense that it must involve an outright transfer to the assignee of the title to the chose in action, and not be conditional or by way of security only.[24]

Where a legal chose in action is legally assigned, the assignee is entitled to sue to enforce the interest assigned in its own name and need not join the assignor as a party to the action. After service of the required notice,[25] the debtor or third party can

23 Equitable assignments of parts of legal choses in action are discussed below, para [1357].

24 Treitel G, *The Law of Contract* (10th ed, Sweet & Maxwell, 1999), p 624 notes that an assignment by A of rent due under a lease "to my daughter until she marries" is not an absolute assignment because A should be a party to any action brought by his daughter against the tenant for the rent. If the daughter could sue alone, she might be able to prove that she was unmarried and so entitled to the rent. However, this would not prevent A, in a subsequent action against the tenant, from proving that the court in the first action had made a mistake in finding that the daughter was unmarried, so that the tenant would have to pay over again. The tenant needs to know to whom it can safely pay the rent.

25 In *Westpac Banking Corporation v Market Services International Pty Ltd* (unreported, SC Vic, Batt J, 1 October 1996), p13 it was held that the required notice does not have to contain an express statement that the assignment is in writing or provide particulars of the assignment. Compare *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 58 at 564-567. A notice that fails to specify matters (such as the date of the assignment) but acquaints the debtor or third party with the fact that someone else is, or claims to be the assignee, will satisfy s 12 (although a notice that positively misstates those matters may not be valid): *Westgold Resources NL v St George Bank* (1998) 29 ACSR 396; (1998) 17 ACLC 327, affirmed *Phillips Fox (a firm) v Westgold Resources NL* [2000] WASCA 85.

safely perform the relevant obligation in favour of the assignee as the assignee is the person who can discharge the debt or chose in action (*Carob Industries Pty Ltd (in liquidation) v SIMTO Pty Ltd* [2000] WASCA 362).

Equitable assignments of legal property

[1309] Although an owner of legal property (C) may intend to assign the legal title to that property to an assignee (A), C may unintentionally fail to comply with the legal formalities required for an effective assignment of that particular type of property (such as the need for the assignment to be in writing, or for it to be in deed form).[26] This means that, despite C's intention to assign the property, C will remain its legal owner. However, as equity is concerned more with the substance of a transaction than its form, and with giving effect to the intention of the parties, C's informal assignment of legal property nevertheless may be enforceable in equity. In that event, although C might still hold the *legal* title to the property, C will be regarded in equity as holding that legal title for A. In effect, an equitable interest in the property, which did not exist prior to the informal assignment, is created out of C's legal ownership of the property.[27] The equitable enforcement of an informal assignment of legal property in this manner creates what is referred to in this chapter as an *equitable assignment* of the legal property.

When equity gives effect to an informal assignment of legal property, the assignor is regarded in equity as holding that property on trust for the assignee. The trust relationship between the assignor and the assignee arises because the informal assignment of the legal property is only enforced in equity. For this reason, the nature of the trust relationship that exists between the parties may be characterised as a type of constructive trust.[28]

26 A legal assignment that does not satisfy the formal legal assignment requirements is hereafter referred to an "informal assignment of legal property".

27 It is incorrect, however, to regard an owner of property as owning two distinct shares in the property, one legal and the other equitable: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694. The nature of equitable interests in property is discussed above, Chapter 3: "Equity and Property".

28 By contrast, where an owner of legal property declares a trust of that property for certain beneficiaries, it is the owner's intention from the outset to create a trust relationship. In this situation, the trust that arises from the declaration of trust may properly be described as an express trust.

Hope JA in the New South Wales Court of Appeal in *DKLR Holding Co (No 2) Limited v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510 at 519 described the nature of the relationship between the legal and beneficial owner of land as follows:

> "Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee in such a case has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for this own benefit in the way he could if no trust existed; equitable obligations require him to use them in some particular way for the benefit of other persons".

The question whether an informal assignment of legal property is enforceable in equity must be examined in two situations. In the first, valuable consideration is given for the informal assignment of legal property. In the second, the informal assignment of legal property is by way of gift.

Where there is valuable consideration

[1310] Equity places considerable importance on the payment of consideration. Where valuable consideration is given for an assignment of or an agreement to assign legal property, equity will give effect to the transaction despite the assignor's failure to comply with the requisite legal formalities.

In a situation where there is a purported immediate assignment of legal property for value that does not satisfy the requisite legal formalities, and consideration has been paid, equity regards the transaction as a promise (or contract) to assign the property. That contract is then enforceable in equity on the basis that equity treats as done that which ought to be done[29] (subject to any statutory requirements for writing).

The position is the same where, instead of the parties purporting (but failing) to make an immediate assignment of the property, they *agree to assign* the property for valuable consideration. This agreement will be effective in equity from the moment the

29 *Holroyd v Marshall* (1862) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 523. The equitable maxims are discussed above, Chapter 1: "The Historical Role of the Equitable Jurisdiction". See also Hopkins N, "Acquiring Property Rights from Uncompleted Sales of Land" (1998) 61 *Modern Law Review* 486.

consideration[30] is paid or executed[31] on the basis, once again, that equity treats as done that which ought to be done.

This means that the transaction may be enforced in equity should the assignor subsequently refuse to take any of the steps that he or she may be required to take in order to complete the legal assignment of the property (such as the execution of the transfer of the land or the production of a certificate of title or share certificate). This equitable intervention affects the title to the property of both parties. Although the assignor remains the legal owner of the property until the legal formalities for the assignment are satisfied, the legal owner is regarded in equity as a type of constructive trustee[32] of the property for the assignee whose ability to deal with the property is circumscribed by equitable obligations. Conversely, the assignee is regarded as the equitable owner[33] of the property.

The validity of the purported assignment for value is not dependent upon the factors relevant to the availability of specific performance of an executory contract. The reason equity gives effect to the assignment is because equity regards the legal owner who has received consideration for the property (or the promise to transfer the property) as obliged to complete the formal legal assignment of the property in the manner intended. In this context, the maxim that equity treats as done that which ought to be done has a sphere of operation that is independent of the

30 The consideration required for this purpose is the consideration required to support a simple contract. Although common law courts will not assess whether the consideration for a promise is adequate (as long as there is consideration), gross inadequacy of consideration may be relevant to the availability of the remedy of specific performance: see below, Chapter 17: "Specific Performance"; Carter J and Harland D, *Contract Law in Australia* (2nd ed, Butterworths, Sydney, 1991), paras [323], [326].

31 Agreements for the sale of land or chattels are bilateral agreements, in that they involve an exchange of mutual or reciprocal promises: each party bargains for the other's promise(s) as the consideration of her or his own promises. Where performance of any of those promises is not due at the time the agreement is made, the consideration provided is said to be executory in nature; where the promise is performed, the consideration is said to be executed: see Carter J and Harland D, *Contract Law in Australia* (2nd ed, Butterworths, Sydney, 1991), para [313].

32 *Lysaght v Edwards* (1876) 2 Ch D 499, Jessel MR at 507; *Shaw v Foster* (1872) LR 5 HL 321, Lord Cairns at 338; *Rayner v Preston* (1881) 18 Ch D 1; *Chang v Registrar of Titles* (1976) 137 CLR 177. However, the vendor's trusteeship is a modified or "qualified" trusteeship only: *Rayner v Preston* (1881) 18 Ch D 1, Cotton LJ at 6. See also *Re Hamilton-Snowball's Conveyance* [1959] Ch 308; *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch 472.

33 Meagher JA in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1997) 45 NSWLR 639 at 654-655 challenged the accuracy of describing the assignee as the "owner" of the entire beneficial interest as soon as agreement is reached because "nothing would remain in the vendor's hands even if no purchase money had been paid".

rules governing the availability of specific performance for executory contracts.[34]

Gifts

[1311] Where a gift fails to satisfy the legal formalities necessary for the effective assignment of the particular type of legal property (such as the need for writing, a deed or registration), the position is more complicated. As a general principle, equity will not lend its processes to assist volunteers by compelling assignors to complete imperfect gifts.[35] This suggests that a legally ineffective gift will be equally ineffective in equity. However, there is a countervailing equitable principle that equity gives effect to intention rather than to form. The Privy Council in *T Choithram International SA v Pagarani* [2001] 2 All ER 492 at 501 recently reconciled the tension between these equitable principles by noting that "although equity will not aid a volunteer, it will not strive officiously to defeat a gift".

The effect of an application of the principle that equity gives effect to intention rather than to form in this context may be described as follows. If a donor manifests an intention to assign legal property by taking all the steps towards an effective legal assignment that only the donor is capable of taking, then equity will consider it inequitable to allow the donor subsequently to refuse to perfect the gift.

After many years of doubt,[36] it is now clear that in Australia it is this latter equitable principle of giving effect to intention that prevails over equity's disinclination to assist volunteers. This means that, in certain circumstances, a legally ineffective gift may be effective in equity to vest the equitable title to that property in the assignee (donee) and to render the assignor (donor) a type of trustee of the property for the assignee.

34 The issue of principle is the same as arises in relation to the equitable assignment of future property; see further below, para [1365]; *Tailby v Official Receiver* (1888) 13 App Cas 523. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [609], [610], [652] and [653]; Keeler J, "Some Reflections on *Holroyd v Marshall*" (1969) 3 *Adelaide Law Review* 360.

35 The equitable maxims are discussed above, Chapter 1: "The Historical Role of the Equitable Jurisdiction". There are three exceptions to the maxim that equity will not perfect an imperfect gift. The first is the doctrine of equitable estoppel (discussed above, Chapter 7: "Estoppel"), the second is the principle of *donationes mortis causa* (under which gifts of property that are made conditional upon the donor's death are regarded as completed on the donor's death unless the donor's estate is insufficient to satisfy the donor's creditors), the third is the rule in *Strong v Bird* (1874) LR 18 Eq 315 (under which imperfect gifts of legal property are regarded in equity as having been completed on the death of the donor, provided that the donee is named as an executor of the donor's estate). The rule in *Strong v Bird* was held to apply to imperfect gifts of real property in *Benjamin v Leicher* (1998) 45 NSWLR 389.

36 See below, paras [1312]-[1315].

[1312] The effectiveness in equity of voluntary assignments of legal property was stated by Turner LJ in *Milroy v Lord* (1862) 4 De GF & J 264 at 274-275; 45 ER 1185 to depend upon the following requirements:

> "[I]n order to render a voluntary settlement valid and effectual, the settlor must have done *everything which, according to the nature of the property comprised in the settlement, was necessary to be done* in order to transfer the property and render the settlement binding upon him" (emphasis added).

Turner LJ went on to note that, if a settlement is intended to be effected by a particular mode or form of assignment (such as a direct assignment, declaration of trust or direction to a trustee), the court will not give effect to it by treating it as some other form (so that, for example, an imperfect assignment will not be upheld as a valid declaration of trust).[37] This qualification is relevant to the equitable assignments of equitable property and will be considered further in that context.[38]

The test in *Milroy's* case raises a number of questions about effective equitable gifts of legal property. The legal formalities for assignments of such property include such matters as the giving of notice of the assignment, signature of the assignment documents by the assignor, and, in some cases, the need for registration of some instrument.[39]

Assume, for example, that C wishes to give to A shares which C holds in X Pty Ltd. C accordingly signs a transfer of the shares (in the form prescribed by X Pty Ltd's constitution) in favour of A and delivers the share transfer form and the share certificates to A. However, before A can register the shares in her name, C changes his mind and demands the return of the share transfer form and the share certificates. At law, the transfer of the shares to A will be complete only when A, having signed the share transfer form, as transferee, registers it with X Pty Ltd. So, on these facts, C remains the legal owner of the shares. The question that arises in this context is whether equity will enforce C's imperfect gift of the shares at the suit of A, and so regard A as having an equitable interest in the shares.[40]

37 In *T Choithram International SA v Pagarani* [2001] 2 All ER 492 at 501 the Privy Council noted that the court will not give a "benevolent construction" so as to treat ineffective words of outright gift as taking effect as if the donor had declared himself a trustee for the donee.

38 See below, paras [1323]-[1356].

39 See above, paras [1304]-[1308].

40 It is important to note that, because the gift is of shares in a private company, the remedy of specific performance potentially is available to A. If the gift was of shares in a public company, it is unlikely that the gift would be enforced in equity, regardless of the steps which C might have taken.

In order to answer this question, it is necessary to consider whether an application of the test in *Milroy's* case[41] requires C to have taken *all* the steps necessary for an effective legal assignment of the shares (up to and including registration) before equity will enforce the gift to A, or whether C is only required to have taken certain steps (such as the delivery of the share transfer form and share certificates).

Members of the High Court in *Anning v Anning* (1907) 4 CLR 1049 provided differing approaches to these questions. Isaacs J was of the view that, if property is assignable at law, equity will not enforce a gift of such property unless all relevant legal assignment requirements have been completed (the "Isaacs view"). This view leaves no room for the recognition in equity of incomplete gifts. Applying the Isaacs view to the above example, A will be unable to enforce the gift of the shares before registration of the shares in A's name and, by that stage, equitable intervention will be unnecessary.

The other justices took a less extreme view, holding that an assignor might be bound by a gift in equity at some stage short of full compliance with the legal formalities. According to Griffith CJ, a gift will be effective in equity when the donor has done all those things which the donor, and only the donor, can do (the "Griffith view"). Applying the Griffith view, C's gift of the shares to A will be effective in equity as soon as C has signed the share transfer form and delivered it, with the share certificates, to A. This follows because C has done everything that C, and only C, can do. The final step in the share transfer, namely registration of the shares in A's name in the share register kept by X Pty Ltd, is a step that either A or C may take.

On the other hand, Higgins J held that a gift will be effective in equity when the donor has taken all the steps necessary to pass the legal title to the donee which are within the donor's power, and even though some of those steps are capable of being taken also by the donee (the "Higgins view"). Under the Higgins view, C's gift to A will only be regarded as effective in equity when C has not only signed and delivered to A the share transfer form and the share certificates, but has also delivered the share transfer form, signed by A, with the share certificates, to X Pty Ltd for registration. Although A could also have delivered the fully executed share transfers to X Pty Ltd for registration, this step was also within C's power. The Higgins view has not received support in later cases.

41 That the assignor must have done all that is necessary to make the assignment legally effective.

[1313] For many years doubt existed in Australia as to which of the three views enunciated in *Anning's* case reflected the proper approach to incomplete gifts of legal property. Dixon J in *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 at 599-600 (Rich J agreed with Dixon J) appeared to adopt the Isaacs view, holding that a voluntary transfer of Torrens title land, which was not in registrable form and, as such, was incapable of registration, was ineffective in equity.[42] His Honour did, however, identify the Torrens transferee's so-called "statutory right to registration" under Torrens legislation which puts a transferee in a position to obtain a legal estate by registration of a transfer (at 599-600). Such a statutory right, although constituting neither a legal nor an equitable interest in the land, is said to arise upon delivery to the transferee of a duly executed transfer in registrable form (at 604).[43] In later cases, Dixon J's statutory right to registration appears to have been confused with an equitable interest in the land, complicating the law in this area even further.[44] McTiernan J also concluded that delivery of a Torrens title transfer was insufficient to effect an equitable assignment of Torrens title land, but did not refer to a transferee's statutory right to be registered. Latham CJ, dissenting, found that the assignment was effective in equity and expressed a preference for the Griffith view (at 586).

In *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9,[45] a case involving the voluntary assignment of a chose in action, Windeyer J supported the Griffith view, citing *Brunker's* case as authority for this proposition (at 28-29). Interestingly, Sir Owen Dixon, who sat as the Chief Justice in *Norman's* case, said that there was nothing in Windeyer J's judgment with which he was disposed to disagree (at 16). The assignment of Torrens title land was not mentioned, but neither was it excluded. In *Taylor v Deputy Federal Commissioner of* Taxation (1969) 123 CLR 206 at 213, Barwick CJ, Taylor and Menzies JJ cited *Brunker's* case as authority for the Griffith view. Kitto J in *Olsson v Dyson* (1969) 120 CLR 365 at 375 (Menzies and Owen JJ agreed with Kitto J) appeared to retreat from the Griffith view in relation to the voluntary assignment of a chose in action and to lend support to the Isaacs view. Barwick CJ also supported the Isaacs view (at 368). Windeyer J dissented, applying the principle he had stated in *Norman's* case.

42 It should, however, be noted that Dixon J's judgment was cited by Windeyer J in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 28-29 as authority for the Griffith view.

43 Dixon J suggested that, in order to constitute a registrable dealing, the transfer must be accompanied by the certificate of title to the land.

44 See, for example, *Noonan v Martin* (1987) 10 NSWLR 402 at 410-413.

45 The facts of this case are discussed below, para [1361].

[1314] The controversy regarding voluntary assignments of legal property has now been resolved by the High Court in *Corin v Patton* (1990) 169 CLR 540[46] in favour of the Griffith view. In that case, a husband and wife owned Torrens title land, subject to a registered mortgage, as joint tenants. The wife, while terminally ill, unilaterally attempted to sever the joint tenancy by signing a transfer of her share in the land in favour of her brother, C, to be held by C on trust for her. At the time of her death, the transfer to C had not been registered and she had taken no steps to ensure that the mortgagee would produce the certificate of title at the Land Titles Office in order to enable the transfer to be registered in C's name. The High Court held that the joint tenancy would only be severed if, before her death, the wife had passed a legal or equitable interest in the land to C.

As C could only obtain a legal interest in the land upon registration of the transfer in his favour, the real issue was whether the wife's voluntary assignment of her interest in the land was effective to pass an equitable interest in the land to C. As she had not done all that was necessary on her part to complete the transfer of her interest to C (namely, not only signing the transfer but also obtaining production of the certificate of title by the mortgagee to enable the transfer to be registered in C's name), the assignment was not effective in equity on any of the views expressed in *Anning v Anning* (1907) 4 CLR 1049. Even though it was strictly unnecessary for the High Court to decide which of those views was correct, it considered this issue in detail.

Mason CJ and McHugh J referred to the uncertainty arising out of the first limb of the test in *Milroy v Lord* (1862) 4 De GF & J 264; 45 ER 1185[47] and posed the following question:

> "Did [the first limb] require that the donor must have done himself all that was necessary to be done in order to transfer the property or did he only have to do all that was necessary to be done *by him* in order to achieve that result?" (*Corin v Patton* (1990) 169 CLR 540 at 550 (original emphasis)).

Their Honours dismissed Dixon J's formulation in *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 at 599-600 (Rich J agreed with Dixon J) of a statutory right of registration and endorsed the Griffith view (*Corin v Patton* (1990) 169 CLR 540 at 556). As they explained (at 559):

46 For an application of the principles in this case, see *Costin v Costin* (1994) NSW Conv R 55-715; (1997) NSW Conv R 55-811.

47 Discussed above, para [1312].

> "[I]f an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognize the gift. So long as the donee has been equipped to achieve the transfer of legal ownership, the gift is complete in equity. `Necessary' used in this sense means necessary to effect a transfer. From the viewpoint of the intending donor, the question is whether what he has done is sufficient to enable the legal transfer to be effected without further action on his part."

They further held that the Griffith view "implicitly recognizes that the donee acquires an equitable estate or interest in the subject matter of the gift once the transaction is complete so far as the donor is concerned" (at 559).

Deane J came to a similar conclusion. His Honour (at 582) described the test for determining whether an imperfect gift of Torrens title land is effective in equity as a twofold one:

> "It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor. Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and, that being so, the donor is bound in conscience to hold the property as trustee for the donee pending the vesting of the legal title."

Brennan J appeared to adopt the Isaacs view that, where completion of a legal assignment requires some action by a third party (such as registration), a voluntary assignment passes no title in equity until that action is taken. Until registration, the donee acquires only a personal right against the donor (rather than an equitable interest in the property) to have the assignment registered, a right which the donor may not defeat. As his Honour explained (at 569-570):[48]

> "The foundation of this view is not that the donee acquires an equity to compel the donor to take any step to facilitate registration nor that the donee acquires any equitable interest in the land …
>
> Upon this analysis, a right to registration, the effective exercise of which is essential to the vesting of title to the gifted land, is a statutory right dependent (at least) on delivery of a registrable transfer. That statutory right … gives rise to no equitable estate or proprietary interest …

48 This approach accepts the "statutory right to registration" recognised by Dixon J in *Brunker v Perpetual Trustee Co Ltd* (1937) 57 CLR 555 at 599-600. Rich J agreed with Dixon J.

> [T]o press equity into service to create an equitable estate or interest where there is no equitable estate or interest arising from contract or from any conduct on the part of the donor is to take equity beyond its proper realm of acting in personam …"

Where, however, no action is needed to complete an assignment at law other than that which can be taken by the donor or the donee, Brennan J appeared, like the majority, to adopt the Griffith view (*Corin v Patton* (1990) 169 CLR 540 at 564).

Toohey J, on the other hand, took the view that the issue to be determined was whether the unregistered transfer could defeat the surviving joint tenant's right to be registered as sole proprietor of the land. In other words, the conflict was not between the donor and the donee, but between the donee and the surviving joint tenant. In addition, he regarded the case as distinguishable from the other incomplete gift cases in that the donor was not attempting to confer a beneficial interest in the property on the donee, only her legal interest. Viewed in this way, Toohey J found it unnecessary to express a preference for either the Griffith view or the Isaacs view. However he did feel that it is a somewhat "unreal demand", even when land is not subject to a mortgage, to require a joint tenant, seeking to sever a joint tenancy, to deliver to the donee the certificate of title, there being only one certificate of title to the land (at 590). His Honour noted that, at the time of the donor's death, the donee did not have an "unqualified right" to have the transfer registered, and that "possession of the certificate of title aside" the donor could have recalled the transfer and taken steps, such as the lodgment of a caveat or an injunction, to prevent its registration (at 592). The "real point", according to his Honour (at 592-593) was that:

> "[T]he transfer to [the donee] had not been registered at the time of [the donor's] death. There was no transaction that equity would enforce; there was a transaction that had not been consummated …
>
> On [the donor's] death the Registrar General was empowered, on application, to register [the husband] as proprietor of an estate in fee simple in the land."

This conclusion appears to beg the question as to the stage at which a voluntary assignment of Torrens title land becomes enforceable, or is regarded as "consummated", in equity, if ever.

[1315] The result of *Corin v Patton* (1990) 169 CLR 540[49] is that the Griffith view is now the accepted test in Australia for the recognition in equity of voluntary assignments of legal property. This test applies not only to Torrens title land but to all other forms of legal property. Although strictly obiter, the statements of the majority in *Corin's* case on this issue are deliberate and appear to settle the position once and for all. In adopting this position, the High Court has manifested a preference for the principle that equity gives effect to the intention of the parties over the principle that equity will not assist a volunteer (or perfect an imperfect gift). An imperfect gift is enforceable in equity, even in the face of a statutory requirement for registration, because equity treats as a sufficient manifestation of intention the taking of certain steps by a donor. The decision, however, does not address the basic policy issue of why an ineffective gift of legal property should be enforced in equity at all.

[1316] The *Corin v Patton* (1990) 169 CLR 540 tests have been applied in a number of cases in relation to the transfer of real property.[50] For example, in *Costin v Costin* (1994) NSW Conv R 55-715 Santow J in the Supreme Court of New South Wales found that a donor (father) had satisfied the relevant tests and severed a joint tenancy of land with his son, Robert, by signing a transfer of the donor's interest in the land to another son, Nicholas, even though that transfer had not been registered. Unlike the donor in *Corin v Patton*, the donor had not only signed the transfer but had authorised the solicitors holding the certificate of title to the land to produce the title to the Land Titles Office[51] to enable the transfer to be registered. On appeal,[52] the New South Wales Court of Appeal held that the donor's authority to the solicitors was revocable until acted upon. The solicitors, who acted for both joint tenants, regarded themselves as bound by a note attached to the certificate of title restricting them from releasing the title without the joint authority of both joint tenants. As the

49 Following this decision the New South Wales government referred the issue of unilateral severance of joint tenancies to the New South Wales Law Reform Commission (NSWLRC). As a consequence of the recommendations made by the NSWLRC in Report 73, *Unilateral Severance of a Joint Tenancy* (1994), s 30 was inserted in the *Conveyancing Act* 1919 (NSW) and s 97 in the *Real Property Act* 1900 (NSW) to allow a joint tenant of land in New South Wales to unilaterally sever the joint tenancy by executing (and in the case of Torrens title land, registering) a special type of transfer. Unilateral severance of joint tenancies is also permitted under *Land Titles Act* 1980 (Tas), s 63 and *Land Title Act* 1994 (Qld), s 59.

50 *Motor Auction Pty Ltd v John Joyce Wholesale Cars Pty Ltd* (1997) 138 FLR 118 (Santow J held that a donor's failure to authorise a mortgagee to produce a certificate of title to enable a transfer of the donor's interest in a joint tenancy to be transferred rendered the gift incomplete and revocable); *Garcia v Lam* (unreported, NSWCA, Sheller, Powell and Cole JJA, 2 July 1996) (the New South Wales Court of Appeal dismissed an appeal from McLaughlin M on the basis that the donor had not done all that was necessary to effect the transfer of the land).

51 Now known as Land and Property Information New South Wales.

52 (1997) NSW Conv R 55-811.

authority was not acted upon before the donor died, it was revoked on his death.

Although the decision of the Court of Appeal was unanimous, the judges differed in their application of the relevant principles to the facts.

Sheller JA (at 56,370) found that neither limb of Deane J's twofold test had been satisfied holding that:

> "In the first place, release of the certificate of title required the joint authority of the deceased and [Robert]. In the second place, until such time as it was acted upon, the deceased could revoke the authority …".

By contrast, Brownie AJA (with whom Powell JA agreed), who described the approach of Mason CJ, Deane and McHugh JJ in *Corin v Patton* as "the majority approach" (at 56,372), found that although the first limb of the test had been satisfied the second had not and (at 57,372):

> "Thus the intended gift by [the donor] to [Nicholas] was complete in the sense that the donor had done all that was required to be done by him alone to transfer the legal title: if his solicitors had acted as he had directed, the legal title would have passed, but the donor had not done all that was necessary to render the gift binding upon himself, or to arm or equip the donee with the means of securing registration of the transfer, or of putting the transfer beyond the donor's recall or intervention."

[1317] Although *Corin v Patton* (1990) 169 CLR 540[53] dealt with informal assignments of real property, the principles in that case apply equally to informal assignments of other forms of property. In each case it is necessary to consider the steps required to formally assign the particular property and whether the donor has done everything to comply with the tests in *Corin*'s case. For example, an unconditional and absolute gift of a legal chose in action that does not comply with all the requirements of s 12 of the *Conveyancing Act* 1919 (NSW), and its equivalents in the other States and the Territories,[54] will be enforceable in equity as

53 Discussed above, paras [1314]-[1316].

54 See above, para [1307]. Section 12 is discussed in relation to equitable property below, paras [1354]-[1356], and in relation to parts of legal choses in action below, para [1357]. Mansfield J in *Lonsdale Sand and Metal Pty Ltd v Commissioner of Taxation* (1998) 81 FCR 419 at 433 recognised that a purported assignment of a debt that did not comply with s 15 of the *Law of Property Act* 1936 (SA) (not being in writing and no notice in writing having been given to the debtor) might nevertheless be effective in equity. He also felt obliged to consider "whether there is any other reason why otherwise it would be unconscionable if the assignment were not recognised".

long as the assignment is in writing and signed by the donor, these being the only steps that the donor, and only the donor, can take. Notice to the debtor of the assignment is a step that may be taken by either the donor or the donee, provided that the notice is given before action is taken on the assignment.[55]

[1318] Where a legal chose in action is assigned in equity[56] the assignor must be a party to any action to enforce the interest assigned, either by being required by the assignee to sue in the assignor's own name or by being joined as a defendant. The rule requiring the assignor to be a party to any action against the debtor or third party is said to be a rule of practice and not a rule of substantive law.[57] For this reason, it may be dispensed with in special cases.[58]

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55 *Walker v Bradford Old Bank* (1884) 12 QBD 511; *Bateman v Hunt* [1904] 2 KB 530; *Re Westerton* [1919] 2 Ch 104; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1. Lack of notice of an assignment affects priorities but, as between the assignor and the assignee, does not prevent a valid equitable assignment of the chose in action: *Mountain Road (No 9) v Michael Edgley Corporation Pty Ltd* [1999] 1 NZLR 335 at 341, 343. However, a debtor or third party who receives a notice of an equitable assignment from the assignee is placed in a difficult situation in relation to performance of the chose in action. For example, in relation to the payment of a debt, the debtor can no longer safely pay the assignor but, having received no authorisation from the assignor to pay the assignee, may not be able to obtain a good discharge from the assignee. In such cases, the debtor should interplead. The issue still remains whether, once an equitable assignment is perfected by notice to the debtor or third party, the assignee can enforce the cause of action directly and in its own name. Roskill LJ and Sir John Pennycuick indicated in *Warner Bros v Rollgreen* [1976] QB 430 that in such circumstances the equitable assignee may not proceed directly against the third party, even after giving notice.

56 An equitable assignee of a debt is a creditor for the purposes of the *Bankruptcy Act* 1966 (Cth): *Wilson v Official Trustee in Bankruptcy* (2000) 97 FCR 196. Further, the right of an equitable assignee is not defeated by the subsequent issue of a notice under *Income Tax Assessment Act* 1936 (Cth), s 218 (requiring the payment of money due or accruing to a taxpayer to the Income Tax Commissioner).

57 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [6 103] disagree with the description of this requirement as a "rule of practice", referring to it as a "principle".

58 These special cases involve practical considerations, protection of the debtor and the avoidance of multiplicity of suit: *William Brandt's Sons & Co v Dunlop Rubber* [1905] AC 454; *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584; *National Mutual Life Nominees Ltd v National Capital Development Commission* (1975) 37 FLR 404 at 412; *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1991) 5 BPR 11.512; *Equus Financial Services Limited v Glengallen Investments Pty Ltd* (Appeal No 262 of 1993, 19 May 1994);*Thomas v National Australia Bank Limited* [2000] 2 Qd R 448. However, an action commenced by an equitable assignee of a legal right, without joining the assignor, is not a nullity and the non-observance of the rule can be cured by the appropriate joinder at any stage. In *Weddell v J A Pearce & Major* [1988] Ch 26 and *Jennings v Credit Corp Australia Pty Ltd as assignee from Citicorp Person to Person Financial Services Pty Ltd* (2002) 48 NSWLR 709 an equitable assignment was held to prevent limitation of an action but did not allow the assignee to recover damages or be entitled to a perpetual injunction. Once an equitable assignment becomes legal, albeit after the expiration of the limitation period, the legal assignee can continue with the proceedings. The need for special circumstances was noted in *Performing Right Society v London Theatre of Varieties* [1924] AC 1 at 29; *Warner Bros v Rollgreen* [1976] QB 430; *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548 at 561; *Stack v Brisbane City Council (No 2)* (1996) 67 FCR 510 at 513-514 (equitable assignee who sues in the name of the assignor may be required to give the assignor an indemnity for costs, if demanded); *Three Rivers District Council v Bank of England* [1996] QB 292 (Staughton LJ holding (at 303) that in the case of an equitable assignment the assignor retains a cause of action at law that the assignor can enforce, albeit for the benefit of the assignee).

EQUITABLE PROPERTY CAPABLE OF ASSIGNMENT

[1319] Equitable property is property that is recognised in equity but not by the common law. Examples of equitable property include the interest of a beneficiary under a fixed trust, the interest of partners in a partnership,[59] the right of a purchaser of land upon entry into a valid contract for the sale of land,[60] the equity of redemption of a mortgagor of land held under old system title, the lien of a purchaser of land over property pending completion of the purchase and the lien of a vendor of land for the unpaid purchase price.

Property of this nature, being recognised in equity only, can obviously only be assigned according to the rules of equity. The issues in relation to the assignment of equitable property differ from those that arise in relation to the assignment of legal property (where the issue is whether, and why, equity should intervene at all). By contrast, equity must provide ways in which equitable property can be assigned, there obviously being no legal rules governing such assignments.

Ordinarily, the effect of an assignment of equitable property is to confer upon the assignee all the equitable remedies applicable to the property and to enable the assignee to give a good discharge of any obligations attaching to the property (*Redman v The Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84, Isaacs J at 95).

[1320] There are various methods by which equitable property can be assigned. First, the equitable interest may be assigned directly by the assignor, during her or his lifetime, to the assignee.[61] Secondly, the equitable interest holder may agree to assign the equitable interest to the assignee.[62] Thirdly, the holder of equitable property may declare herself or himself a trustee of that property for the assignee (the declaration of trust).[63] As the

59 *Federal Commissioner of Taxation v Everett* (1979) 143 CLR 440.

60 The nature of the purchaser's equitable interest in the land is discussed in *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164; *Stern v McArthur* (1988) 165 CLR 489; *KLDE Pty Ltd v Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288; *Road Australia Pty Ltd v Commissioner of Stamp Duties* [2001] 1 Qd R 327.

61 See below, para [1324].

62 See below, paras [1325]-[1329].

63 See below, paras [1330]-[1332]. The intention of the assignor to make an *immediate* disposition of the equitable property is what distinguishes a direct assignment of an equitable interest from an agreement to assign and a declaration of trust.

property held by the trustee is equitable property, the declaration of trust necessarily involves the creation of a subtrust. The effect of such a declaration is to vest an equitable interest in the trust property in the beneficiary of the subtrust. Fourthly, the holder of the equitable interest may direct the holder of the legal interest, the trustee, henceforth to hold the equitable interest on trust for another person or to pass the legal interest to another person (direction to the trustee).[64] Fifthly, the donee of an equitable interest may disclaim that interest.[65] Sixthly, the holder of the equitable interest may release the trustee from her or his obligations as trustee and allow the trustee to treat the property as her or his own.[66] Seventhly, the holder of the equitable interest may nominate another person to take the equitable interest on the holder's death.[67] Eighthly, the beneficiary under a resulting trust may divest herself or himself of that interest.[68]

If an assignment of equitable property has taken a particular form (such as a direct assignment, an agreement to assign, a declaration of trust or a direction to a trustee), the requirements for that particular form of assignment must be satisfied. If the assignment fails to satisfy those requirements, proving compliance with the requirements for some other form will not save it. This is simply an application of the second limb of the test in *Milroy v Lord* (1862) 4 De GF & J 264 at 274-275; 45 ER 1185.[69]

[1321] As a general rule, in the absence of some statutory provision to the contrary, no formality (such as writing or notice) is required for the assignment of equitable property. All that is required for such an assignment is "a clear expression of an intention to make an immediate disposition";[70] the language of the assignment is "immaterial if the meaning is plain",[71] provided that it is the language of disposition and not of declaration of trust. In addition, an intention to *assign* an equitable interest must be distinguished from a mere revocable *mandate* which may be modified or recalled before being acted upon and is revocable on the death of the mandator.[72]

64 See below, paras [1333]-[1343].

65 See below, para [1344].

66 See below, paras [1345]-[1347].

67 See below, paras [1348]-[1350].

68 See below, paras [1351]-[1353].

69 Discussed above, para [1312].

70 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J (dissenting) at 30; but affd *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385, Barwick CJ at 391; Kitto J at 397.

71 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, Lord Macnaghten at 462.

72 *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614 (discussed below, para [1336]); *Coulls v Bagot's Executor & Trustee Co* (1967) 119 CLR 460; *Parker & Parker v Ledsham* [1988] WAR 32.

[1322] Although historically no formalities were required in equity for assignments of equitable property, the need for certain formalities in such assignments, such as writing, has been statutorily imposed.

In contrast to equitable assignments of legal property,[73] equity does not place the same importance on valuable consideration in the context of equitable assignments of equitable property, because the maxim that equity will not assist a volunteer is inapplicable to its "own" property. For this reason, a voluntary assignment of equitable property will be effective if the donor expresses a clear intention to make an immediate disposition of the equitable property, provided the gift is absolute and not by way of charge only.[74]

There are two relevant statutory provisions dealing with the need for writing (and notice) in assignments of equitable property. The first is s 23C of the *Conveyancing Act* 1919 (NSW),[75] and its equivalents in the other Australian States,[76] which applies to equitable interests in all types of property, real and personal. The second is s 12 of the *Conveyancing Act* 1919 (NSW),[77] and its equivalents in the other Australian States and Territories,[78] which applies to equitable choses in action (such as an interest in a partnership) as well as legal choses in action.

The need for writing under s 23C

[1323] Writing has been required for the effective assignment of equitable property since ss 1-3 and 7-9 of the *Statute of Frauds* (29 Car II, c 3) were introduced in 1677. Today all Australian States have statutory provisions requiring equitable assignments to be in writing.[79] These provisions are all substantially similar to s 23C which provides:

73 See above, paras [1309]-[1318].

74 *Kekewich v Manning* (1851) 1 De GM & G 176; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 30. It follows that a charge of equitable property requires valuable consideration: *Re Earl of Lucan* (1890) 45 Ch D 615.

75 Hereafter called "s 23C".

76 *Property Law Act* 1974 (Qld), ss 5, 9; *Property Law Act* 1936 (SA), s 29; *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Property Law Act* 1958 (Vic), s 53; *Property Law Act* 1969 (WA), s 34. There is no equivalent legislation in the Territories.

77 Hereafter called "s 12".

78 *Property Law Act* 1974 (Qld), ss 199, 200; *Law of Property Act* 1936 (SA), s 15; *Conveyancing and Law of Property Act* 1884 (Tas), s 86; *Property Law Act* 1958 (Vic), s 134; *Property Law Act* 1969 (WA), s 20. The *Law of Property (Miscellaneous Provisions) Ordinance* 1958 (ACT), s 3 applies the New South Wales provision to the Territory, while, in the Northern Territory, the *Property Act* 1860 (SA), s 19 is still in force.

79 *Property Law Act* 1974 (Qld), ss 5, 9; *Property Law Act* 1936 (SA), s 29; *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Property Law Act* 1958 (Vic), s 53; *Property Law Act* 1969 (WA), s 34.

"(1) Subject to the provisions of this Act with respect to the creation of interests in land by parol —

(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

Although doubt existed as to whether para (c) applies to dispositions of *all* property, real or personal, or to land only,[80] it has now been held that s 23C (like its equivalents in the other States) does apply to dispositions of equitable interests in both real and personal property.[81]

In many cases concerning s 23C, or its equivalents, courts have been required to determine for stamp duty purposes whether a particular *oral* transaction effected a change in the ownership of equitable property. The consequence of a determination to this effect was that any subsequent *written* document dealing with that property could not itself be said to have brought about any change in the ownership of the property. The function of such a written document was merely to provide evidence of the oral transaction, not to effect a "disposition" of the equitable property.

The distinction between an effective oral disposition of equitable property and a subsequent written confirmation of that disposition is important in relation to the assessment of stamp duty in those jurisdictions in which stamp duty is payable only on

80 Appearing as it does in Pt II, Div 3 of the *Conveyancing Act* 1919 (NSW), entitled "Assurances of Land".

81 A majority of the High Court in *Adamson v Hayes* (1973) 130 CLR 276 and the House of Lords in *Grey v Inland Revenue Commissioner* [1960] AC 1, *Oughtred v Inland Revenue Commissioner* [1960] AC 206 and *Vandervell v Inland Revenue Commissioner* [1967] AC 291 have held that equivalent sections in Western Australia and England respectively do extend to dispositions of personalty. This approach was adopted in New South Wales by Giles J in *P T Ltd v Maradona Pty Ltd (No 2)* (1992) 27 NSWLR 241 at 251.

written instruments and not on oral transactions.[82] However, as the stamp duty legislation in the majority of Australian States and Territories now requires the payment of stamp duty on the assignment of defined types of property, regardless of whether those assignments are oral or in writing,[83] the relevance of that distinction has diminished.

As s 23C(1)(a) and (c) both require writing when equitable property is "disposed of", it will be necessary to consider whether each of the various methods of equitable assignment constitutes a "disposition" of property.

Direct assignments of equitable interests

[1324] In considering the effectiveness of direct assignments of equitable interests, a distinction must be drawn between direct assignments of real and personal equitable property. Assignments of equitable interests in real property are regulated by s 23C(1)(a), whereas assignments of equitable interests in personal property are regulated by s 23C(1)(c).

Section 23C(1)(a) expressly requires writing[84] for the "disposition" of any equitable interest in land. For this reason, all direct assignments of equitable interests in land must be in writing. The effect of non-compliance with s 23C(1)(a) is to render void any oral direct assignment of an equitable interest in real property.

The effect of s 23C(1)(c) is to require all assignments of equitable interests in property, including personal property, to be in writing and signed by the assignor or an agent of the assignor, because all such assignments constitute "dispositions" of "subsisting" equitable interests in that property, as required by para (c).[85] The effect of non-compliance with s 23C(1)(c) is to render any oral direct assignment of an equitable interest in personal property void.

82 For example, *Stamp Act* 1921 (WA); *Stamp Duties Act* 1923 (SA); *Stamp Act* 1978 (NT). However, even these statutes contain anti-avoidance provisions that require the payment of stamp duty on oral transactions in certain specified circumstances.

83 *Duties Act* 1997 (NSW); *Duties Act* 1999 (ACT); *Duties Act* 2000 (Vic); *Duties Act* 2001 (Tas); *Duties Act* 2001 (Qld).

84 It should be noted that legal assignments of land are not simply required to be in writing but, in addition, must be in deed form: see above, para [1305].

85 Assignments of equitable choses in action, in any event, may need to comply with the writing (and notice) requirements imposed by s 12 (and its equivalents), although compliance with that section probably is not mandatory. The requirements of s 12 in this context are discussed below, paras [1354]-[1356]. No particular form of words is required for an equitable assignment. The language is immaterial if the meaning is plain: *William Brandt's Sons & Co v Dunlop Rubber* [1905] AC 454 at 462.

Agreements to assign equitable interests

[1325] In considering the application of writing requirements to agreements to assign equitable interests, a distinction must be drawn between agreements to assign real property and agreements to assign personal property.

There is no doubt that, in order to be enforceable, agreements for valuable consideration to assign equitable interests in *real property* require writing, since all contracts for the disposition of interests in land must be in writing (or proved by some memorandum or note thereof) and signed.[86]

The position is not so straightforward under s 23C(1)(c) in relation to agreements for valuable consideration to assign equitable interests in *personal property*. As between assignors and assignees the issue arising out of an oral assignment is likely to relate to the enforceability of the oral assignment under the doctrine of part performance[87] or the principles of equitable estoppel.[88] However, where it is necessary to determine for stamp duty, income tax or succession purposes whether an oral agreement to assign an equitable interest has been effective to pass an equitable interest in personal property to an assignee, compliance with s 23C(1)(c) will be relevant.

[1326] There are two ways of analysing the effect of an agreement to assign an equitable interest in personal property.

On the one hand, the agreement may be seen as making the assignor a constructive trustee of that equitable interest for the assignee. According to this analysis, the agreement to assign need not be in writing because the assignor retains her or his existing equitable interest and "creates" a new equitable interest in the assignee which the assignor is regarded as holding on trust for the assignee. According to this analysis, there is no "disposition" of a "subsisting" equitable interest that must comply with

86 *Conveyancing Act* 1919 (NSW) s 54A; *Statute of Frauds Act* 1972 (Qld), s 5; *Law of Property Act* 1936 (SA), s 26; *Mercantile Law Act* 1935 (Tas), s 6; *Instruments Act* 1958 (Vic), s 126. The Imperial legislation still applies in Western Australia. An oral agreement is enforceable under the doctrine of part performance discussed below, Chapter 17: "Specific Performance". Note that *Law of Property (Miscellaneous Provisions) Act* 1989 (UK), s 2(1) requires all contracts for the sale or other dispositions of interests in land (defined to include any estate, interest or charge in or over land) to be in writing and to incorporate all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each document.

87 See below, Chapter 17: "Specific Performance". *Law of Property (Miscellaneous Provisions) Act* 1989 (UK), s 2(1) effectively abolishes the doctrine of part performance in the United Kingdom. For a discussion of the effect of this section on a mortgage by deposit of title deeds see *United Bank of Kuwait Plc v Sahib* [1997] Ch 107.

88 See above, Chapter 7: "Estoppel".

s 23C(1)(a). Furthermore, s 23C(2) provides that subs (1) does not affect the creation or operation of constructive trusts.[89]

On the other hand, the agreement may be seen as an outright disposition of the assignor's existing equitable interest in the property to the assignee. According to this analysis the agreement to assign involves a "disposition" of a "subsisting" equitable interest that must comply with the writing requirement imposed by s 23C(1)(c).

[1327] The effect of agreements to assign equitable interests in personal property was considered by the House of Lords in *Oughtred v Inland Revenue Commissioners* [1960] AC 206. In that case trustees held a parcel of 200,000 shares in a private company ("the first parcel") in trust for the appellant for life. The equitable remainder in the first parcel was vested in her son, Peter. The appellant also owned another parcel of 72,700 shares ("the second parcel") absolutely. On 18 June 1956, in order to reduce the estate duty that would be payable on her death, the appellant orally agreed to transfer the second parcel to Peter, and he, in return, orally agreed to make her the absolute beneficial owner of the first parcel. On 26 June 1956, the parties executed three documents to record their agreement:

a] a deed of release between the appellant, Peter and the trustees ("the release") under which the appellant and Peter released their equitable interests in the first parcel to the trustees. The trustees acknowledged in the release that they held the first parcel in trust for the appellant absolutely and intended to transfer the first parcel to her;

b] a transfer by the appellant to Peter's nominees of the second parcel; and

c] a transfer by the trustees to the appellant of the legal interest in the first parcel ("the trustees' transfer").

The trustees' transfer, which was expressed to be the consideration for the release, was assessed for stamp duty on an ad valorem basis[90] as a conveyance on sale (as defined in the relevant stamp duty legislation) of Peter's equitable reversionary

89 Ipp and Murray JJ in the Western Australian Court of Appeal in *Sorna Pty Ltd v Flint* (1999) 21 WAR 563 held that the exemption in the Western Australian equivalent to s 23C(2) (namely, *Property Law Act* 1969 (WA), s 34(2)) does not overcome the effect of *Mining Act* 1978 (WA), s 119 which requires any legal or equitable interest in or affecting a mining tenement to be created or assigned by an instrument in writing.

90 The amount of stamp duty payable varies with the value of the property being assigned ("ad valorem"). If the property has no value (for example, where a bare legal interest is assigned to a person who already owns the equitable interest), only nominal duty is payable.

interest, even though ostensibly the trustees' transfer dealt with the legal interest in the first parcel.

The liability of the trustees' transfer for ad valorem stamp duty depended upon whether or not Peter's equitable interest in the first parcel had passed to the appellant before execution of that transfer (under Peter's oral agreement). If Peter's oral agreement in relation to the first parcel was specifically enforceable, he would hold his equitable interest in the first parcel on constructive trust for his mother, thereby enabling his mother to claim an equitable interest in the first parcel. Although agreements for the sale of personal property are usually only specifically enforceable if the remedy of damages is inadequate, as Peter's oral agreement related to shares in a private company that were not available for purchase on the open market, equitable relief would have been available to the appellant.

According to this analysis, as the appellant was already the absolute beneficial owner of the first parcel, the trustees' transfer formally transferred to the appellant only the trustees' bare legal interest in the first parcel, and, as such, should only be liable for nominal stamp duty.

Despite the cogency of this argument, a majority of the House of Lords[91] upheld the stamp duty assessment, finding in effect that the appellant was not the owner in equity of the first parcel before the trustees' transfer to her of that interest.

Although the reasons of the House of Lords principally relate to the interpretation of the relevant stamp duty legislation (which made it strictly unnecessary for the House of Lords to determine the exact effect of Peter's oral agreement), the general effect of that oral agreement was also discussed.

In considering the effectiveness in equity of Peter's oral agreement in relation to the first parcel, the question arose as to whether or not that oral agreement amounted to a "disposition" of his "subsisting" equitable interest to his mother (under the English section equivalent to s 23C(1)(c)), or whether, alternatively, his oral agreement "created" a constructive trust of that interest for her.

By finding for the Inland Revenue Commissioners, the majority appeared to favour the view that Peter's oral agreement constituted a disposition of his subsisting equitable interest to

91 Lord Denning, Lord Jenkins and Lord Keith. Lord Radcliffe and Lord Cohen dissented.

his mother, which, being oral, was ineffective. By taking this position, the majority of the House of Lords appeared to adopt a transaction-based approach to the stamp duty legislation, requiring ad valorem stamp duty to be paid on the trustees' transfer regardless of the effect of Peter's oral agreement on his equitable reversionary interest.[92] Although Lord Jenkins appeared to assume that a constructive trust of Peter's equitable interest arose on the making of the agreement, he did not analyse the nature or effect of that trust.[93]

[1328] It is generally accepted that the dissenting judgments of Lord Radcliffe and Lord Cohen in *Oughtred's* case (that Peter's specifically enforceable oral agreement created in the appellant an equitable interest in his reversion in the first parcel under a constructive trust), provide a better analysis of the position.[94] This approach characterises an agreement to assign equitable property for consideration, not as an outright "disposition" of a "subsisting" equitable interest to the assignee but, by virtue of the specifically enforceable agreement, as the creation of a subtrust of that interest for the assignee by operation of law.[95]

The English Court of Appeal in *Neville v Wilson* [1997] Ch 144 at 157, 158[96] described the approach of Lord Radcliffe as "unquestionably correct" and held that "no convincing reason

92 Nominal stamp duty on a written instrument is payable only where the transfer of a legal estate is "truly valueless". The transfer of a legal estate to the person who already holds the equitable interest is not valueless since it perfects and strengthens that interest. It has been suggested that the fact that stamp duty is payable on a conveyance of land even though the purchaser, after exchange of contracts, already has an equitable interest in the land, may have influenced the court's approach to the application of the English section equivalent to s 23C(1)(c): Martin J E (ed), *Hanbury and Martin's Modern Equity* (14th ed, Sweet & Maxwell, London, 1993), p 91.

93 Lord Keith agreed with Lord Jenkins.

94 See, for example, Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [739]; Martin J E (ed), *Hanbury and Martin's Modern Equity* (14th ed, Sweet & Maxwell, London, 1993), p 91; *D H N Food Distributors v London Borough of Tower Hamlets* [1976] 3 All ER 462. This reasoning was applied in *McKinnon Wallace Holdings Pty Ltd v Commissioner of State Revenue* [1999] 1 VR 397 where a registered proprietor of land held the land as bare trustee for the taxpayer. The taxpayer in turn held the beneficial interest on trust for the beneficiaries under an investment trust. The taxpayer entered into a contract (constituted by a written offer and acceptance by conduct) to sell the beneficial interest in the land. The contract was completed without any written transfer and the parent company of the trustee transferred all the shares in the registered proprietor to the parent company of the purchaser. The effect of this arrangement was to effect a change in the beneficial ownership of the land without any change in the legal owner. The Commissioner of State Revenue assessed the transaction for ad valorem conveyance duty. The taxpayer successfully appealed to the Victorian Court of Appeal which was prepared to assume that a constructive trust of the land had come into existence upon completion of the contract of sale and that there accordingly had not been any immediate disposition of the taxpayer's interest in the land.

95 Because not all agreements to assign personal property are specifically enforceable, damages generally being an adequate remedy for the breach of such agreements, this analysis will apply only to personal property of a special or unique character, such as shares in a private company.

96 Nourse LJ (with whom Rose and Aldous LJJ agreed).

was suggested in argument and none has occurred to us since" why the exemption in relation to the creation of implied or constructive trusts in the relevant section equivalent to s 23C(2) should not apply.

[1329] One difficulty with the constructive trust approach, however, is that it does not explain the mechanism by which the assignor disposes of her or his equitable interest to the assignee and suggests that the assignor remains a subtrustee of the equitable interest for the assignee throughout the life of the subtrust.

Lords Radcliffe and Cohen attempted to explain the position as follows. According to Lord Radcliffe (*Oughtred v Inland Revenue Commissioners* [1960] AC 206 at 227):[97]

> "On June 18, 1956, the son owned an equitable reversionary interest in the settled shares; by his oral agreement of that date he created in his mother an equitable interest in his reversion, since the subject matter of the agreement was property of which specific performance would normally be decreed by the court. He thus became a trustee for her of that interest sub modo: … subsection (1) of that section [the section equivalent to s 23C] did not operate to prevent that trusteeship arising by operation of law. On 26 June Mrs Oughtred transferred to her son the shares which were the consideration for her acquisition of his equitable interest: upon this transfer he became in a full sense and without more the trustee of his interest for her. She was the effective owner of all outstanding equitable interests … There was, in fact, no equity to the shares that could be asserted against her, and it was open to her, if she so wished, to let the matter rest without calling for a written assignment from her son."

Lord Cohen described the situation as follows (at 230):

> "It might well be that there has been no document transferring the equitable interest. The appellant may have been content to rely on getting in the legal interest by the transfer and on the fact that it would be impossible for Peter to put forward successfully a claim to an equitable interest in the settled shares once the consideration shares had been transferred to him or his nominees by the appellant."

One consequence of this analysis is that because the equitable interest retained by the assignor is a "somewhat nebulous 'bare'

97 Lord Cohen took a similar approach at 231.

equitable estate" that cannot be asserted against the assignee, it can be simply "disregarded".[98]

An alternative explanation of the assignor's position is provided by Chitty J in *Grainge v Wilberforce* (1889) 5 TLR 436 at 437[99] that, at least where the assignor does not assume any active duties towards the assignee and the head trustee expressly acknowledges that he or she owes duties to the sub-beneficiary, a constructive trust of personal property is seen as passing the assignor's entire equitable interest to the assignee.

The nature of a subtrust was considered in some detail by the New South Wales Court of Appeal in *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639.[100] The simplified facts of this complex stamp duty case (at 654)[101] are as follows:

- ISPT was the trustee of a unit trust, all the units in which were held by Coles Myer Property Investments (CMPI);
- ISPT made a written offer to purchase land from CMPI, the legal owner of land, for a nominated figure;
- CMPI orally accepted the offer;
- ISPT paid the full purchase price to CMPI;
- Upon the payment of the purchase price, CMPI (as vendor) held the land on trust for ISPT (which in turn held that beneficial interest on subtrust for its unitholder, CMPI).

The question arose whether that transaction resulted in a transfer (or conveyance) of any beneficial interest in the land from CMPI to ISPT within the meaning of the relevant stamp duties legislation.

By a majority, the New South Wales Court of Appeal, affirming the decision of the trial judge[102] held that there was no change in beneficial ownership as CPMI retained its beneficial interest in the land.[103] Meagher JA noted the argument of the Commissioner of Stamp Duties that "when a trustee acquires land for his trust, there is a moment, a nanosecond, when the

98 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [736].

99 Discussed below, para [1332].

100 Fitzgerald and Meagher JJA, and in particular the dissenting judgment of Mason P at 650-652.

101 The facts are as stated by Meagher JA.

102 *ISPT Pty Ltd v Chief Commissioner of Stamp Duties* (1997) 98 ATC 4.054; 38 ATR 128 (Studdert J).

103 See Stone M and Lesnie V, "Some thoughts on beneficial interests and beneficial ownership in revenue law" (1996) 19 *University of NSW Law Journal* 181.

beneficial interest in the land belongs to the trustee and not his beneficiary." His Honour commented: "Not surprisingly, no authority was quoted in favour of so farouche a proposition" (*Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 655).

Fitzgerald JA (less colourfully) described the nature of ISPT's equitable interest in the land upon payment of the purchase price as follows (at 660):

> "The beneficial estate or interest in the [land] which passed to ISPT was the concatenation of rights, enforceable in equity against [CMPI] both as vendor and sole unit holder, which ISPT obtained in respect of the property under the contract of sale and purchase and the trust deed with respect to the [ISPT trust]. Nothing else passed to ISPT, or to or from [CMPI] …"

Declarations of subtrust

[1330] Where an owner of an equitable interest in property declares that henceforth he or she will hold that equitable interest on trust for an assignee (which effectively creates a subtrust of that equitable interest), the question arises whether that declaration must be in writing so as to comply with s 23C. In considering this question, a distinction must be drawn between declarations affecting real and personal property.

There is no doubt that where the subject matter of a declaration of subtrust is an equitable interest in *land*, the declaration must be in writing, regardless of whether such a declaration is seen as "creating" an interest in land in the sub-beneficiary or as "disposing" of an assignor's "subsisting" interest in land. This follows because s 23C(1)(a) requires both the "creation" and the "disposition" of interests in land to be in writing. In addition, declarations of trust in respect of land, or interests in land, are expressly required by s 23C(1)(b) to be in writing.

It should be noted that s 23C(1)(b) only requires a declaration of trust respecting land to be "manifested and proved by some writing"; it does not require the declaration itself to be in writing. This requirement is similar to the writing requirement for the enforceability of contracts for the sale of land contained in s 54A of the *Conveyancing Act* 1919 (NSW) (and its equivalents in the other States).[104] The effect of non-compliance with

104 *Statute of Frauds Act* 1972 (Qld), s 5; *Law of Property Act* 1936 (SA), s 26; *Mercantile Law Act* 1935 (Tas), s 6; *Instruments Act* 1958 (Vic), s 126. The Imperial legislation still applies in Western Australia.

s 23C(1)(b) is that an oral declaration of trust is not void but unenforceable only: a memorandum proving that declaration will render the declaration enforceable. By contrast, an oral declaration that is required to be in writing under para (a) will be void. If some written document evidencing that declaration is subsequently executed, it will be that written document that effects the assignment of the property, not the prior oral declaration.

[1331] The question whether declarations of trust of equitable interests in personal property are required by s 23C(1)(c) to be in writing depends on the way in which such declarations are seen to operate. Section 23C(1)(c) requires "dispositions" of "subsisting" equitable interests to be in writing. For this reason, declarations of trust of equitable interests in *personal property* need only comply with s 23C(1)(c) if they are seen as effecting a "disposition" of a "subsisting" equitable interest in that property.

One indication that s 23C(1)(c) is intended to apply to declarations of trust of personal property is that the term "disposition" is defined in some jurisdictions as including a declaration of trust.[105] This would seem to suggest that, in those jurisdictions at least, *all* declarations of trust of equitable interests in personal property must be in writing. However, there are some persuasive arguments as to why s 23C(1)(c) should not be seen as applicable to declarations of subtrust of personal property.[106] First, it is arguable that statutory definitions of "disposition", which include within their meaning "a declaration of trust", have no application to s 23C if those definitions refer to a series of transactions and end with the words "and every other assurance of property *by any instrument*".[107] These concluding words suggest that the term "disposition" in the statutory definition is simply intended to provide an example of a written instrument, not a type of transaction. Secondly, where the assignor imposes active duties on herself or himself as subtrustee, the assignor clearly retains an equitable interest in the property. This means that the assignor subjects herself or himself to new obligations in favour of the assignee, rather than "disposing" of an existing equitable interest.[108] Thirdly, declarations of trust of *legal* interests in personal property need

105 *Conveyancing Act* 1919 (NSW), s 7; *Property Law Act* 1974 (Qld), s 5.

106 See, for example, Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [743].

107 Emphasis added.

108 This analysis accordingly does not apply where the assignor (subtrustee) does not assume any active duties towards the assignee.

not be in writing to be enforceable in equity. All that is required for a valid declaration of trust of such property is an intention by the assignor to hold the property on trust for the intended beneficiary. It would be anomalous if oral declarations of trust of legal interests in personal property were effective in equity but oral declarations of trust of equitable interests in such property were ineffective.

[1332] The precise effect of a declaration of trust has not been conclusively settled. On the one hand a declaration of trust of personal property might be regarded as passing to the assignee the whole equitable interest of the assignor, leaving the assignor without any interest in the property. For this reason, the declaration of trust, being a "disposition" of a "subsisting" equitable interest, must be in writing (*Grey v Inland Revenue Commissioners* [1958] Ch 690, Upjohn J at 715).

Chitty J succinctly explained the relevant principle in *Grainge v Wilberforce* (1889) 5 TLR 436 at 437:

> "[W]here A was trustee for B, who was trustee for C, A held in trust for C, and must convey as C directed."

This analysis sees B as falling out of the picture completely and A holding the relevant equitable interest directly on trust for C. This approach is particularly attractive where B does not assume any active duties towards C and where B's continued interest in the equitable interest appears unnecessary. If the head trustee expressly acknowledges that he or she owes duties to the sub-beneficiary, why should proceedings against the head trustee brought by the sub-beneficiary require the concurrence of the assignor (the subtrustee)?

On the other hand, a declaration of trust of an equitable interest in personal property may leave the assignor as a beneficiary under the head trust but with an obligation to hold the equitable interest for the benefit of the assignee (*Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, Dixon J at 621-622). Under this type of arrangement, the declaration of trust need not be in writing because its effect is to "create" an equitable interest rather than to "dispose" of a "subsisting" equitable interest.

Although the former approach provides a more practical explanation of the rights of the head trustee, assignor (subtrustee) and assignee (sub-beneficiary), the latter approach allows the court to give effect to the assignor's intention to create a trust rather than to assign an equitable interest to the assignee.

Directions to trustees to transfer equitable or legal interests

[1333] An assignment by the holder of an absolute equitable interest in property[109] by direction to trustees (who hold the equitable interest on trust for the assignor) can take one of two forms. In the first place, the assignor may direct her or his trustees henceforth to hold the legal interest on trust for some other person (the assignee). Alternatively, the assignor may direct her or his trustee to deal with the legal interest in the property for the benefit of the assignee, leaving the trustee with no interest in the property. The formal transfer of the trustee's legal interest to the assignee must comply with the rules for the legal assignment of that interest,[110] and, until that occurs, the direction is only in the nature of a revocable mandate.[111]

The question as to whether a direction to trustees effects a "disposition" of the assignor's "subsisting" equitable interest, within the meaning of s 23C(1)(a) or (c), is considered separately in each of these situations.

[1334] A beneficiary of a trust (the assignor), who is absolutely entitled to the trust property, may direct her or his trustees henceforth to hold the trust property for the assignee. As with agreements to assign[112] and declarations of trust,[113] the precise effect of this type of direction is unclear. Does the direction to the trustees pass the assignor's equitable interest in the property to the assignee? (If so, the direction must comply with the writing requirement in s 23C(1)(a) in respect of real property, or s 23C(1)(c) in respect of personal property.) Or does the direction simply make the assignor a subtrustee of the equitable interest for the assignee and therefore effectively "create" an equitable interest in the assignee? (If so, where the direction relates to an equitable interest in land, it must comply with s 23C(1)(a), whereas if it relates to an equitable interest in personal property, it may be given orally.)

109 A beneficiary who is sui juris and fully entitled to the trust property may call an end to the trust: *Saunders v Vautier* (1841) Cr & Ph 240; [1835-42] All ER Rep 58.

110 For an example of a transfer of shares from the registered holder at the direction of the purchaser of those shares see *Lion Nathan Brewing Investment Pty Ltd v Commissioner for ACT Revenue* (1997) 79 FCLR 177.

111 If the direction is not acted on before the assignor's death, it will be revoked on her or his death: *Parker and Parker v Ledsham* [1988] WAR 32.

112 See above, para [1325].

113 See above, para [1330].

[1335] The former analysis was adopted in England by Lord Radcliffe in the House of Lords in *Grey v Internal Revenue Commissioners* [1960] AC 1,[114] another case involving a stamp duty avoidance scheme. In that case, a settlor transferred shares to trustees, as nominees, on trust for him. Only nominal stamp duty was payable on that transfer.[115] The settlor then orally directed his trustees to hold the shares on trust for his grandchildren (the assignees). The trustees subsequently executed a declaration of trust (which was signed by the settlor to testify that he had given the relevant direction) acknowledging the new trust. The trustees' written declaration was assessed for stamp duty as a voluntary disposition of the settlor's existing equitable interest in the shares.

The question accordingly arose as to whether it was the settlor's oral direction to the trustees or the trustees' subsequent written declaration of trust that had passed the settlor's equitable interest in the shares to the assignees. Only in the latter situation would ad valorem stamp duty have been payable, stamp duty being payable at that time on instruments, not on transactions.

In challenging the assessment, the trustees argued that the settlor's oral direction operated by way of declaration of trust rather than by way of "disposition" of the settlor's equitable interest to the assignee. As it was the settlor's oral direction that had effectively passed his equitable interest to the assignees, the trustees' written declaration was confirmatory only and not a disposition of an equitable interest of any value. As such it was liable for only nominal stamp duty.

In finding for the Inland Revenue Commissioners, a majority of the English Court of Appeal and all the members of the House of Lords held that the effect of an oral direction to trustees by a beneficiary absolutely entitled to property (the settlor), that the property, in future, should be held on trust for assignees, is to pass the settlor's equitable interest to the assignees. This passing of the equitable interest therefore is a "disposition" of equitable property within the meaning of the English equivalent to s 23C(1)(c) and, as such, must be in writing (unlike a declaration of trust of an equitable interest in property).

On the facts of the case, the settlor's oral direction could not effect a disposition of his equitable interest, which meant that it was the trustee's written declaration of trust which, in fact, had effectively disposed of that interest. As the declaration involved

114 See also Upjohn J, the trial judge, at [1958] Ch 375, and Lord Evershed MR in the Court of Appeal at [1958] Ch 609.

115 See above, para [1327], n 90.

the disposition of an equitable interest of value, it was assessable for ad valorem stamp duty. As Lord Radcliffe explained (*Grey v Internal Revenue Commissioners* [1960] AC 1 at 15-16):

> "Whether we describe what happened in technical or in more general terms the full equitable interest in the 18,000 shares concerned, which at that time was his, was … diverted by his direction from his ownership into the beneficial ownership of the various equitable owners …
>
> Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction: and it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee."

[1336] In *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614 a residuary beneficiary in his deceased wife's estate ("the assignor"), by letter, directed the trustee company which was the executor of that estate (and which also held a power of attorney from the assignor) to pay out of the assignor's interest in the estate certain specified amounts to certain specified persons and institutions ("the assignees"). The trustee company duly acted upon the assignor's direction. The Comptroller of Stamps assessed the assignor's letter for ad valorem stamp duty.

The High Court, affirming the decision of the Full Court of the Supreme Court of Victoria, held that, as the letter did not dispose of any interest in property, it was not dutiable. Dixon J recognised that, as residuary beneficiary, the assignor was not entitled to any specific item of property in his wife's estate but had only an equitable interest in the "entire mass" of that estate (at 622).

However, more importantly for present purposes, Dixon J recognised that the assignor could have voluntarily disposed of his equitable interest in the property comprising the estate in one of three ways (at 621-622, McTiernan J agreed with Dixon J):

a] by a declaration of trust (in which case the assignor would retain the title to the equitable interest but constitute himself a subtrustee of that interest for the benefit of the assignees); or

b] by an expression of an immediate intention to assign some lesser interest in the property to the assignees (in which case no communication of that intention to the trustees or to the assignees would have been necessary to effect an assignment of the interest, except for the purpose of preserving priority); or

c] by directing his trustees henceforth to hold the property on trust for the assignees.

His Honour (at 622-623) described this third method in the following terms:

> "A beneficiary who is *sui juris* and entitled to an equitable interest corresponding to the full legal interest in property vested in his trustee may require the transfer to him of the legal estate or interest. He may then transfer the legal interest upon trust for others. Without going through these steps he may simply direct the existing trustee to hold the trust property upon trust for the new beneficiaries. He cannot without the trustee's consent impose upon him new active duties. But he may substitute a new object, at any rate in the case of any passive trust … But it must be a direction, and not a mere authority revocable until acted upon. Such an authority is not in itself an assignment. It may, it is true, result in a transfer of an equitable interest. For the trustee acting upon it may make an effectual appropriation of the trust property to the new beneficiary, or may acknowledge to him that he holds the trust property thenceforward on his behalf. If the authority contemplates or allows such a method of imparting an equitable interest to the donee, the action of the trustee may be effectual to bring about the result. But, in such a case, it is not the donor's expression of intention which per se constitutes the assignment. It is the dealing with the trust property under his authorization. The distinction is, of course, of great importance in considering whether a document is itself an assignment, and, as such, liable to stamp duty."

On the facts of the case, the High Court decided that, although the assignor's letter came "very near to expressing an immediate intention to make over an interest" (at 623) in the assignor's equitable property to the assignees, and "very near to conveying to the trustees a direction thenceforward to hold the residue upon new trusts" (at 623-624),[116] on a close construction of that letter, it was satisfied that the assignor had not expressed an intention to pass any interest to the assignees; rather, he had only intended the assignees to take their interests on a distribution of the estate, not before.[117]

The construction of the assignor's letter as an authority rather than a direction to the trustees meant that:[118]

116 Starke J at 620 held that the letter constituted a mere authority.

117 By contrast, in *NT Power Generation Pty Ltd v Trevor* (2000) 18 ACLC 885 at 891 a document entitled "Acknowledgment Release & Assignment", which provided that no assignment was to take place unless and until the assignee demanded it in writing and sent a demand to the debtor (the assignors' former employer), was held not to evidence an intention by the assignors to make "then and there" a "complete disposition and transfer" of their interest in a debt to the assignee.

118 An authority, unless acted on during the lifetime of the authorising party, is automatically revoked as a matter of law by the death of the authorising party: *Parker & Parker v Ledsham* [1988] WAR 32 at 37.

> "If, before probate actually issued, or before the trustee company acted under the letter, the intending donor desired to modify or recall any part of his instruction, I think he might have done so quite consistently with all that the letter expresses" (*Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614 at 624).

However, had the assignor's letter been construed as a direction to his trustees, it appears from the passage in Dixon J's judgment set out above that the direction would have been construed as a direct assignment of the assignor's equitable interest to the assignees falling within s 23C(1)(c).

[1337] If a direction to trustees by an absolutely entitled assignor is regarded as effecting a "disposition" to the assignee of the assignor's "subsisting" equitable interest in the trust property (rather than the creation of a subtrust for the assignee) then all such directions to trustees, whether in respect of real or personal property, must be in writing (under either s 23C(1)(a) in relation to real property, or under s 23C(1)(c) in relation to personal property).[119]

If, however, such directions to trustees operate by way of declaration of trust, then although directions to trustees affecting equitable interests in real property must be in writing (under either s 23C(1)(a) or s 23C(1)(b)), directions to trustees affecting equitable interests in personal property may be made orally (because s 23C(1)(c) does not apply to the "creation" of equitable interests).

[1338] The holder of an absolute equitable interest in property (the assignor) may alternatively direct the holder of the legal interest in that property (the trustee) henceforth to pass that legal interest to an assignee.

The question that arises in this context is whether the assignor's equitable interest passes to the trustee by virtue of the assignor's direction, or whether the transfer of the legal estate to the assignee by the trustee carries with it the assignor's absolute equitable interest. The answer to this question will depend upon whether or not the assignor's direction to the trustee constitutes a "disposition" of the assignor's equitable interest back to the trustee.

119 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [717]. See also the reference to *Grey v Internal Revenue Commissioners* [1960] AC 1 by Gibbs J in *Adamson v Hayes* (1973) 130 CLR 276 at 304.

[1339] This problem is well illustrated by the facts in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291.[120] In that case, the National Provincial Bank ("the Bank") held a parcel of shares ("the shares") on bare trust[121] for Vandervell. In order to enable Vandervell to make a gift of money to the Royal College of Surgeons ("the College") to establish a chair of pharmacology and to avoid surtax,[122] the following scheme was implemented. Vandervell orally directed the Bank to transfer the shares to the College so as to pass to the College both the legal and equitable interests in the shares. The Bank handed the share certificates and signed (but blank) transfers to Vandervell's solicitor who passed them on to the College. The College completed and registered the transfers and so became the legal owner of the shares. The College simultaneously granted to Vandervell's trustee company (VTL) an option to repurchase the shares for £5,000. Dividends on the shares, totalling £250,000, were declared and paid to the College on the basis that it was the legally registered owner of the shares. Two years later, VTL exercised its option and repurchased the shares.

Although there was no doubt that the College was the legal owner of the shares, Vandervell had not signed any written instrument divesting himself of his equitable interest in them. For this reason, Vandervell was assessed for surtax on the dividends on the basis that he still owned the equitable interest in the shares.

The Inland Revenue Commissioners argued that Vandervell had not completely parted with his equitable interest in the shares, and that the Bank could only transfer the bare legal interest in the shares to the College because the equitable interest, being vested in Vandervell, could only be disposed of by him in writing.

Vandervell argued that the transfer by the Bank of its legal title to the shares, at his oral direction, had carried with it his beneficial interest in the shares without the need for a separate and additional written disposition of his beneficial interest. On this basis, the income from the shares was not taxable in Vandervell's hands.

120 This case is hereafter referred to as *Vandervell (No 1)*.

121 Vandervell was fully entitled to, and could have called for, the legal estate at any time.

122 Under the relevant English income tax legislation, an individual whose total income for any year exceeded a stated amount was charged additional income tax called "surtax". Surtax has ceased to exist as a separate tax in England and income tax today is charged at different rates according to an individual's total income.

For present purposes, these arguments raised the question whether Vandervell's oral direction to the Bank amounted to a "disposition" of his "subsisting" equitable interest in the shares within the meaning of the English equivalent to s 23C(1)(c).

The House of Lords, in unanimously upholding a majority decision of the English Court of Appeal, held that, while Vandervell's oral direction to the Bank had not, in itself, passed his equitable interest in the shares to the College, that equitable interest passed to the College when the Bank transferred its legal interest in the shares. Vandervell accordingly was not liable for surtax on the income from the shares.[123]

[1340] Although the result of this decision might be satisfactory from a practical point of view, the judgments contain little explanation as to how Vandervell disposed of his equitable interest in the shares. Lord Upjohn explained his decision on the following basis:[124]

> "[T]he object of the section [namely, the equivalent to s 23C(1)(c)], as was the object of the old Statute of Frauds, is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth his beneficiaries. But when the beneficial owner owns the whole beneficial estate and is in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate there can be no possible ground for invoking the section where the beneficial owner wants to deal with the legal estate as well as the equitable estate …
>
> [I]f the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; the greater includes the less …"

This suggests that, because property is not seen as consisting of two separate interests, one legal and the other equitable, when

123 Despite this finding, Vandervell was found by a bare majority (Lords Upjohn, Pearce and Wilberforce, Lords Reid and Donovan dissenting) to be liable to surtax on the basis that VTL held the benefit of the option to repurchase the shares on a resulting trust for Vandervell. By not stipulating clearly that the option was to be held by VTL on trust for the beneficiaries of that trust, Vandervell had failed to divest himself of the beneficial interest in the shares. Vandervell subsequently divested himself of any interest under the option: see para below, [1351].

124 [1967] 2 AC 291 at 311 (with whom Lord Pearce agreed at 309). See also Lord Donovan at 317-318. Lord Reid did not deal with this issue.

the Bank transferred its legal interest to the College, it simultaneously transferred Vandervell's equitable interest. According to this analysis, Vandervell's oral direction to the Bank did not amount to a "disposition" of his "subsisting" equitable interest in the shares: that disposition occurred as a result of the transfer by the Bank of its legal interest to the College.

Lord Wilberforce, on the other hand, took a different approach. He suggested that the reason Vandervell's oral direction did not have to be in writing was because once Vandervell, by his agent (his solicitor), obtained from the Bank the share certificates and blank but executed transfers, he was in a position to become the full legal owner of the shares. This meant that, when he handed over those documents to the College with the intention of making a gift of the shares to the College, he put the College in a position to become their absolute legal owner, and, on registration of the transfers, it did become their legal owner (at 330). According to this view, when the Bank handed the blank share transfers and share certificates to Vandervell's solicitor Vandervell become the "absolute master of the shares and only needed to insert his name as transferee in the transfer and to register it to become the full legal owner, He was also the owner in equity" (at 330). At that point, presumably Vandervell's equitable interest merged in the legal interest, and the whole legal and equitable interest then passed from Vandervell to the College. Lord Wilberforce went on to point out that, had Vandervell died before the College registered the shares (being legal property) in its name, the gift would have been complete in equity (because Vandervell had done everything in his power to transfer the legal interest to the College, as discussed above in paras [1311] to [1316]).

[1341] Although there is little doubt that the transfer of legal title by an absolute owner of property carries with it the equitable interest in that property (in the absence of any evidence to the contrary, or unless the presumption of resulting trust applies), this result does not necessarily follow where there are separate legal and equitable interests, as there were in *Vandervell (No 1)*.[125]

125 For a discussion of the nature of the interests of an owner of property see *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 Gibbs CJ at 442; Aickin J at 463; Brennan J at 474. In that case a registered proprietor of land executed a transfer of the land in favour of an assignee for nominal consideration, intending to pass only the bare legal title in the land. The assignee executed a declaration of trust in favour of the registered proprietor. The intention of this arrangement was to effect a transfer of only the bare legal title to the land while leaving the equitable title with the registered proprietor. A majority of the High Court held that the transfer of the legal title carried with it the equitable title.

Lord Donovan, while acknowledging that the legal and equitable estates in the shares were in separate ownership, held that once Vandervell instructed the Bank to transfer the shares to the College and "made it abundantly clear that he wanted to pass, by means of that transfer, his own beneficial, or equitable, interest, plus the bank's legal interest, he achieved the same result as if there has been no separation of the interests" (*Vandervell (No 1)* at 317).

[1342] The approach of Lords Upjohn, Pearce and Donovan does not explain how Vandervell's equitable interest ended up in the hands of the College or what would have happened if Vandervell had died after orally directing the Bank to transfer the legal interest to the College but before the Bank had actually carried out his direction.[126] One possible explanation of their approach might be to characterise the assignor's oral direction to the trustees to deal with the legal estate as a release of the assignor's equitable interest in the property which, it has been said, operates by way of "extinction" rather than by way of "disposition", and so need not be in writing (*Crichton v Crichton* (1930) 43 CLR 536).[127] However, a release of an equitable interest by the holder of an absolute equitable interest generally leaves a trustee free to deal with property as her or his own and, in the present context, the assignor does not intend the trustee to hold the property as her or his own but intends to assign it to the assignee.

In addition, if an assignment of equitable property takes a particular form, the requirements of that particular form of assignment must be satisfied. If the assignment fails to satisfy those requirements proving compliance with the requirements for some other form will not save it.[128]

Lord Wilberforce's approach (which requires the trustee to put the assignor in a position to become the full legal owner of the property) offers a more precise analysis of the position.

[1343] Despite the technical problems with the decision in *Vandervell (No 1)* [1967] 2 AC 291, it has been suggested that the majority approach is likely to prevail, the practical effect of that approach overriding its limitations: it allows an equitable interest in personal property to be transferred by a beneficiary's oral

126 In those circumstances, if Vandervell's direction is seen as a revocable mandate, it would presumably be revoked upon his death: *Parker and Parker v Ledsham* [1988] WAR 32.

127 Discussed below, para [1346].

128 The second limb of the test in *Milroy v Lord* (1862) 4 De GF & J 264 at 274-275; 45 ER 1185 is discussed above, para [1312].

direction and a trustee's subsequent written instrument, instead of by two separate written instruments, one by the beneficiary and the other by the trustee.[129] The effect of this approach is that, if an absolute owner of an equitable interest in personal property orally directs the legal owner to transfer the property to a third person (the assignee), with the intention that the assignee shall become the equitable as well as the legal owner, and the trustee does so, then it is the trustee's transfer which passes *both* the legal and the equitable interests in the property to the assignee and not the assignor's oral direction.

Disclaimers of equitable interests

[1344] The donee of an equitable interest may disclaim (or repudiate) that interest because, for example, unacceptable or onerous conditions are attached to the gift.[130] The question which must be considered in this context is whether such a disclaimer constitutes a "disposition" of an equitable interest within the meaning of s 23C(1)(c).

In *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125, a stepfather made a gift of shares in a company to his stepson (the donee). Because the share transfer was defective, the donee only acquired an equitable interest in the shares. When the donee became aware of the gift, he orally disclaimed it. However, when the company was wound up, the donee changed his mind and claimed his share of the surplus funds in the company. The question accordingly arose as to whether the disclaimer, being oral, was void under the English equivalent to s 23C(1)(c), leaving the donee with his equitable interest in the shares. The English Court of Appeal held that, because "a disclaimer operates by way of avoidance, and not by way of disposition", the oral disclaimer was effective (at 1143).

The characterisation of a disclaimer as a transaction operating by "avoidance" rather than by way of "disposition" provides no explanation as to the way in which the donee's equitable interest in the gifted property passes from the donee back to the

129 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [723], [726].

130 An interesting example of a disclaimer of a gift is provided by the Canadian case of *Re Moss* (1977) 77 DLR (3d) 314 (BC). In that case, a beneficiary, the Penticton Congregation of Jehovah's Witnesses, disclaimed a gift left to it by a congregant, who, five months before his death, had been excommunicated from the Congregation for chewing tobacco on the lawn of its premises.

donor.[131] One possible, but rather artificial, explanation is to regard the equitable interest as passing to the donee only if the donee fails to disclaim the gift within a reasonable time of becoming aware of it.

As the term "disposition" is statutorily defined in New South Wales to include "disclaimer", if that definition is relevant in construing s 23C(1)(c),[132] it is arguable that the *Paradise Motor* case will not be applied in New South Wales. In that event, a disclaimer of a gift of equitable property will constitute a "disposition" of a "subsisting" equitable interest requiring writing under either s 23C(1)(a) (in relation to real property) or s 23C(1)(c) (in relation to personal property).

Releases of equitable interests

[1345] The holder of an absolute equitable interest in property (the assignor) may release the legal owner (the trustee) from her or his obligations to deal with the trust property for the benefit of the assignor. Such a release leaves the trustee free to deal with the property as her or his own.[133]

One way of analysing the effect of a release is to regard the assignor as having ceased to hold an equitable interest in the property and, accordingly, as having passed that equitable interest to the trustee. Viewed in this manner, the release operates as a "disposition" of a "subsisting" equitable interest within the meaning of s 23C(1)(a) (in relation to land) or s 23C(1)(c) (in relation to personal property), and accordingly must be in writing. This view is strengthened by the statutory definition of "disposition" as including a "release".[134]

On the other hand, it is also possible to analyse the release as involving the extinction of the assignor's equitable interest, rather than as a disposition of that interest. According to this analysis, once the trustee acquires the full beneficial ownership

131 In *Probert v Commissioner of State Taxation* (1998) 72 SASR 48 a testator left the net residue of his estate to his sister (the appellant) and his niece in equal shares. The Commissioner assessed a disclaimer executed by the appellant before the grant of probate with ad valorem duty. In allowing an appeal against that assessment, Olsson J in the South Australian Supreme Court noted (at 54) that a formal disclaimer of a benefit conferred by a will "does not act positively as an assignment or disposition of property. The whole concept of such an act in relation to residue, at least if it occurs before personal representatives become functus officio, is that it acts negatively by preventing the relevant property vesting at all".

132 See above, para [1331].

133 On release, see further below, paras [2903]-[2905].

134 If, for the reasons given above, para [1331], that definition is relevant in construing s 23C(1)(c).

of the property the assignor's equitable interest can no longer be identified as a separate interest in that property. Viewed in this way, an effective release only requires the assignor to form an intention to surrender up the equitable interest and to communicate that intention to the assignee: it need not be in writing because no equitable interest is "disposed" of.

[1346] Support for the latter view may be found in the High Court decision of *Crichton v Crichton* (1930) 43 CLR 536 at 563,[135] although that case was decided under a statutory provision that required "grants and assignments" (rather than "dispositions") to be in writing. This view is also consistent with the decision of the House of Lords in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291[136] to the effect that a direction by the holder of an absolute equitable interest to her or his trustees to deal with the legal estate for the benefit of a third party does not involve a disposition of an equitable interest in property.[137]

[1347] As a matter of principle, it is difficult not to characterise a release of an equitable interest in property, either real or personal, which enlarges the interest of the assignee, as a "disposition" of a "subsisting" equitable interest under either s 23C(1)(a) (in respect of land) or s 23C(1)(c) (in respect of personal property). On this basis, the release of all equitable interests should be in writing.

Nomination of beneficiaries

[1348] Under this type of transaction, an assignor nominates a beneficiary to take, on the assignor's death, a benefit in property that would otherwise pass to the assignor's estate. If the nomination is seen as a "disposition" of an equitable interest in that property, then it must comply with s 23C(1)(a) (if it affects real property) or s 23C(1)(c) (if it affects personal property).

[1349] In *Re Danish Bacon Co Ltd Staff Pension Fund* [1971] 1 WLR 248, a member of a pension fund ("the fund") was entitled under the rules of the fund to nominate, in the approved form, a beneficiary to whom the member's contributions to the fund would be payable upon the member's death, provided the member died while in employment or after retirement, while in receipt of a pension. The member, in the approved form, nominated Dorothy. However, at a later date, the member made a written request to the secretary of the fund (which was not in

135 Dixon J at 563 did acknowledge that the position might be different under modern legislation.

136 Discussed above, para [1339].

137 Although that case dealt with a direction to dispose of a legal and not an equitable interest.

the approved form) to alter that appointment in favour of Ethel. This alteration was made. Upon the member's death, his contributions to the fund became payable. Megarry J held that the nomination was not a testamentary disposition and expressed doubt as to whether the nomination had to be in writing under the English equivalent to s 23C(1)(c). The basis of his decision was that the member's interest in the fund was not a "subsisting" equitable interest in "property". The beneficiary's rights under the scheme did not operate immediately upon the nomination — they only arose if the member died while in employment or left his employment voluntarily. The only interest that the member could dispose of was a contractual right to ensure that the fund fulfilled its obligations under the scheme; he did not own any equitable interest in the property itself.[138]

[1350] Megarry J's reasoning was approved by the Privy Council in *Baird v Baird* [1990] 2 AC 549.[139] In that case, an employee, Baird, who had contributed to his employer's pension plan during the term of his employment, was entitled to certain benefits if he died while in employment before the stipulated retirement age, and to nominate a beneficiary to whom those benefits would be payable on his death. If the nominated beneficiary predeceased Baird, the benefits would be paid to his surviving spouse, if any, or to his estate. In 1965, Baird nominated his brother as his beneficiary in the form approved by his employer. In 1972, when Baird died without revoking or varying this nomination, his brother claimed the death benefits. However, Baird's widow also claimed the benefits on the basis that Baird's nomination of his brother was an invalid testamentary disposition that had not complied with the relevant statutory will-making formalities. In dealing with this issue the Privy Council considered whether Baird's nomination had had the effect of disposing of any "property". In concluding that it had not, the Privy Council characterised Baird's right in the death benefits as a right to compel payment of these benefits (a right that was not acquired by the beneficiary). As their Lordships stated (at 557):

> "He retains no proprietary interests in his contributions but receives instead such rights, including the right to appoint interests in the fund to take effect on the occurrence of specified contingencies, as the trusts of the fund confer upon him."

138 Compare *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15, which held that a nomination under such a scheme involves a contract to create a trust in respect of particular property at a given point in time.

139 See also Atherton R, "Nominations and Testamentary Dispositions" (1991) 65 *Australian Law Journal* 49.

Under the terms of the pension scheme, a trust of the benefits arose upon the employer's approval of the nomination and the beneficiary acquired rights under that trust during Baird's lifetime (at 558). However, until this issue is determined by the High Court, the question of whether a nomination must comply with the writing requirement in s 23C(1)(c) cannot be regarded as settled.

Divestiture of equitable interests under resulting trusts

[1351] Where a beneficiary under a resulting trust divests herself or himself of that interest,[140] the question arises as to whether the divestiture must comply with the writing requirement imposed by s 23C(1).

This issue was considered by the English Court of Appeal in the second case involving Vandervell and the Royal College of Surgeons ("the College"): *Re Vandervell's Trusts (No 2); White v Vandervell Trustees Ltd* [1974] Ch 269.[141]

Vandervell Trustees Ltd (VTL), a nominee company (or bare trustee) for Vandervell, had an option to repurchase the shares which Vandervell had previously given to the College. In 1961, on Vandervell's instructions, VTL exercised the option and repurchased the shares for £5,000 out of a trust fund which Vandervell had established for his children ("the children's trust"). Both Vandervell and VTL intended the shares to be held by VTL as part of the children's trust. Between 1961 and 1965 ("the disputed period"), dividends on the shares were paid to VTL and applied for the purposes of the children's trust. Despite Vandervell's intention regarding the option, in *Vandervell (No 1)*[142] a majority of the House of Lords held that the equitable interest in the option was held by VTL on a resulting trust for Vandervell. In 1965, to avoid any confusion about the ownership of the shares, Vandervell executed a deed transferring to VTL all of the rights, if any, which he might hold in the option or the shares. The Inland Revenue Commissioners assessed Vandervell for surtax[143] on dividends that were declared on the shares

140 This question is similar to a trustee's release by an absolutely entitled beneficiary from the trustee's obligations to deal with the trust property for the benefit of the beneficiary. The release of equitable interests is discussed above, paras [1345]-[1347].

141 This case is hereafter referred to as *Vandervell (No 2)*.

142 *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, discussed above, para [1339].

143 See above, para [1339], n 122.

during the disputed period. After Vandervell died in 1967, and before this claim was litigated, the executors of his estate sought a declaration that they were entitled to all dividends received by VTL during the disputed period, the aim of the litigation being to obtain a ruling as to Vandervell's tax liability.[144] Megarry J made this declaration on the basis that Vandervell could not have orally divested himself of his equitable interest under the resulting trust[145] of the option. This decision was reversed on appeal to the English Court of Appeal[146] which held that the dividends belonged to the children's trust and that no surtax was payable by Vandervell's estate. The case was then settled before it reached the House of Lords.

[1352] As with the decision in *Vandervell (No 1)*,[147] although the result of *Vandervell (No 2)* might be correct from a practical and commercial point of view, the Court of Appeal's explanation as to why Vandervell's disposition of his equitable interest under the resulting trust did not have to be in writing is far from satisfactory.

Lord Denning MR seemed to place considerable weight on the fact that Vandervell's equitable interest in the option had arisen under a resulting trust, describing such an interest in the following terms:[148]

> "A resulting trust for the settlor is born and dies without any writing at all. It comes into existence whenever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled."

In his opinion, as a declaration of trust of personal property does not have to be in writing, Vandervell's oral declaration that the shares, to which he was absolutely beneficially entitled, were to

144 The executors applied to join the Inland Revenue Commissioners to this action but VTL objected and the objection was upheld: *Vandervell Trustees Ltd v White* [1971] AC 912.

145 In *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 (*Vandervell (No 1)*) at 329, Lord Wilberforce explained that the option was vested in VTL "as a trustee on trusts, not defined at the time, possibly to be defined later. But the equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settlor." Megarry J at first instance in *Vandervell (No 2)*, held that, although VTL held the option upon trust, no effective trust of the option had been declared so that VTL held the option on an automatic resulting trust in favour of Vandervell: *Re Vandervell's Trusts (No 2); White v Vandervell Trustees Ltd* (1974) Ch 269 at 296.

146 Lord Denning MR, Lawton and Stephenson LLJ.

147 *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291. The facts of this case are discussed above, para [1339].

148 *Re Vandervell's Trusts (No 2)*; *White v Vandervell Trustees Ltd* [1974] Ch 269 at 320.

be held in trust for his children was effective to vest his equitable interest under the resulting trust in the children's trustees. His Lordship also considered as relevant the fact that the resulting trust had been a trust of the *option*, whereas the trust for the children was a trust of the *shares* (at 319).

These arguments are difficult to justify in principle. First, the exemption from writing found in s 23C(2) only applies to the "creation or operation" of resulting, implied or constructive trusts, and not to the termination of those trusts or the disposition of interests under them. Secondly, it would seem that a trustee who holds an option to purchase shares on behalf of a beneficiary, also holds the shares acquired upon the exercise of the option on behalf of that beneficiary, unless the beneficiary has disposed of her or his rights under the trust or released the trustee from the trustee's obligations under the trust.

Lawton LJ based his decision on the principle that, where a trustee uses another person's money to buy property, the trustee will hold that property on trust for that person (at 325). This argument, while explaining how the children's trust could have acquired an equitable interest in the shares, does not explain how Vandervell's equitable interest under the resulting trust of the option was extinguished without writing.

Both Lord Denning MR and Lawton LJ also relied on the doctrine of estoppel in arriving at their conclusion. They held that Vandervell should be estopped from denying that the shares belonged to the children's trust because he had acquiesced in or encouraged VTL to use money from the children's trust to exercise the option. The difficulty with this argument is that an estoppel does not normally arise unless a person knows that he or she has rights which are contrary to the position subsequently asserted. On the facts of the case, since Vandervell did not know that he had any rights in relation to the option and the shares at the time the option was exercised, it is difficult to see how an estoppel could be set up against him.

[1353] The decision in *Vandervell (No 2)* is only explicable on the basis that a decision that the property still belonged to Vandervell, which for all practical purposes would have been a decision for the Inland Revenue Commissioners, would have been totally unfair in the circumstances surrounding this case and would have "defeated the intention of a dead man" (at 325; Lord Denning MR at 320). The problems with the reasoning of the English Court of Appeal suggests that its conclusion that the

disposition of an interest under a resulting trust need not be in writing is not consistent with s 23C(1)(c).[149]

It would seem that, contrary to the decision in that case, any divestiture by the beneficiary of a resulting trust of her or his equitable interest under that trust constitutes a "disposition" of a "subsisting" equitable interest which must comply with s 23C(1). If the subsisting equitable interest under the resulting trust concerns land, writing is required by s 23C(1)(a) in any event; if the resulting trust is over personal property, writing is required by s 23C(1)(c).

The need for writing and notice under s 12 in relation to equitable choses in action

[1354] Section 12 of the *Conveyancing Act* 1919 (NSW), and its equivalents in the other Australian States and Territories,[150] requires absolute assignments of debts and legal choses in action to be in writing, the assignment to be signed personally by the assignor and written notice of the assignment to be given to the debtor or trustee. At first glance s 12 appears to apply only to *legal* choses in action and so to be inapplicable in the context of assignments of equitable choses in action.[151] However, the reference to a "trustee" in the section helped to lead the High Court in *Federal Commissioner of Taxation v Everett* (1979) 143 CLR 440 at 447 to construe the term "legal" chose in action in the section to mean a "lawfully assignable" chose in action and, accordingly, to apply to "equitable" choses in action, such as a partner's interest in the assets of the partnership.[152]

149 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [748]. In Martin J E (ed), *Hanbury and Martin's Modern Equity* (14th ed, Sweet and Maxwell, London, 1993), p 89, n 66, it is suggested that one possible explanation might be that Vandervell might not have had a "subsisting" separate equitable interest in the shares. Another suggested explanation is that the exercise of the option gave rise to a specifically enforceable contract which "created" a constructive trust in favour of Vandervell, which did not need to be in writing.

150 Section 12 is set out above, para [1307]. The equivalent sections in the other States are *Property Law Act* 1974 (Qld), ss 199, 200; *Law of Property Act* 1936 (SA), s 15; *Conveyancing and Law of Property Act* 1884 (Tas), s 86; *Property Law Act* 1958 (Vic), s 134; *Property Law Act* 1969 (WA), s 20. The *Law of Property (Miscellaneous Provisions) Ordinance* 1958 (ACT), s 3 applies the New South Wales provision to the Territory, while, in the Northern Territory, the *Property Act* 1860 (SA), s 19 is still in force.

151 Assignments of legal choses in action are discussed above, paras [1307]-[1308].

152 Another example of an equitable chose in action is the interest of a beneficiary in an unadministered deceased estate against the executors or administrators of that estate.

This interpretation raises a number of difficulties for the assignment of equitable choses in action. In the first place, it requires a distinction to be drawn between assignments of equitable interests generally (which need not comply with s 12 but are covered by s 23C) and assignments of equitable choses in action (which must comply with s 12). Secondly, it allows equitable choses in action to be assigned in equity only if the requirements imposed by s 12 are satisfied. The effect of this interpretation is that the formalities for the assignment of equitable choses in action are more onerous than those for the assignment in equity of legal choses in action, because while a legal assignment that does not comply with the formalities in s 12 may be enforced in equity, if s 12 applies to equitable assignments, an equitable assignment that does not comply with the s12 formalities will not be enforced.[153]

[1355] In order to avoid these difficulties, s 12 should be seen as merely providing a method for the assignment of equitable choses in action, although not necessarily a mandatory method.[154] This interpretation has two benefits. It avoids the rejection of the well-established rule that notice is not an essential requirement of an effective equitable assignment. It also avoids the need for a distinction to be drawn between equitable interests and equitable choses in action. On the other hand, however, such a suggestion appears to render the need for compliance with s 12 rather superfluous in most situations: if s 12 is not mandatory, it adds nothing to the requirements already imposed by s 23C(1)(c) on assignments of equitable interests in personal property.[155]

Another suggestion is that the decision in *Everett's* case can be explained on the basis that partnership interests are sui generis and distinguishable from other forms of equitable choses in action, and so special formalities are needed in relation to their assignment. The distinct nature of partnership interests may be seen to arise out of the fact that partners have both an equitable interest (in the surplus of partnership assets over liabilities on

153 Equitable assignments of legal choses in action are discussed above, paras [1309]-[1318].

154 This is the approach adopted in *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWR 427 at 448. It can also be justified by the language used by members of the High Court in *Federal Commissioner of Taxation v Everett* (1979) 143 CLR 440 at 447, that the interest of a partner "may be" assigned under s 12. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [608], [685]. Young J in *Global Custodians Ltd v Mesh* [1999] NSWCA 313 at p 7 held that s 12 does not apply to the assignment of equitable choses in action or equitable rights falling short of a chose in action.

155 One feature that may distinguish s 12 from s 23C(1)(c) is that the former applies only to "absolute assignments", whereas the latter applies to "dispositions". This distinction requires an examination of whether the relevant method of assigning equitable choses in action effects an "absolute assignment" of that interest or not.

dissolution of the partnership) and a legal interest (arising under the partnership agreement) in the partnership.[156] Seen in this light, compliance with s 12 may be necessary to assign the legal content of the interest.[157]

However, none of these suggestions is entirely convincing and legislative amendment to s 12 is required to clarify that s 12 does not apply to the assignment of equitable interests.

[1356] Assuming s 12 is not mandatory in assignments of equitable choses in action, then although notice to the debtor[158] of an assignment of an equitable chose in action is not an essential requirement for a valid equitable assignment, nevertheless, it is in the assignee's interests to ensure that such notice is given to the debtor for the purposes of preserving the assignee's priority over competing assignees and to prevent the debtor from obtaining a valid discharge from liability from the assignor.

LEGAL PROPERTY CAPABLE OF ASSIGNMENT IN EQUITY ONLY

[1357] Although most legal property is capable of being assigned at law or in equity, there is some legal property which, although incapable of assignment at law, is assignable in equity.

Until the passage of the *Judicature Act* 1873 (UK) and corresponding statutory provisions in Australia,[159] common law courts regarded legal choses in action as mere possibilities[160] or bare rights of action[161] and, as such, were incapable of being assigned legally. Equity, however, never shared the common law's attitude to the assignment of legal choses in action and permitted legal choses in action to be assigned, even in the absence of valuable

156 Young J in *Global Custodians Ltd v Mesh* [1999] NSWCA 313 at p 8 noted that unless a partnership agreement makes special provision to the contrary, the assignment of a partner's interest in a partnership merely assigns the share of capital or income otherwise payable by the partnership to the assignor.

157 See Heydon J D, Gummow W M C and Austin R P, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 2002), para [7.27].

158 In the context of assignments of equitable choses in action, the debtor will be the trustee of the relevant equitable interest. One construction of s 12 which renders it inapplicable to assignments of equitable choses in action is to read the term "trustee" as a reference to a "trustee in bankruptcy".

159 Section 12 of the *Conveyancing Act* 1919 (NSW) and its equivalents in the other Australian States and Territories is set out and discussed above, para [1307].

160 Future property is discussed below, paras [1358]-[1371].

161 Bare rights to litigate are discussed below, paras [1374]-[1375].

consideration, if the assignor manifested a "clear expression of an intention to make an immediate disposition" [162] of the chose in action. Once legal choses in action became legally assignable by statute, the enforcement of assignments of such property in equity became relevant only in those circumstances where the legal assignment failed to comply with the statutory formalities.[163] It is important to realise that the statutory provisions which allow assignments of legal choses in action do not allow assignments of only *parts* of legal choses in action. As parts of legal choses in action were also incapable of being assigned at law, independently of the statute, it follows that parts of legal choses in action can only be assigned in equity.

For an effective assignment in equity of part of a legal chose in action, all that is required is a clear expression of intention by the assignor to make an immediate disposition. In rejecting the need for valuable consideration in this context, Windeyer J (dissenting) in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 34[164] explained:

> "The whole of a debt being now voluntarily assignable under the statute, it would be a strange anomaly if a part could not be the subject of voluntary equitable assignment. To say, 'you can give away the whole, but you cannot give away a part, for a part you must get a price' would seem to contradict common sense."

Equity enforces voluntary assignments of parts of legal choses in action, not by compelling the assignor to do something, but by refusing to allow the assignor to act in a way inconsistent with the assignor's actions. The assignor's conscience is bound, not by consideration received, but because, as between the assignor and the assignee, the gift is complete (*Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J (dissenting) at 33).

FUTURE PROPERTY CAPABLE OF ASSIGNMENT

[1358] The discussion so far has centred on *existing* property, or rights in existing property, and the way in which such property can be disposed of at law or in equity. Consideration must now be given

162 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J (dissenting) at 30.

163 See above, paras [1309]-[1318].

164 This passage was approved by Kitto J in *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385 at 397.

to that form of property known as *future* property (which is also referred to as a "mere expectancy" or an "expectancy"). The term "future property" refers to property that does not presently exist but that may exist at some future time. The concept of ownership of future "property" is a fiction: it is not really proprietary at all because it obviously is impossible to own property that does not exist. However "future property" has been given a proprietary status in equity.

One example of future property is the interest of a beneficiary under the will of a living person.[165] During the testator's life, the beneficiary cannot be said to own any interest, legal or equitable, in the testator's property. All that the beneficiary presently has is the hope or expectation of acquiring some interest in that property should the testator predecease the beneficiary without revoking or altering her or his will. Like a contingent remainder that may never vest, the expectation of an heir may simply evaporate or disappear. Other examples of future property include the copyright in a book not yet written, or next year's grape harvest or wool clip. In each of these examples, it is always possible that the intended property may not materialise: the expected best-seller may not be completed, and drought or disease may ruin any anticipated grape harvest or wool clip.

Future property is not recognised by the common law and so cannot be assigned at law. However, agreements to assign such property are enforced in equity in certain circumstances.

[1359] Agreements to assign future property are only assignable in equity if the agreement is made for valuable consideration. Voluntary assignments of future property are not enforceable in equity. In this context, equity is faithful to the maxim that it will not assist volunteers: the conscience of the assignor is bound by the consideration paid by the assignee.[166]

An agreement to assign future property for value is treated in equity as an agreement to assign the property when it is acquired (*Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, Windeyer J (dissenting) at 24-26). A clear explanation of the effect of an assignment of future property is provided in the following statement of Deane J, in the Full Federal Court, in *Federal Commissioner of Taxation v Everett* (1978) 38 ALR 625 at 643-644:

165 This type of future property is referred to as a "spes successionis" or a "spes".

166 Equity's approach to agreements for value to assign equitable property is considered above, para [1325]-[1329].

> "[A] purported assignment of a mere expectancy (in the sense of the chance of becoming entitled under the will or intestacy of a person who is still living) or of property to be acquired in the future, is inoperative as an assignment, and has no effect unless made for valuable consideration. If there be consideration, it will operate as an agreement to assign the property when acquired, or to hold it in trust (the latter if the whole of the consideration has been satisfied) and this agreement will be binding on the parties as from its date and binding on the property in equity (although not at common law), if and when it is acquired by the assignor … In the interval … the interest of the assignee is not contractual merely, but he has, as between himself and the assignor, a prospective interest in the property to be acquired which has some of the incidents of a proprietary right."

Although the principle regarding agreements to assign future property appears quite straightforward, difficulties in its application have arisen. One such difficulty lies in determining whether particular property is present or future property. A second is whether all agreements for valuable consideration to assign future property are enforceable in equity or whether only those agreements that attract the remedy of specific performance (damages being an inadequate remedy for their breach) will be enforced. A third concerns the determination of the nature of the assignee's right. Each of these issues is separately considered.

Distinguishing between present rights and future property

[1360] Most interests in property are easily identifiable as either existing property rights or as rights that will only arise at some time in the future. There are, however, some interests in property that are not so easily identifiable. For example, is the right to receive rent under a lease, or interest under a mortgage, a present right or one that will only arise in the future? It is clear from these examples that, in certain circumstances, it may be difficult to distinguish between a present right that may produce some benefit in the future[167] and the future benefit itself. In the words of the High Court, a distinction must be drawn between "present property … carrying with it a right to income generated in the future" and "mere future income dissociated from the proprietary interest

167 The Latin phrase for a present right of this nature is "debitum in praesenti solvendum in futuro".

with which it is ordinarily associated".[168] The High Court has dealt with this issue in the cases considered below.

[1361] In *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, a taxpayer entered into a deed in 1956 under which he undertook, during the 1958 tax year, to "transfer and assign" to his wife by way of gift "all his right title and interest" to interest on a loan which he had made which was repayable at will and without notice by the borrower ("the loan") and to dividends that might be declared on certain shares to which he was entitled as a residuary beneficiary under two estates ("the shares"). The purpose of this scheme was to reduce the taxpayer's liability for income tax. After execution of the deed, the shares were transferred to the taxpayer and were registered in his name. During the 1958 tax year, £450 was paid to the taxpayer as interest on the loan and dividends totalling £460 were paid to him on the shares. The Commissioner of Taxation claimed that the rights to the interest and the dividends were future property and, as such, were not assignable without consideration. This meant that the interest and dividends, when received, formed part of the taxpayer's assessable income. The taxpayer argued that neither the interest nor the dividends were taxable in his hands because he had effectively assigned them to his wife. The High Court upheld the assessment, holding that the taxpayer's rights to both the interest (by a majority)[169] and the dividends (unanimously) were mere expectancies: it was possible that the borrower might repay the loan and that no dividends might be declared on the shares during the 1958 tax year leaving the taxpayer with no present right to assign either the interest or the dividends.

[1362] A similar issue arose in *Shepherd v Commissioner of Taxation (Cth)* (1965) 113 CLR 385. In that case, a taxpayer granted a licence ("the licence agreement") of indefinite duration for the manufacture of castors, in respect of which he held the patent, in return for the payment of royalties on the gross sale price of the castors. In 1957, the taxpayer ("the licensor") entered into a deed in terms of which he purported to assign, by way of gift, all his "right, title and interest in and to an amount equal to ninety per

168 *Commissioner of Taxation of the Commonwealth of Australia v Everett* (1980) 143 CLR 440, Barwick CJ at 450 (with whom Stephen, Mason and Wilson JJ agreed). In *Westgold Resources NL v St George Bank* (1998) 29 ACSR 396; (1998) 17 ACLC 327 (affirmed *Phillips Fox (a firm) v Westgold Resources NL* [2000] WASCA 85) the assignment of benefits under a future put option was described as the assignment of future property, at best.

169 Dixon CJ, Menzies and Owen JJ, McTiernan and Windeyer JJ dissenting. Although the assignment of the interest on the loan appeared in form to be an assignment of present property, the fact that there was no necessary continuation of the taxpayer's right to the interest for the period of the assignment (namely, the 1958 tax year) led the majority to conclude that the right to the interest was future property only.

centum of the income" which might accrue during the following three years from royalties payable under the licence agreement.[170] Under the terms of the licence agreement, the taxpayer was at the mercy of the licensee as to the amount of royalties payable — if the latter sold no items, the taxpayer would receive no income. The taxpayer was assessed for tax for the tax year ending 1958 on the royalties he received under the licence agreement. The taxpayer argued that the royalties did not form part of his income, having been effectively assigned.[171]

A majority of the High Court,[172] after a careful construction of the deed of assignment, held that the deed was effective to assign the taxpayer's present right to receive the royalties.[173] Kitto J drew a distinction between the taxpayer's contractual right to receive royalties (which he referred to as "the tree") and the payments that might accrue to the taxpayer under the licence agreement (referred to as "the fruit" of the tree) (at 396). According to his Honour (at 396), at the date of the assignment, although the licensee was free to decide how many castors, if any, he would manufacture and try to sell:

> "[t]here existed … a contractual relationship between the [taxpayer] and the [licensee] which by its terms must continue throughout the ensuing three years, whether [the licensee] should wish it to continue or not. [The taxpayer], therefore, had a vested right in respect of those three years … [T]he existence of the [taxpayer's] contractual right would be unaffected, though the quantum of its product might be. The tree, though not the fruit, existed at the date of the assignment as a proprietary right of the [taxpayer] of which he was competent to dispose; and he assigned ninety per centum of the tree."

The result of the case would have been different if the taxpayer had attempted to assign a proportion of any payments that the licensee might have made voluntarily (over and above the royalties) during the existence of the licence agreement or payments that he might have received after the licence agreement came to an end. The hope that such payments might be made, being a mere expectancy, would not be assignable without valuable consideration.

170 The "present" property component was the licence agreement (a presently existing chose in action); the "future" property consisted of the royalties.

171 The assignment had to be equitable because it related to part only (90%) of a chose in action which cannot be assigned legally under s 134 of the *Property Law Act* 1958 (Vic) and its equivalents in the other States and Territories: see above, para [1357].

172 Barwick CJ and Kitto J, Owen J dissenting.

173 Barwick CJ at 392; Kitto J at 396.

Barwick CJ and Kitto J distinguished the decision in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9[174] (in relation to the right to interest on the loan) on the basis that the loan in that case had been repayable at the will of the borrower, so that the taxpayer might have had no right to any interest at all during the 1958 tax year. The taxpayer in *Norman's* case could have voluntarily assigned his right to any interest that might have accrued on the loan had no set period been mentioned in the assignment.

[1363] Similar problems as to the nature of assigned property have arisen in other cases. For example, in *Williams v Commissioner of Inland Revenue* [1965] NZLR 395, a taxpayer who, as the holder of a life estate under a trust conducting a grazing business for his benefit, was entitled to receive the net income from that business "as and when the same shall be received", attempted by deed to assign by way of gift "the first … £500 of the net income which shall accrue to the assignor personally while he lives". In upholding the Commissioner's argument that the assignment was ineffective, the New Zealand Court of Appeal construed the assignment as relating to a mere expectancy on the basis that the trust might or might not have earned any income. On the other hand, in *McLeay v Inland Revenue Commissioner* (1963) 9 AITR 265, a voluntary assignment in 1959 by a taxpayer, of all interest payable to him from 1 May 1959 until 1 May 1964 under a registered mortgage which was statutorily repayable at any time after July 1965, was held by McCarthy J to be an effective assignment of a present chose in action, even though the interest was payable in the future.[175]

[1364] These cases illustrate the difficulty in distinguishing between present and future property. A determination as to whether property exists at the date of an assignment or is future property will depend ultimately on a close examination of the relevant instrument of assignment to ascertain the precise subject matter of the assignment.

Basis for the equitable enforcement of assignments of future property

[1365] Lord Westbury LC in *Holroyd v Marshall* (1862) 10 HLC 191 at 211; [1861-1973] All ER Rep 414 stated that equity will enforce an agreement for valuable consideration to assign future property

174 Discussed above, para [1361].

175 See also *Federal Commissioner of Taxation v Australia Guarantee Corp Ltd* (1984) 54 ALR 209.

when the assignor acquires possession of the property, but only if the contract "is one of that class of which a Court of Equity would decree specific performance". The effect of this qualification, if it were accepted, would be to render unenforceable in equity all those agreements to assign future property for which damages are an adequate remedy: only contracts that attract the remedy of specific performance, such as contracts for the sale of land or contracts involving personal property for which there is no ready market, would be enforceable.[176]

This qualification, however, was rejected by the House of Lords in *Tailby v Official Receiver* (1888) 13 App Cas 523,[177] a case involving the assignment, inter alia, of future book debts. As Lord Macnaghten explained (at 547):

> "It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property."

His Lordship went on to state that, as a general rule, the difficulty in cases involving assignments of future property:

> "is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. *The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created*." (at 547-548 (emphasis added))

It would seem therefore that the basis upon which agreements for value to assign future property are enforceable in equity is that such agreements have always been regarded in equity as binding the conscience of the assignor (equity regarding as done that which ought to be done),[178] irrespective of whether or not those agreements are specifically enforceable.[179] This means that agreements for value to assign future goods operate in equity as agreements to transfer ownership on the coming into existence

176 It is interesting to note that *Holroyd's* case involved the sale of machinery and implements in a mill and not special personal property.

177 Lord Herschell at 531; Lord Watson at 535; Lord Macnaghten at 547.

178 The equitable maxims are discussed above, Chapter 1: "The Historical Role of the Equitable Jurisdiction".

179 The availability of the remedy of specific performance will depend on whether damages for a breach of the relevant agreement are an adequate remedy.

of those goods. The availability of the remedy of specific performance in this context is relevant only to the question as to whether the future property is sufficiently identifiable to be the subject matter of such a decree.

[1366] It is unclear whether the principle in *Holroyd v Marshall* (1862) 10 HLC 191; [1861-1973] All ER Rep 414[180] applies to agreements to assign unascertained future chattels. This issue arises because of the existence of a statutory provision in Sale of Goods legislation that no property in unascertained goods can pass until the goods are ascertained.[181]

[1367] In England, the accepted view is that expressed in *Re Wait* [1927] 1 Ch 606[182] that the relevant legislative provision[183] applies in determining the title to unascertained future goods to the exclusion of any equitable principles and that the parties to an agreement to assign unascertained future goods cannot contract out of this provision. Put another way, this means that the determination of the time at which the property in unascertained future goods passes to the assignee, both at law and in equity, is made under the Act and not under the principle in *Holroyd's* case.

The position in Australia is less certain. The Sale of Goods statutes in the Australian States and Territories are not identical to the English statute.[184] For example, s 56 of the *Sale of Goods Act* 1923 (NSW) expressly provides that the Act does not "affect any remedy in equity of the buyer or the seller in respect of any breach of a contract of sale".[185] This section has been held to permit the court to make an order for specific performance of agreements to sell chattels where the making of such an order is

180 Namely, that agreements for value to assign future property are enforceable in equity when the assignor acquires possession of that property: see above, para [1365].

181 *Sale of Goods Act* 1954 (ACT), s 21; *Sale of Goods Act* 1923 (NSW), s 21; *Sale of Goods Act* 1972 (NT), s 21; *Sale of Goods Act* 1896 (Qld), s 19; *Sale of Goods Act* 1895 (SA), s 16; *Sale of Goods Act* 1896 (Tas), s 21; *Sale of Goods Act* 1958 (Vic), s 21; *Sale of Goods Act* 1895 (WA), s 16.

182 A case dealing with an agreement to sell wheat from a particular wheat shipment. The court arrived at this conclusion on the basis of s 18 of the *Sale of Goods Act* 1893 (UK). This principle has been affirmed by the Privy Council in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74. See also *King v Greig* [1931] VLR 413.

183 *Sale of Goods Act* 1979 (UK), s 16.

184 See above, para [1366], n 181.

185 In all other jurisdictions, the principal legislation provides that specific performance may be ordered of agreements to deliver specific or ascertained goods without giving the defendant the option of retaining the goods on payment of damages if the court thinks fit. No such provision exists in relation to unascertained goods: *Sale of Goods Act* 1954 (ACT), s 55; *Sale of Goods Act* 1972 (NT), s 56; *Sale of Goods Act* 1896 (Qld), s 53; *Sale of Goods Act* 1895 (SA), s 51; *Sale of Goods Act* 1896 (Tas), s 56; *Sale of Goods Act* 1958 (Vic), s 58; *Sale of Goods Act* 1895 (WA), s 51.

appropriate (namely, where damages for breach of the agreement are inadequate because of the special nature of the goods).[186]

Although there does not appear to be any convincing argument as to why the principle in *Holroyd's* case should not apply to agreements for the sale of unascertained future chattels, the High Court in *Akron Tyre Co Pty Ltd v Kittson* (1951) 82 CLR 477 approved the principle in *Re Wait* [1927] 1 Ch 606 (but without finding that the Sale of Goods legislation codifies equitable principles as well as rules of law).

Determining the nature of the assignee's right before acquisition

[1368] Once future property comes into existence, or is acquired by the assignor, the right of an assignee under an agreement for value to assign that property is clear. Lord Westbury in *Holroyd v Marshall* (1862) 10 HLC 191 at 211; 11 ER 999 explained that the agreement transfers an equitable interest in the future property to the assignee immediately it comes into existence or is acquired by the assignor. Lord Macnaghten made a similar observation in *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543. The position was clearly described in the following passage by Dixon J in *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27:[187]

> "Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights of ownership for the assignee."

[1369] However, what is the nature of the assignee's rights after the agreement is entered into but *before* the future property comes into existence or is acquired by the assignor? At that stage, does the assignee merely have a contractual right against the assignor

186 See, for example, *Dougan v Ley* (1946) 71 CLR 141, which involved the sale of a licensed taxicab in circumstances where the number of such licenses was restricted and there was a statutory restriction on their transfer.

187 This principle was applied in *Re De Groot* (unreported, Qld SC, Muir J, 23 December 1999) (effect of an assignment of a plaintiff's entitlement to money paid in settlement of a personal injury action was that as soon as the plaintiff's right to receive settlement moneys accrued, the plaintiff held those moneys on trust for the assignees) and *Bacaral Pty Ltd v Bodnar* [2000] VSC 523 (specific charge of future property is a present security that will fix on that property as soon as it is acquired).

or actually acquire some proprietary interest in the future property? This issue will be important if the assignor becomes bankrupt.

In that situation, the question is whether the bankruptcy releases the assignor from her or his obligation to transfer the property to the assignee when it is acquired. Under s 153(1) of the *Bankruptcy Act* 1966 (Cth), a discharge from bankruptcy operates to release a bankrupt from "all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his security for the benefit of creditors generally". Under s 82 of that Act, all debts and liabilities of the bankrupt, present or future, are provable in the bankruptcy. The effect of these provisions is that if an assignee's rights in the future property are contractual only, and the assignee has not proved in the assignor's bankruptcy, the discharge of the assignor from bankruptcy will release the assignor from her or his liability to the assignee, even if the property is acquired after the date of the discharge. However, if the assignee has a proprietary right in the future property, the assignee may assert that right when the assignor subsequently acquires the property, regardless of the assignor's discharge from bankruptcy.

[1370] In *Collyer v Isaacs* (1881) 19 Ch D 342,[188] the English Court of Appeal held that an agreement for value to assign future property conferred on the assignee contractual rights only which were provable in the assignor's bankruptcy, and that the assignor's discharge from bankruptcy discharged the assignor not only "from the principal liability to pay the debt, but also from the ancillary liability to give security for it on his after-acquired chattels".

Two exceptions to this general proposition were however recognised. The first related to marriage settlements containing a covenant to settle after-acquired property; the second dealt with definite contracts to settle specific property not in existence at the time of the contract. Although these exceptions, especially the latter, appear to contradict the general principle laid down in *Collyer's* case, the second exception provided the English Court of Appeal in *Re Lind* [1915] 2 Ch 345 with the means of avoiding the general principle. In that case, it was held that such agreements create an immediate equitable charge on the property when it comes into existence and, accordingly, that before then, the assignee has more than a mere contractual right

188 Sir George Jessel MR at 353; Baggallay LJ at 353; and Lush LJ at 354, agreed.

to enforce the agreement (Swinfen Eady LJ at 357, 358 and 360; Bankes LJ at 373-374). As Phillimore LJ attempted to explain (at 365-366, 368):

> "[I]t is I think well and long settled that the right of the assignee is a higher right than the right to have specific performance of a contract, that the assignment creates an equitable charge which arises immediately upon the property coming into existence ...
>
> I do not understand an assignment which at the time only operates as a contract, but when the property comes into possession operates without more as an actual assurance; and even if this were intelligible I do not understand why in its chrysalis state it is not subject to the laws of a chrysalis, why, being still only a contract, it is not discharged by a discharge of contracts."

This suggests that an assignee acquires a proprietary right in property before it vests in the assignor. It follows that, as soon as the property is acquired, the promise by the assignor to assign the property becomes capable of performance (equity regarding as done that which ought to be done) and is held on trust by the assignor for the assignee, provided the stipulated consideration is paid (*Booth v Federal Commissioner of Taxation* (1987) 76 ALR 375). Yet, although the right of an assignee before the property comes into existence appears to be more than a mere contractual right against the assignor, it is difficult to see it as an interest in property because, at that stage, no property exists.

[1371] Despite the difficulty involved in characterising the assignee's interest in future property as a proprietary interest, Dixon J in *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27[189] described the assignee's prospective right in property as a "higher right than the right to have specific performance" which may survive the assignor's bankruptcy because "it attaches without more *eo instanti* when the property arises and gives the assignee an equitable interest therein". This appears to indicate that, at least for the purpose of priority disputes, assignees of future property for valuable consideration will be regarded in equity as having a proprietary interest in the property.[190]

189 See also *Re Puntoreiro* (1991) 104 ALR 523.

190 In *Garcia v Lam* (unreported, NSWSC, McLaughlin M, 20 February 1997) it was held that since equity will not enforce a contract to assign future property unsupported by consideration, damages are not available for breach of that contract.

PROPERTY INCAPABLE OF ASSIGNMENT

[1372] The legal and equitable rules relating to the assignment of property capable of assignment have been considered in this chapter. However, there are some forms of property that are not capable of being assigned at all, either at law or in equity.[191] Such interests may be rendered incapable of assignment either by statute (for example, testator's family maintenance legislation that renders ineffective assignments of interests dependent upon court orders), under common law rules (which prohibit assignments contrary to public policy) or by a contractual prohibition on assignment.[192]

Interests that are incapable of assignment under the common law fall into three broad categories: namely, public pay, personal contracts and bare rights to litigate. Each of these categories is considered below.

Public pay

[1373] The holder of a public office (such as the office of the Governor-General or one of the State Governors) may not assign her or his pay if it enables her or him to maintain the dignity of the public office or to discharge public duties (*Marr v Admiralty Commissioners* 1926 SC 842).

Bare rights to litigate

[1374] A bare right to litigate (for example, a right to seek damages for a tort) cannot be assigned.[193] Such assignments are considered to be contrary to public policy in that, unless justified, they encourage litigation by persons not interested in the litigation.

191 As noted above, para [1301], n 1, if assignability is a fundamental characteristic of the proprietary character of an item the fact that the item is not assignable may suggest that the item is not "property".

192 An assignment of contractual rights in breach of a prohibition against assignment is ineffective to vest contractual rights in the assignee: *Westgold Resources NL v St George Bank* (1998) 29 ACSR 396; (1998) 17 ACLC 327 (affirmed *Phillips Fox (a firm) v Westgold Resources NL* [2000] WASCA 85). The court left open the possibility that a purported assignment in breach of the contract constituted a breach, giving rise to a right to terminate the contract.

193 *Trendtex Trading Corp v Credit Suisse* [1982] AC 679; *In the Marriage of Zorbas and Zorbas* (1990) FLC 92-160.

Indeed, in some jurisdictions, it is a common law tort[194] to supply a party, who has no interest in an action, with financial assistance to pursue that action in court (maintenance), or to enter into an agreement to divide any proceeds so derived (champerty).[195]

Even in those jurisdictions where the torts of maintenance and champerty have been abolished by statute, courts may, subject to the terms of the statute, still treat agreements for maintenance as contrary to public policy (*Singleton v Freehill Hollingdale & Page* [2000] SASC 278 at p 10).[196]

However, although a bare right to litigate may not be assigned, the proceeds of litigation instituted by the assignor may be assigned (*Glegg v Blomley* [1912] 3 KB 474 (CE)). The proceeds of litigation are an example of future property to which the principle in *Holroyd v Marshall* (1862) 10 HLC 191; 11 ER 999[197] applies, namely, that the assignment is enforceable in equity only if consideration is provided.

[1375] An exception to the general proposition that a bare right to litigate cannot be assigned exists in cases where the assignee has "an interest"[198] or a "genuine and substantial" or "genuine commercial interest"[199] in the litigation.[200] This exception is also the basis of the rule that an assignment of a bare right of action in contract will be enforceable if it is annexed to a right of

194 Maintenance today is probably not a crime: *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 203. In New South Wales, criminal and tortious liability for maintenance was statutorily abolished by the *Maintenance and Champerty Abolition Act* 1993, ss 3 and 4.

195 Champerty is "a particular form of maintenance": *Glegg v Blomley* [1912] 3 KB 474, Parker J at 490. For examples of champertous agreements arising out of conditional fee arrangements between legal advisers and clients see *Re Trepca Mines Ltd (No 2)* [1962] Ch 511; *Hughes v Kingston Upon Hull City Council* [1999] QB 1193. By contrast, contingency agreements have been upheld provided the legal adviser does not take an interest in the subject matter of the proceedings and believes her or his client has a reasonable cause of action: *Schokker v Commissioner of Taxation (No 2)* [2000] 106 FCR 134. The rules relating to champerty apply not only to litigation but also to arbitration proceedings: *Bevan Ashford (A Firm) v Geoff Yeandle (Contractors) Ltd (in liquidation)* [1999] Ch 239 at 249.

196 For a discussion of the concepts of maintenance and champerty see *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 142 ALR 198 at 205-207; *Thai Trading Co (A Firm) v Taylor* [1998] QB 781 at 786, 787; *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 at 11; *Bandwill Pty Ltd v Spencer-Laitt* [2000] WASC 210 at 394-400.

197 Discussed above, para [1365].

198 *Ellis v Torrington* [1920] 1 KB 399, Bankes LJ at 406.

199 *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, Lord Wilberforce at 694; Lord Roskill at 703.

200 A valid assignment of a debt is not invalidated because the need for litigation to recover the assigned debt is contemplated: *Camdex International Ltd v Bank of Zambia* [1998] QB 22. The Privy Council discussed the nature of a charge (stated to be fixed charge) over the book debts of a company in *Agnew and Bearsley v The Commissioner of Inland Revenue* [2001] UKPC 28 (5 June 2001).

property that is also assigned.[201] Another exception allows a trustee in bankruptcy (or the liquidator of an insolvent company) to lawfully assign any of the bankrupt's bare causes of action that have vested in the trustee on terms that the trustee is to receive a share of the proceeds of the litigation, if successful.[202]

Personal contracts

[1376] Rights under a contract may be incapable of assignment if those right are personal to the party attempting to assign them. Personal contracts usually call for the exercise of skill or expertise or involve an element of personal confidence.[203] For example, if A agrees with B to play the leading role in a stage play to be directed by B, a famous producer and director, B cannot assign the benefit of his rights under that contract to another director. The reason for the refusal by courts to enforce the assignment of rights arising under personal contracts is that it is unfair to compel a person (such as A) to perform a contractual obligation for an assignee (the new director) when the obligation was intended to be personal to the assignor (*Don King Productions Inc v Warren* [1993] 3 WLR 276). As Collins MR succinctly explained in *Tolhurst v Associated Portland Cement Manufacturers* [1902] 2 KB 660 at 668, assignment is only permitted where "it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it".

In addition, and regardless of the nature of the contract, the contract may provide, either expressly or impliedly, that the rights under the contract may not be assigned.[204] Any purported assignment or agreement to assign such rights will have no effect

201 See, for example, *Re Kenneth Wright Distributors Pty Ltd (in liq); W J Vines Pty Ltd v Hall* [1973] VR 161, where an assignment of a right to sue a bailee for damages caused by the bailee's negligence was enforceable on the basis that the assignment formed part of the assignment of the chattels themselves.

202 *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 21 ACSR 457; (1996) 14 ACLC 1610; *Re Movitor Pty Ltd* (1996) 64 FCR 380; *Brookfield v Davey Products* (1996) 14 ACLC 303; *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211; *In re Oasis Merchandising Services Ltd* [1998] Ch 170; *Re Daniel Efrat Consulting Services Pty Ltd* (1999) 91 FCR 154; *Norglen Ltd (in liq.) v Reeds Rains Prudential Ltd* [1996] 1 WLR 864; *Circuit Systems Ltd (in liq.) v Zuken-Redac (UK) Ltd* [1997] 1 WLR 721; affd *Norglen Ltd (in liq.) v Reeds Rains Prudential Ltd* [1999] 2 AC 1.

203 Carter J and Harland D, *Contract Law in Australia* (2nd ed, Law Book Co, Sydney, 1991), para [1818]; *Bruce v Tyley* (1916) 21 CLR 277.

204 *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* [1993] RPC 493; *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 45. It should be noted that the fact that a contract is personal and not assignable does not prevent the benefit or "fruits" of the contract from being assigned: *McGowan v Commissioner of Stamp Duties (Qld)* [2001] QCA 236.

at law or in equity,[205] although a contractual prohibition against assignment does not necessarily prevent the benefit of a contractual obligation being held on trust for an assignee (*Don King Productions Inc v Warren* [1999] 3 WLR 276).

205 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549 at 561.

CHAPTER FOURTEEN

CONTRIBUTION

John Glover and Andrew Robertson

DEFINITION

[1401] Contribution is a doctrine which equalises the sharing of burdens. Where two or more persons owe a common obligation to a third person, one person liable may have to contribute to another person liable if that second person pays or satisfies the obligation in a greater than proportionate share. This doctrine has origins both at common law and in equity,[1] although the principle is now considered to be substantially equitable (*Morgan Equipment Co v Rodgers (No 2)* (1993) 32 NSWLR 467 at 482). The obligation is based on the principle of common law and equity that "persons who are under co-ordinate liabilities to make good the one loss (eg sureties liable to make good a failure to pay the one debt) must share the burden pro rata." (*Albion Insurance Co Ltd v Governmentt Insurance Office (NSW)* (1969) 121 CLR 342, Kitto J at 350). The equity arises for a person who has paid in excess of her or his share if the overall value of the obligation is divided between all those liable to perform it.[2] An order of contribution prevents the other persons liable from being enriched by the payment, at the expense of the person who has paid or will have to pay (*Burke v LFOT Pty Ltd* [2002] HCA 17, McHugh J at [38]).

1 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1001]-[1005]. To some extent, the principles are recognised by the *Mercantile Law Amendment Act* 1856 (Imp), s 5, and its Australian equivalents. The Australian equivalents are: *Mercantile Law Act* 1962 (ACT), s 13(1); *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 3; NT: *Mercantile Law Amendment Act* 1861 (SA), s 3, applied by *Northern Territory (Administration) Act* 1910 (Cth), s 5; *Mercantile Act* 1867 (Qld), s 4; *Mercantile Law Act* 1936 (SA), s 17; *Mercantile Law Act* 1935 (Tas), s 13; *Supreme Court Act* 1986 (Vic), s 52; WA: *Mercantile Law Amendment Act* 1856 (Imp), 19 & 20 Vict c 97, s 5. The matter is also treated under the heading of subrogation: see below, Chapter 15: "Subrogation". See also Bingham P, "The Surety's Rights to Contribution" (1984) 12 *Australian Business Law Review* 394 at 395.

2 *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184; *Spiers & Son Ltd v Troup* (1915) 84 LJKB 1986, Scrutton J at 1992. See also Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 404-406.

[1402] Although an obligation to contribute may arise out of shared liabilities, such as for debts or breaches of contract, trust or fiduciary duty, the equitable duty is most often invoked in relation to guarantees and insurance contracts. Legislation in each State has extended and to some degree displaced the contribution principle in relation to the shared liability of tortfeasors.[3] Victoria has a statutory regime relating to liability in respect of any damage, whatever the legal basis of liability.[4] The South Australian statute applies to liabilities in tort, contract and under statute.[5] The equity is applied in admiralty to participation in a "common maritime adventure": cargo owners are obliged to contribute to losses suffered by any one or more of them in preservation of ship and cargo.[6]

THE PREREQUISITES FOR A CONTRIBUTION CLAIM

The prerequisites for an equitable contribution claim are first, the discharge of a shared duty; and secondly, the existence of either co-ordinate liabilities or a common enterprise or design. The availability of a contribution claim is subject to equitable defences and contrary agreement between the parties.

Discharge of a shared duty

[1403] Payment or satisfaction by one person of a duty shared with another is the usual basis of a contribution entitlement. Included in this may be the costs of defending a claim and alleging that no primary duty exists, provided the costs are reasonable and litigation is to the co-obligor's benefit (*Morgan Equipment Co v Rodgers* (1993) 32 NSWLR 467, Giles J at 482). Actual payment or satisfaction of a sum in excess of a just proportion of the

3 *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5; *Law Reform Act* 1995 (Qld), Pt 3, Div 2; *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA), s 6; *Tortfeasors and Contributory Negligence Act* 1954 (Tas), s 3; *Wrongs Act* 1958 (Vic), Pt IV; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA), s 5. The New South Wales legislation has been held inapplicable to liability arising under the *Trade Practices Act* 1974 (Cth): see *Australia & New Zealand Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265, Sheppard J at 276-277.

4 *Wrongs Act* 1958 (Vic), s 23A. Section 23B has been held to provide a basis for an order for contribution as between persons severally liable in respect of a contravention of the *Trade Practices Act* 1974 (Cth): *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1.

5 *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA), s 4.

6 Wilson D J and Cooke J H S, *Lowndes and Rudolf: The Law of General Average and the York-Antwerp Rules* (11th ed, Sweet & Maxwell, London, 1990); *Marine Insurance Act* 1909 (Cth), s 72(1).

principal debt is required before an action at law for money paid can be brought. In equity, the right to contribution can be declared before actual payment is made or the loss is sustained, provided that such loss or payment is imminent (*McLean v Discount & Finance Ltd* (1939) 64 CLR 312, Starke J at 341).[7] Payment is "imminent" if the person to whom the duties are owed has obtained a judgment or made a demand (*Wolmershausen v Gullick* [1893] 2 Ch 514).[8] However, even if judgment is obtained against a party otherwise entitled to claim contribution from another person, a court may look to the likelihood that the first-mentioned party is ready and willing to pay the judgment debt before ordering contribution from the other person (*Bond v Larobi Pty Ltd* (1992) 6 WAR 489, Owen J at 503).

What amounts to a "payment" was commented upon by the High Court in *Mahoney v McManus* (1981) 55 ALJR 673, where the majority held that the operation of the contribution principle "should not be defeated by too technical an approach to the question whether a surety has paid the creditor" (Gibbs CJ at 676). Putting a debtor company in funds to pay its creditors was held to be equivalent to direct payment of the creditors (Gibbs CJ at 676).[9] Contribution can be claimed where a payment is made without demand, provided a demand was not a pre-condition to the payer's liability and the payment was not officious or voluntary (*Stimpson v Smith* [1999] 2 All ER 833).

Co-ordinate liabilities

[1404] Contribution entitlements may arise from duties owed jointly, jointly and severally, or just severally, so long as the parties are subject to a common obligation or "co-ordinate liabilities" to make good the one loss.[10] The list of liabilities that are regarded as co-ordinate has been said to be no more closed than the

7 See also O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), pp 632-634.

8 See also Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 403-404.

9 Brennan J at 680, in his dissenting judgment, observed that, when the debtor made the relevant payment to the creditor, the sureties' liability was discharged. He believed that no equity to contribution should arise to give the payer an advantage in the event of the debtor's insolvency.

10 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, Kitto J at 350; *Smith v Cock* [1911] AC 317, 326; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1006]. See also *Burke v LFOT Pty Ltd* [2002] HCA 17; and Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), para [618]-[620]. As to the need for a "loss", see *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624.

categories of negligence.[11] The co-ordinate liabilities most commonly relied upon in contribution cases are those between indemnity insurers, sureties, trustees and company directors. Co-ordinate liabilities also arise between partners,[12] co-contractors,[13] mortgagors,[14] joint tenants and tenants in common, taxpayers,[15] and parties liable to the holder of a bill of exchange.[16]

One of the tests that has been applied by the courts to determine whether parties are under co-ordinate liabilities is whether payment or performance by one would constitute a good defence to a like claim made against the other.[17] If it would, then the equity of contribution is likely to be attracted, provided the parties are equally culpable.[18] *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184 is a useful illustration of this test. Three persons were liable as sureties to indemnify a creditor in respect of one debt, but on different instruments and not knowing of each other's existence. Lord Eyre CB held that as they had a "common interest and common burthen", they were bound to contribute as effectively as if on one instrument.[19] Since payment by one had the effect of discharging the others, it was said that each ought to contribute.

Liabilities need not arise at the same time in order to be regarded as co-ordinate, nor need they flow from the same cause of action (*Street & Halls v Retravision (NSW) Pty Ltd* (1995) 56 FCR 588 at 597). Liabilities can be co-ordinate even though one arises from tort and the other from contract (*Sky Channel Pty Ltd v Tszyu* [2000] NSWSC 838). In *Sky Channel Pty Ltd v Tszyu*, the plaintiff

11 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1006].

12 *Re Royal Bank of Australia; Robinson's Executor's Case* (1856) 6 De GM & G 572; 43 ER 1356. See also Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 425-426.

13 *Muschinski v Dodds* (1985) 160 CLR 583, Gibbs CJ at 596.

14 *Ker v Ker* (1869) 4 IR Eq 15, Christian LJ at 28; *Harbert's Case* (1584) 3 Co 11b; 76 ER 647. See also Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 413-414.

15 *Armstrong v Commissioner of Stamp Duties (Cth)* (1967) 69 SR (NSW) 38 (CA).

16 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1001].

17 See, eg, *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, Barwick CJ, McTiernan and Menzies JJ at 346; *Scholefield Goodman & Sons Ltd v Zyngier* [1984] VR 445, Fullagar J at 459-461 (FC); *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624, Ipp AJA at [78].

18 See *Burke v LFOT Pty Ltd* [2002] HCA 17, esp at [59]-[66] and *Alexander v Perpetual Trustees WA Ltd* [2001] NSWCA 240.

19 See also *McNamara v Commonwealth Trading Bank of Australia* (1984) 37 SASR 232, Legoe J at 247 (FC).

claimed contribution from the defendant in respect of a judgment made against the defendant for breach of contract, and against the plaintiff in tort for procuring the breach of contract. The liabilities were held to be co-ordinate, even though they flowed from different causes of action. Since the plaintiff's payment discharged the defendant to the extent of the amount paid, the plaintiff was entitled to recover half the amount paid from the defendant.

Whether the liabilities of the parties flow from the same or different causes of action, a contribution order may be refused where their culpability is not equal or comparable or their acts or omissions are not of equal or comparable causal significance (*Burke v LFOT Pty Ltd* [2002] HCA 17, Gaudron ACJ and Hayne J at [16]-[19]). In *Burke v LFOT Pty Ltd* a vendor who misled a purchaser was held to be unable to claim contribution from the purchaser's solicitor, whose negligent failure to recommend inquiries prevented the purchaser from learning the truth. This result may have been justifiable on the basis that the causal significance of the vendor's conduct was "of such a different order" from that of the solicitor that the vendor should be denied contribution.[20] It was also justified on the basis that the parties were not subject to a common obligation. Callinan J held that the solicitor's duty of care was of such a different kind from the vendor's statutory obligation not to engage in misleading or deceptive conduct that the parties could not be said to be subject to a common burden.[21]

[1405] Insurance cases in Australia have included several contribution claims arising out of double insurance — involving workers' compensation insurers on the one hand, and motor vehicle third party insurers on the other.[22] Where employees are injured through negligent use of the employer's motor vehicle in the course of their employment, both types of insurer may be liable to indemnify an insured employer. Liability is in respect of the same risk. The High Court in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 ordered that each of the insurers in such a situation was liable to pay contribution to the other: whatever else they covered, the indemnities of the policies intersected and each applied to the subject of the claim (Barwick CJ, McTiernan and Menzies JJ at

20 [2002] HCA 17, Gaudron ACJ and Hayne J at [19] and McHugh J at [59]-[64]. Compare Kirby J (diss) at [106]-[11]. See further below, para [1819].

21 [2002] HCA 17, [143]. Compare Kirby J (diss) at [101]-[105].

22 See Sutton K C T, *Insurance Law in Australia* (3rd ed, LBC Information Services, Sydney, 1999), pp 988-992 and the cases there cited.

346; Kitto J at 349-350 (agreeing)).[23] The insurers were under co-ordinate liabilities to make good the one loss and were therefore required to share the burden pro rata.[24] The fact that two policies may cover widely varying sets of risks is of no account if there is a shared liability in respect of the risk in question.

[1406] Contribution claims arising out of guarantees are the most common type. For example, in *Capita Financial Group Ltd v Rothwells Ltd* (1993) 30 NSWLR 619, Capita and Rothwells gave separate, but nearly identical, "letters of comfort" to a merchant bank. The signatories promised to provide a particular borrower with sufficient funds to meet its banking commitments. When the borrower went into default and the bank required that the letters be honoured, Capita, acting alone, lent the borrower enough money to discharge its obligations. Rothwells denied that it was obliged to contribute. The obligations to ensure that the borrower had sufficient funds, it was argued, were not co-ordinate. The funding duty could be fulfilled in a number of different ways. Signatories might make equity investments in the borrower's undertaking; or they could lend moneys to any one of several entities. In the result, the signatories' interests could well be quite different depending on which option was employed. The New South Wales Court of Appeal dismissed this argument shortly (Kirby P at 630 (Priestley and Cripps JJA agreeing)). The fact that the obligation contained in the letters could be fulfilled in a variety of ways did not detract from the fact that performance of the duty by one party would discharge the other. This was the decisive factor. From the creditor's perspective, it was a matter of indifference how the borrower was put in funds. A signatory which honoured its letter could choose the mode of performance which suited it best without sacrificing the right to obtain contribution from the other.

Sureties will not be subject to co-ordinate liabilities if a proper construction of their respective engagements discloses that one is surety for the debtor and the other is surety in the event of default of both the debtor and the original surety (*Craythorne v Swinburne* (1807) 14 Ves Jun 160; 33 ER 482 (Ch)).[25] The second

23 See also *Mercer v Petroleum Drilling Services (Aust) Pty Ltd* (1985) 39 SASR 277 (a 50/50 apportionment was ordered); *Quinn v Llesna Rubber Co Pty Ltd* [1989] VR 347 (contribution was equal).

24 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, Kitto J at 349-350; *Borg Warner (Aust) Ltd v Switzerland General Insurance Co Ltd* (1989) 16 NSWLR 421, Cole J at 432. But see *QBE Insurance Ltd v Government Insurance Office (NSW)* (1986) 4 MVR 405 (ACT) (vehicle driven by the negligent co-employee was not owned by the employer and no contribution between vehicle and workers' compensation insurers was ordered).

25 A sub-surety is not liable to contribute to a surety's payment.

surety in that event is a "collateral" surety, liable after the creditor has made demand of the other, and so is not in a sufficiently mutual relation with the other surety as to attract the contribution equity.[26] Even where co-sureties are under a common obligation at law, no right of contribution will arise where the substance of the transaction requires that one surety should be treated as though he or she were the principal debtor and another as subject only to a secondary liability (*Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116). This will be the case, for example, where money is lent to a company and one surety enjoys the whole benefit of the loan through her or his shareholding in that company (*Official Trustee in Bankruptcy v Citibank Savings Ltd*). If a second surety has no interest in the company, that second surety is treated as secondarily liable and the first surety is not entitled to claim contribution from the second. In this respect equity looks to the substance, rather than the form of the transaction.

[1407] Trustees share their obligations jointly and severally. They are liable to contribute equally provided they are in pari delicto. Where the loss is caused by the improper advice of one trustee, being a person on whose advice the other trustees were entitled to rely, the advising trustee will be liable to indemnify the co-trustees against any loss caused by breach of trust, instead of being entitled to claim contribution from them.[27]

[1408] Directors of companies must be shown to have been personally responsible before they can be made liable for corporate losses. They are not responsible for decisions to which they were not a party. After the fault of individual directors is established, a causal link must be established between the fault and the loss suffered.[28] The consequence of this is that one director cannot normally claim contribution from another unless the conduct of the other was such that he or she was also at fault. Alternatively,

26 See *Scholefield Goodman & Sons Ltd v Zyngier* [1984] VR 445 (FC); affd [1986] AC 562 (PC), for a recent application of this principle in circumstances where one surety was liable to the holder of a bill of exchange as a party to it upon the default of the debtor as acceptor, and another surety was liable for the general indebtedness of the debtor to the holder of the bill. It was held, inter alia, that, as the holder had to exhaust its remedies on the bill before making claim of the second surety, the sureties were not mutual or liable to contribute. But see *Maxal Nominees Pty Ltd v Dalgety Ltd* [1985] 1 Qd R 51 (FC).

27 *Bahin v Hughes* (1886) 31 Ch D 390 (CA); *Bacon v Camphausen* (1888) 58 LT 851 (Ch). See also *Robinson v Harkin* [1896] 2 Ch 415; Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [2119].

28 Sealy L S, "The Director as Trustee" [1967] *Cambridge Law Journal* 83 at 88. This result is said to follow from the fact that trustees act jointly, while directors act by a majority. A dissenting or absent director is not responsible for the acts of others. Cf K Mason and J W Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), para [615].

if the breach of duty benefited only one director, then that director cannot claim contribution from her or his fellow directors, even if they were privy to the breach (*Walsh v Bardsley* (1931) 47 TLR 564 (Ch)).[29] The statutory provisions imposing joint and several liability on directors in respect of debts incurred when a company is insolvent have been held to give rise to a common obligation or co-ordinate liabilities. The doctrine of contribution applies, notwithstanding the fact that the relevant provisions create an offence as well as civil liability (*Spika Trading Pty Ltd v Harrison* (1990) 19 NSWLR 211).[30]

Engaging in a "common enterprise or design"

[1409] Contribution entitlements may be upheld between the parties to a scheme or design directed to a common end, even though they do not share common or co-ordinate liabilities. The entitlement arises where an act is done in furtherance of a common design and the claimant incurs an expense or suffers a loss. Other parties to the design will be liable in equity if they knew of and consented to what the claimant did.[31] The principle operates as a sort of equitable indemnity implied between adventurers: the loss or expense incurred by the claimant is treated as the parties' common burden and shared accordingly. This type of contribution claim was recognised in *Cummings v Lewis* (1993) 113 ALR 285. Horse trainer Bart Cummings made loose arrangements with two firms of accountants. Cummings was to acquire a collection of racehorses and the accountants would prepare horse-owning syndicates for their clients to enter. At no stage were the parties linked in any partnership or fiduciary relationship, nor was there any provision made for the event of a loss being made. Cummings acquired several million dollars worth of horses at auction. However, the accountants thereafter were unable to market interests in the syndicates, with the effect that Cummings was left with substantial unpaid debts. These debts were the subject of Cummings' equitable contribution claim against the accountants. The Full Court of the Federal Court held that the claim should fail. Cooper J outlined the nature of the species of equitable contribution based in a shared purpose or adventure (at 315-323), but went on to hold that the element of commonality was quite insufficient in that case (at 324 (Sheppard and Neaves JJ concurring)). The parties hoped

29 See also Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 424-425.

30 See also *Street v Retravision* (1995) 56 FCR 588.

31 *Direct Birmingham, Oxford, Reading & Brighton Railway Co (Spottiswoode's Case)* (1855) 6 De G M & G 345; 43 ER 1267; *Ashurst v Mason* (1875) LR 20 Eq 225; *Jackson v Dickinson* [1903] 1 Ch 947.

to profit from the horse venture in entirely different ways. Cummings hoped to earn training fees, while the accountants hoped to profit from the provision of professional services to the syndicates (at 314). The "common enterprise" species of contribution was not attracted where there was no shared effort to a common end.

PROPER PROPORTIONS

[1410] Prima facie, parties to a shared debt or obligation are required to contribute equally (*Newberry v Harrop* [1986] 1 Qd R 187, Master Weld at 189). Indeed, the contribution principle is said to derive from application of the equitable maxim "equality is equity".[32] This is qualified for different primary obligations as follows.

Guarantees

[1411] Sureties are prima facie liable in an equal measure. Occasionally, the effect of the contribution principle is not excluded, but varied by terms of the guarantee instrument. Sureties are made liable for differing amounts. Equity responds by making each surety contribute in proportion to the amount of that surety's absolute liability (*Mahoney v McManus* (1981) 55 ALJR 673). So, if the debt in question is less than the total amount that any of the several sureties guaranteed, the sureties do not contribute to it equally. Contribution is rateable in the proportion that the debt bears to the guarantee limit of each.[33] If a co-surety becomes insolvent, the guaranteed debt must be equally or rateably shared by the remaining solvent sureties, and any dividends received from the estate of the insolvent surety must also be shared.[34]

Insurance

[1412] Contribution between insurers is not assessed on the same basis as "rateable contribution" between sureties. Consider the situation in which two policies of insurance cover the particular

32 *Muschinski v Dodds* (1985) 160 CLR 583, Gibbs CJ at 596-597; *Baumgartner v Baumgartner* (1987) 164 CLR 137, Mason CJ, Deane and Wilson JJ at 150-151. In *Armstrong v Commissioner of Stamp Duties (Cth)* (1967) 69 SR (NSW) 38 (CA), Wallace P said at at 43: "[T]he right and duty of contribution ... are founded on doctrines of equity and on the maxim 'equality is equity'."

33 *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75, Lord Russell CJ at 81; approving *Pendlebury v Walker* (1841) 4 Y & C Ex 424; 160 ER 1072. See also O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), p 643.

34 *Mahoney v McManus* (1981) 55 ALJR 673, Gibbs CJ at 676-677; O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), p 623.

risk which has given rise to a claim. The risk is a liability in tort of the insured to an employee. Policy A provides for a maximum indemnity of $10,000 and Policy B provides for a maximum indemnity of $100,000. Assume further that a settlement of $9,000 is reached out of court with the concurrence of both insurers. It might be expected that rateable contribution between insurers, by application of the guarantee principles, should be in proportion to the maximum liability each bore: the insurer providing Policy A would be liable for $818, or $10,000/$110,000 of the claim. Instead, the principle of "independent liability" is employed, so that the insurers contribute equally up to the lower of the two maximum liability limits. Hence the insurers providing Policy A and Policy B are each liable for $4,500. Had the claim exceeded $10,000, the maximum liability basis of apportionment would be applied to the excess. In *Government Insurance Office (NSW) v Crowley* [1975] 2 NSWLR 78,[35] Helsham J upheld the independent liability basis in dealing with contribution claims similar to those in the example given.

Trusteeship

[1413] Trustees and other fiduciaries with a common liability to contribute are liable in the same proportions as sureties,[36] except in the situation in which one of two or more trustees in breach of trust is also a beneficiary of the trust. If that trustee were privy to the breach of trust when committed, he or she is only entitled to contribution from the co-trustees to the extent that the loss exceeds the amount of her or his beneficial interest (*Chillingworth v Chambers* [1896] 1 Ch 685).

Co-indebtedness generally

[1414] Co-debtors will be equitably liable in the proportions appropriate for sureties, unless some other equitable consideration requires otherwise. In *Forgeard v Shanahan* (1991) 5 BPR 97,408 (Rolfe J, NSWSC), a residential home jointly owned and mortgaged by a de facto couple was sold. The woman continued to live in the

35 Helsham J referred to but did not follow the analogy of the *Marine Insurance Act* 1890 (Imp), s 80(1), which provides for the "maximum liability" basis of contribution. Where two policies were each unspecific regarding the loss which occurred, contribution based on the insurers' actual liabilities was seen to be more equitable. See also Sutton K C T, *Insurance Law in Australia* (LBC Information Services, Sydney, 1999), pp 993-1002. The *Insurance Contracts Act* 1984 (Cth) does not affect the question of contribution between insurers: see Tarr A, Liew K and Holligan W, *Australian Insurance Law* (2nd ed, Law Book Co, Sydney, 1991), p 330.

36 *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184. Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [2118].

house and to pay mortgage instalments for some time while the man lived elsewhere. The man's entitlement to the sale proceeds was reduced by his liability to contribute to mortgage payments during the period in which they were paid by the woman. Against this, half the rental value of the house over the period the woman continued to live there was set-off. If a contribution equity was asserted in the mortgage payments, an equitable account for the benefit of receiving rents and profits had to be given.

NATURE OF THE ENTITLEMENT

[1415] A contribution claim is equitable in a broad sense: it may be enforced by an action at law for money paid, or in an action in the equitable jurisdiction for a declaration, account or, specifically, contribution. In *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, Kitto J expressed the doctrine to be "a principle of equity ... that persons who are under co-ordinate liabilities to make good the one loss ... must share the burden pro rata" (at 349-350).[37] Contribution being of nature an equitable cause of action, *Limitations Act* provisions apply only in exceptional circumstances.[38]

[1416] The entitlement to contribution is subject to certain conditions. In the case of guarantees, the entitlement to contribution cannot be based on the payment of instalments of a principal debt where the instalments paid are less than the surety's due proportion of the principal debt in its entirety. That is, even if only one of several guarantors pays all the instalments which fall due, an entitlement to contribution depends upon the payer exceeding a due proportion of the whole of the principal debt.[39] Depending upon the terms of the guarantee instrument, death may discharge a surety, and may proportionately increase amounts for which co-sureties are liable.[40] Where there has been a fraudulent breach of trust to which all trustees have been parties, there is no contribution entitlement between them.[41] Partners are liable jointly for partnership debts while a partnership is subsisting,

37 See also Williams G, *Joint Obligations* (Butterworths, London, 1949), p 165.

38 Discussed in *Manufacturer's Mutual Insurance Ltd v GIO* (1993) 7 ANZ Ins Cas 77,835, Cohen J at 77,840-1 (NSWSC).

39 O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), pp 624-625.

40 O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), pp 629-632.

41 Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [2120].

and contribution proportions applied on the taking of a partnership account will be equal unless the partnership deed provides otherwise.[42] Contribution cannot be claimed in respect of an illegal partnership (*Foster v Driscoll* [1929] 1 KB 470).[43]

LIMITS ON THE ENTITLEMENT

[1417] Though a right to contribution does not spring from contract, the doctrine may be qualified or excluded by contract.[44] Informal statements of common intention made by the parties bearing co-ordinate liabilities have been held to vary contribution rights, even though that intention is not embodied in any express or implied agreement.[45] Express contribution agreements between persons potentially liable are rare (except in joint venture agreements).[46] What occasionally occurs is that a right to contribution is excluded by a term of the engagement whereby a potential claimant becomes liable to the primary obligation[47] — excluded, that is, by the claimant's agreement with the third party obligee and not with possible contributors. For instance, contribution between sureties might be excluded by the terms of their guarantees. In *Cornfoot v Holdenson* [1932] VLR 4 sureties agreed that they would not seek to "claim the benefit" of any relevant guarantee or security held by the creditor. As a matter of construction, Mann J held that the clause applied to subrogation rights only, leaving a mutual right to contribution between the guarantors intact.

[1418] Contribution will be excluded in all cases where one party has a prior duty to perform. A surety who is liable to indemnify another surety has no equity of contribution against that other surety (*Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116). As noted above, even where co-sureties are under a common liability at law, the agreements and under-

42 See *Partnership Act* 1963 (ACT), s 50; *Partnership Act* 1892 (NSW), s 44; NT: *Partnership Act* 1891 (SA), s 44, applied by *Northern Territory (Administration) Act* 1910 (Cth), s 5; *Partnership Act* 1891 (Qld), s 47; *Partnership Act* 1891 (SA), s 44; *Partnership Act* 1891 (Tas), s 49; *Partnership Act* 1958 (Vic), s 48; *Partnership Act* 1895 (WA), s 57.

43 See also Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), p 426.

44 See *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184, Lord Eyre CB at 321.

45 *Morgan Equipment Co v Rodgers* (1993) 32 NSWLR 467, Giles J at 477 (NSWSC); *Muschinski v Dodds* (1985) 160 CLR 583, Gibbs CJ at 597; Deane J at 617.

46 See *Israel v Foreshore Properties Pty Ltd (in liq)* (1980) 54 ALJR 421.

47 For example, as in *Hong Kong Bank of Australia Ltd v Larobi Pty Ltd* (1991) 23 NSWLR 593. In *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, Taylor and Owen JJ at 488 stated that: "[N]o such right [of contribution] will arise where such a result would clearly be contrary to the intentions of the parties ... when the joint obligation was undertaken."

standings between them may establish that, as between them, "one has primary liability and another has a liability to be resorted to only if resort to the first is insufficient." (at 120) The surety who is in substance primarily liable has no right of contribution against the surety who may be characterised as secondarily liable (*Official Trustee in Bankruptcy v Citibank Savings Ltd*). Until recently, insurance policies commonly provided that, in the event of a claim being made where there was other insurance covering the same risk, the insurer was only liable for a certain proportion of the claim. Often only the "excess" of the amount of the claim over the indemnity payable under the other policy was said to be available. Such provisions are now void under the *Insurance Contracts Act* 1984 (Cth), s 45(1). Contribution is also excluded where it leads to a circuity of actions. The claimant in *Robinson v Campbell (No 2)* (1992) 30 NSWLR 503 at 506 (CA) was not allowed to pursue a right to contribution against a party who was entitled to bring complicated proceedings for his reimbursement.

[1419] Contribution will not be ordered where it would have the effect of unjustly enriching the claimant. The claimant in *Burke v LFOT Pty Ltd* [2002] HCA 17 was a vendor of land ordered to pay damages to the purchaser for loss suffered as a result of the vendor's misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act* 1974 (Cth). The vendor represented to the purchaser that one of the tenants was a "high quality tenant", notwithstanding a poor record in the payment of rent, and failed to disclose an incentive payment made to the tenant. The vendor was ordered to pay $750,000 to the purchaser, a sum equal to the difference between the price paid by the purchaser and the true value of the premises. The vendor successfully claimed contribution in the sum of $375,000 from the purchaser's solicitor on the basis that he negligently failed to advise the purchaser to make inquiries in relation to the financial standing of the tenants. The High Court allowed an appeal. Gaudron ACJ and Gummow JJ held that, if the vendor was to receive contribution from the solicitor, the vendor would be unjustly enriched. The vendor would receive an amount in excess of the true value of the premises which its misleading conduct caused the purchaser to pay (at [22]).[48] McHugh J held that it was not inequitable that the vendor should be solely liable for repaying the sum gained as a result of its misleading conduct, even though the purchaser might have discovered the truth had it not been for the solicitor's omissions (at [67]).

48 Compare Kirby J (diss) at [111]-[112].

CHAPTER FIFTEEN

SUBROGATION

John Glover and Andrew Robertson

INTRODUCTION

[1501] Subrogation is a doctrine by which rights are transferred from one person to another by operation of law. The purpose is to avoid undesirable outcomes and procedural inconvenience. In both substantive and procedural uses, it can be said that the applicant "stands in the shoes" of the person from whom subrogation is sought. Subrogation functions procedurally to avoid inconvenient circularities in litigation. Unnecessary steps are circumvented by third persons being compelled to allow their names to be used in proceedings between others. Subrogation in a broad sense prevents unconscionable conduct where it regulates outcomes.[1] Liabilities for debts and the commission of wrongs are brought home to the persons ultimately responsible. Double compensation is denied to the victims of wrongs.[2]

An important substantive use of subrogation is to prevent an injured party from obtaining recovery for a loss both from an insurer and from the person who caused the loss. After paying an indemnity, the insurer is able to assert the injured person's rights, so that the person causing the loss is made liable to the insurer and not the person injured.[3] In relation to guaranteed debts, subrogation prevents debtors escaping their obligations when others have been called upon to pay upon the debtors' default.

1 See *Australasian Conference Association Ltd v Mainline Construction Pty Ltd (in liq)* (1978) 141 CLR 335, Gibbs CJ at 348.

2 See Meagher R P, Gummow W M C, and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Ch 9, esp pp 282-283; Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), Ch 3.

3 *Aetna Life Insurance Co v Middleport* 124 US 534 (1888), Miller J at 548-549; *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249, McCardie J at 252. See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Ch 9; *Orakpo v Manson Investments Ltd* [1978] AC 95, Lord Diplock at 104. See also Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), Ch 3.

The doctrine allows a surety to be reimbursed by allowing her or him to exercise the rights of the creditor against the debtor.[4] The same object is achieved in relation to invalid loans, when the doctrine of subrogation gives lenders the benefit of enforceable rights or securities which were discharged with the loan proceeds.[5] The possibility of windfall gains to borrowers is thus denied.

Subrogation avoids procedural inconvenience, for example, by not requiring trustees of doubtful solvency to be sued to judgment by persons wishing to press their claims against a trust fund or indemnifying beneficiaries. A paying insurer may be allowed proprietary relief on the basis of a subrogatory entitlement to the fruits of action by the indemnified insured against the person who caused the insured loss (*Napier (Lord) and Ettrick v Hunter* [1993] AC 713). Both circularity of action and an insured's double recovery may be prevented.

[1502] Subrogation, from the perspective of persons liable to the exercise of subrogatory rights, appears as a form of involuntary assignment.[6] Third parties are intruded into subsisting legal relations. Persons owing obligations are ordered to tender future performance to a person other than the one originally entitled. The idea resembles assignment, though, only up to a point; for it is essentially remedial in nature. Rights which have been extinguished can still be the subject of a subrogatory entitlement.[7] In *Castellain v Preston* (1883) 11 QBD 380 (CA), an insurer paid its insured an indemnity for a house fire before discovering that it did not bear the risk at the relevant time. A contract of sale, by which the insured had sold his interest in the house, had been executed before the fire occurred. In these circumstances, subrogation theory was the means whereby the insurer recovered its payment. The insurer was subrogated to its insured's contractual rights against the purchaser to be paid the price of the house. The fact that, by the time of trial, the price had been paid in full and no relevant obligation existed was no bar. A subrogatory right against the purchaser was still based on the obligation to pay the price. Subrogation may otherwise be based on rights which were hypothetical at all times.[8]

4 See below, para [1504].

5 See below, paras [1511]-[1513].

6 Dawson J P, "Restitution or Damages?" (1959) 20 *Ohio State Law Journal* 175 at 183.

7 See the distinction drawn by Mitchell C, *The Law of Subrogation* (Clarendon Press, Oxford, 1994), pp 5-7 between "simple subrogation" and "reviving subrogation".

8 For example, *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1 (CA); affd [1903] AC 6, where a lender pursuant to a void contract of loan was subrogated to the lien of the vendor of a house purchased with the loan proceeds. As the proceeds paid the vendor out in full, the lien never in fact arose.

Some of the general principles that courts have applied in determining whether to grant a subrogatory remedy are as follows.

- Claimants who act officiously in discharging the obligations of another cannot obtain subrogation.[9] Exceptionally, where claimants have satisfied obligations without being legally compellable to do so, subrogation may be available if business ethics and/or the need to protect a commercial reputation obliged them to pay. In *Gill v Registrar General* (1991) 5 BPR 11,587, Young J (SC NSW), the Law Society of New South Wales was held not to be officious where it paid to discharge a mortgage forged by one of its members. The Society was subrogated to the defrauded client's right to be compensated out of the Registrar General's Assurance Fund.
- A person will not be allowed to make a profit or improve her or his position through the exercise of subrogation. If a person makes a loan which is intended to be unsecured, for example, he or she cannot become subrogated to previously secured rights.[10]
- Subrogation can be excluded or modified by contract.[11]
- Subrogation will not be allowed if the desired benefit is a gift in the hands of the person from whom it is sought (*Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333).
- Subrogation will not be allowed indirectly to enforce a contract which is ineffective at law. This is a difficult condition. In *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1, the English Court of Appeal decided that a statutorily void contract of a loan made to an infant did not preclude the lending society being subrogated to a third party's security. The decision was not followed by the House of Lords in *Orakpo v Manson Investments Ltd* [1978] AC 95, in relation to a loan avoided by very similar legislation. The House of Lords ruled in the later case that a lender's subrogation to the third party's security would be an undue defiance of the legislature. *Thurston's* case was distinguished on the basis that the contract there in question was made "void" rather than "unenforceable". There does not appear to be any difference in principle between the cases.

[1503] Subject to these conditions, there is no a priori limitation on the range of situations in which subrogation will be allowed.[12] Most of the Australian case law on subrogation falls under the

9 *Owen v Tate* [1976] 1 QB 402 (CA); *Macclesfield Corp v Great Central Railway* [1911] 2 KB 528 (CA).

10 See *Evandale Estates Pty Ltd v Keck* [1963] VR 647 and *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

11 *O'Day v Commercial Bank of Australia Ltd* (1933) 50 CLR 200, Rich J at 213; Dixon J at 220. See also *Austin v Royal* (1999) 47 NSWLR 27.

12 See the view expressed by Lord Salmon in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 110, below.

categories discussed below and they will be treated separately here; however, whenever there is a primary and secondary liability in respect of the same obligation, the doctrine may conceivably apply. It is notable that, in addition to these categories, subrogation has been applied, for example, to the payment of estate duty under statute[13] and partnership debts (*Turner v Webb* (1941) 42 SR (NSW) 68). Subrogation has unsuccessfully been claimed in respect of the Crown's statutory priority in the winding up of a company in relation to land tax,[14] and in respect of a creditor's right to lodge a proof of debt in a bankruptcy (*Re Byfield* [1982] 1 All ER 249). The doctrine functions in a general way in order to avoid injustice, and categories of its operation cannot be closed. Indeed, in *Orakpo v Manson Investments Ltd* [1978] AC 95,[15] Lord Salmon said (at 110):

> "The test as to whether the courts will apply the doctrine of subrogation to the facts of any particular case is entirely empirical. It is, I think, impossible to formulate any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be."

[1504] In England, the House of Lords has identified two separate types of subrogation, the first based on common intention and the second based on unjust enrichment.[16] The doctrine of subrogation that operates in insurance cases is, according to the House of Lords, based on the common intention of the parties, and gives effect to the indemnity principle embodied in the contract. This type of subrogation has in a loose sense been described as contractual.[17] Secondly, the term subrogation is used to describe an equitable remedy which, in England, is granted to prevent or reverse unjust enrichment. Where one party establishes that a second party has been unjustly enriched at the expense of the first, the remedy of subrogation is a means by which the court

13 See *Will of Harper (decd); Harper v Harper* [1922] VLR 512 (FC); *Brown v Brown* (1921) 22 SR (NSW) 106; *Re Cumming's Estate; Cuthbert v Cumming* (1939) 34 Tas LR 77.

14 *Re Sara Properties Pty Ltd (in liq)* [1982] 2 NSWLR 277.

15 This is a case which has been criticised in Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [910].

16 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221. For criticism and analysis of this decision, see Bridge, M "Failed Contracts, Subrogation and Unjust Enrichment: Banque Financière de la Cité v Parc (Battersea) Ltd" [1998] *Journal of Business Law* 323 and Villiers, T "A Path Through the Subrogation Jungle: Whose right is it anyway?" [1999] *Lloyd's Maritime and Commercial Law Quarterly* 223.

17 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, Lord Hoffmann at 231-232. Cf A Burrows, *The Law of Restitution* (Butterworths, 1993), pp 78-82, who argues that insurance subrogation is also based on unjust enrichment.

can effect restitution.[18] This second type of subrogation is part of the law of restitution and does not rest on the intention of the parties. Accordingly, subrogation can be granted in England as a restitutionary remedy even where it is inconsistent with the intention of the parties.[19]

CATEGORIES OF SUBROGATION

Guarantees

[1505] A surety who satisfies a guaranteed obligation is entitled to the benefit of any securities for the performance of that obligation given by the debtor to the creditor. The debtor should not escape her or his debts, and "the surety should not have the whole burden thrown upon him by the creditor's choice not to resort to the remedies within his power".[20] Subrogation arising out of suretyship has been partially codified in each Australian jurisdiction, following the *Mercantile Law Amendment Act* 1856 (Imp), s 5.[21] The scope of these legislative provisions is arguably no greater than the equitable doctrine, although codification may have slightly changed its operation. Equitable defences, for example, would not apply to a statutory claim. Nor does it seem to matter that the claimant acted officiously, as long as the wording of the relevant provision is attracted.[22] The legislation otherwise applies the equitable principles to suretyship situations. Neither satisfaction nor fulfilment of the securities which the guarantor seeks is an impediment to the guarantor's subrogation to the creditor's rights. Sureties, therefore, who pay out a guaranteed promissory note in full and discharge the obligation that it contains are entitled to have the promissory note assigned to them. The sureties may then be reimbursed through fictional enforcement of the creditor's interest under the

18 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, Lord Steyn at 226-228, Lord Hoffmann at 231-234, Lord Clyde at 237, Lord Hutton at 243-245.

19 See further, [1514] below.

20 Moccatta, Sir Alan, *Rowlatt on The Law of Principal and Surety* (3rd ed, Sweet & Maxwell, London, 1936), p 205, quoted in *Australasian Conference Association Ltd v Mainline Construction Pty Ltd (in liq)* (1978) 141 CLR 335, Gibbs CJ at 348.

21 *Mercantile Law Act* 1962 (ACT), s 13; *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 3; NT: *Mercantile Law Amendment Act* 1861 (SA), s 3, applied by *Northern Territory (Administration) Act* 1910 (Cth), s 5; *Mercantile Act* 1867 (Qld), s 4; *Mercantile Law Act* 1936 (SA), s 17; *Mercantile Law Act* 1935 (Tas), s 13; *Supreme Court Act* 1986 (Vic), s 52; WA: *Mercantile Law Amendment Act* 1856 (Imp), c 97.

22 O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), p 666; Putnam T, *Suretyship: Guarantees, Indemnities and Performance Bonds* (Oyez, London, 1981), p 85.

note (*Everingham v Waddell* (1881) 7 VLR (L) 180, Higinbotham J at 187).

[1506] A right to subrogation from suretyship arises, both in equity and under statute, only when the guaranteed debt has been paid in full.[23] A surety who has paid only part of the debt will have a right to subrogation, at least in equity, where the creditor has recovered the balance of the debt from the debtor or from the realisation of securities (*Bayley v Gibbons Ltd* [1992-3] 1 Tas LR 385). The right to subrogation applies to securities widely defined, including entitlements to priority over general creditors, moneys appropriated to satisfy a guaranteed debt, and judgments against other parties which are of use to a paying surety in the enforcement of contribution and indemnity rights.[24] Where the words of the legislation are not complied with, uncodified equitable principle continues to apply. For example, where a bank as surety sought securities from the debtor which were held by a co-surety, the relevant statute was held to be inapplicable; the codified subrogatory right only provided for recourse to securities held by the *creditor* (*Commissioners of the State Savings Bank of Victoria v Patrick Intermarine Acceptances Ltd (in liq)* [1981] 1 NSWLR 175).[25] The claim was allowed, nevertheless, on the basis that it was within the equitable doctrine.

Finance guarantees commonly exclude the surety's right to subrogation. The point of this is to negate the derivative right that sureties possess to have the creditor's securities preserved for their benefit and not sacrificed or impaired. Exclusion of the right limits the number of persons who have standing to complain about the conduct of mortgagees' sales. The Supreme Court of South Australia has upheld the efficacy of such a subrogation exclusion, whilst, at the sureties' suit, finding a different way of disciplining a "reckless" creditor (*Johnson v Australian Guarantee Corp Ltd* (1992) 59 SASR 382).[26]

23 *Duncan, Fox, & Co v North & South Wales Bank* (1880) 6 App Cas 1; *Globe & Rutgers Fire Insurance Co v Truedell* [1927] 2 DLR 659 (SC Ont); *Ex parte Brett; Re Howe* (1871) LR 6 Ch App 838, Sir W M James LJ at 841; *Dixon v Steel* [1901] 2 Ch 602, Cozens-Hardy J at 607. See also O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), p 657.

24 See O'Donovan J and Phillips J C, *The Modern Contract of Guarantee* (3rd ed, LBC Information Services, Sydney, 1996), pp 670-673, for more examples of securities which may be the subject of a subrogation claim.

25 This decision was criticised in Malcolm D K, "The Penetration of Equitable Principles into Modern Commercial Law — Part I" (1987) 3 *Australian Bar Review* 185 at 208, for not precisely following the words of the legislation. However, it was held on the facts that the legislation did not apply.

26 Discussed in Lipton J, "Equitable Rights of Contribution and Subrogation: Recent Australian Judicial Approaches" (1995) 12 *Australian Bar Review* 1 at 11-13.

Bills of exchange

[1507] A person secondarily liable on a bill of exchange, either as a drawer or an indorser, may be called upon to pay by the holder of the bill. After payment, the drawer or indorser may claim an entitlement to rights of subrogation against an acceptor of the bill, an antecedent party, or against the surety of either.[27] The legislation in respect of guarantees[28] applies to claims under bills of exchange,[29] although in *Scholefield Goodman & Sons Ltd v Zyngier* [1984] VR 445, the finding was made that suretyship legislation did not apply where the indorser's obligations extended well beyond the payment guaranteed. A right to subrogation in this context may also arise under the *Bills of Exchange Act* 1909 (Cth), s 64(2). This provides that indorsers and, in some circumstances, drawers who pay on a bill are entitled to its possession. The instrument is not then discharged and the parties entitled to it may further negotiate the bill or sue the acceptor of it. This provision is re-enacted by the *Cheques and Payment Orders Act* 1986 (Cth), s 87(1) and made applicable to instruments to which that Act applies.

[1508] A major restriction on subrogation and bills of exchange under the various Acts and also in equity is that the indorser or drawer must pay the bill in full prior to making a claim. By the payor's subrogation to the bill held by the holder upon her or his payment of it, either the acceptor of the bill (pursuant to either the bills of exchange legislation or the suretyship legislation) or a surety for the acceptor will be liable to the payor.[30]

In *Dalgety Ltd v Commercial Bank of Australia Ltd* [1981] 2 NSWLR 211, the defendant was a bill holder who held some unsatisfied securities for repayment of the bill by the acceptor of it. An indorser of the bill paid when the acceptor failed to pay. Subsequently, the defendant holder discharged the securities without regard to the indorser's exposure. Rogers J (at 215) held that the holder was to be excused because "no equitable principle requires the defendant to prejudice its own position" in driving

27 See *Commissioners of the State Savings Bank of Victoria v Patrick Intermarine Acceptances Ltd (in liq)* [1981] 1 NSWLR 175; *Ex parte Bishop; Re Fox, Walker & Co* (1880) 15 Ch D 400 (CA).

28 *Mercantile Law Act* 1962 (ACT), s 13; *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW), s 3; NT: *Mercantile Law Amendment Act* 1861 (SA), s 3, applied by *Northern Territory (Administration) Act* 1910 (Cth), s 5; *Mercantile Act* 1867 (Qld), s 4; *Mercantile Law Act* 1936 (SA), s 17; *Mercantile Law Act* 1935 (Tas), s 13; *Supreme Court Act* 1986 (Vic), s 52; WA: *Mercantile Law Amendment Act* 1856 (Imp) 19 & 20 Vict c 97.

29 Declared, for example, in *D & J Fowler (Aust) Ltd v Bank of New South Wales* [1982] 2 NSWLR 879, Helsham CJ at 885.

30 See *D & J Fowler (Aust) Ltd v Bank of New South Wales* [1982] 2 NSWLR 879 and the suretyship legislation.

the best deal it could with the acceptor for discharge of its securities. The effect of the subrogation being statutory, and hence peremptory, in its application was not considered.

Insurance

[1509] Subrogation in relation to insurance policies has two objects. The insured's double recovery is avoided and the person causing the loss is made to bear liability for it. After payment of an indemnity, subrogation places the insurer in the insured's position regarding the indemnified event. It entitles the insurer to the advantage of all the insured's rights against third parties (*Castellain v Preston* (1883) 11 QBD 380, Brett LJ at 388 (CA)).[31] Non-indemnity insurance, like life insurance, is implicitly not included in this regime. Insurance subrogation is codified in Australia only in respect of marine insurance.[32] The same right is qualified, however, by the *Insurance Contracts Act* 1984 (Cth) in the following ways. First, subrogation cannot be pressed to rights against the insured's family, authorised users of the insured's vehicles,[33] or, in some circumstances, the insured's employees.[34] Secondly, an insurer cannot use subrogation to recover more than the indemnity which was paid.[35] Thirdly, the insurer must notify the insured of any provision in the policy which limits the duty of the insurer to indemnify, if the right of subrogation is made subject to restriction or loss.[36] This may be of significance in that an entitlement to insurance subrogation is to a larger degree more discretionary than any right of subrogation otherwise arising.[37] Most insurance subrogation is purely equitable and it extends to a wide class of advantages within the foregoing principle. Subrogation need not only be to a right which might be asserted in the future; it may be asserted to the fruit of the previous exercise of a right or condition whereby the loss is diminished. *Castellain v Preston* (1883) 11 QBD 380[38] exemplifies the high level of artificiality to which this may be

31 See also Derham S R, *Subrogation in Insurance Law* (Law Book Co, Sydney, 1985).

32 *Marine Insurance Act* 1909 (Cth), s 85.

33 *Insurance Contracts Act* 1984 (Cth), s 65; *Lennock Motors Pty Ltd v Pastrello* (1991) 6 ANZ Insurance Cases 61-033 (SC ACT).

34 *Insurance Contracts Act* 1984 (Cth), s 66; *Boral Resources (Qld) Pty Ltd v Pyke* (1989) 93 ALR 89 (SC Qld).

35 *Insurance Contracts Act* 1984 (Cth), s 67.

36 *Insurance Contracts Act* 1984 (Cth), s 68.

37 See Tarr A A, Liew K and Holligan W, *Australian Insurance Law* (2nd ed, Law Book Co, Sydney, 1991), p 282. Tarr observes that the effect of the new paramount obligation of good faith implied by the *Insurance Contracts Act* 1984 (Cth) may be that equitable entitlements discussed here also arise contractually.

38 See above, para [1502].

raised. The rule that an insurance contract is a contract of indemnity is enforced by means of the remedial subrogatory rights conferred on an insurer.[39]

[1510] An insurer's subrogatory claim accrues on the payment of the indemnity and it must be made in the name of the insured who is indemnified. Alternatively, a valid assignment of the insured's rights must be taken (*Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643, Lord Goff at 663). Subrogatory rights cannot be exercised until the indemnity is paid, even though the insured may expressly agree to subrogation before payment of the claim.[40] The insured is under a duty at general law not to prejudice an insurer's rights in the course of a subrogated action and is liable in damages for default.[41] This mainly refers to the insured's renunciation or waiver of rights after a loss has been suffered. An exemption clause or indemnity agreed to with a third party prior to the loss occurring has been held not to constitute prejudice to the insurer; in such an event, rights would be "not acquired" upon the happening of the loss, rather than "renounced" or "waived" thereafter.[42]

Trading trusts

[1511] Subrogatory doctrine under this heading has developed in connection with a particularly Australian use of trusts, associated with tax minimisation of the 1970s and 1980s. The trustees personally liable for debts incurred in the course of trading are often "$2 companies", being undercapitalised or valueless corporate shells.[43] Value in fact may only reside in the assets of the trust or the assets of the persons who benefit from it. Creditors of trustees who conduct businesses may be entitled to be subrogated to any right of indemnity that a trustee has against trust assets, where the business is conducted properly and the debts are incurred within the trustee's powers (*Re Staff Benefits Pty Ltd* [1979] 1 NSWLR 207, Needham J at 213). This is allowed

39 See also *British Traders' Insurance Ltd v Monson* (1964) 111 CLR 86, Kitto, Taylor and Owen JJ at 94.

40 *Santos Ltd v American Home Assurance Co* (1986) 4 ANZ Insurance Cases 60-795, White J at 74,874 (FC SA). See also *Rap Industries Pty Ltd v* Royal Insurance Australia Ltd (1988) 5 ANZ Insurance Cases 60-876 (SC NSW), Brownie J at 75,519, which followed the *Santos* case.

41 *Arthur Barnett Ltd v National Insurance Co of New Zealand Ltd* [1965] NZLR 874, McCarthy J at 885 (CA).

42 *State Government Insurance Office (Qld) v Brisbane Stevedoring* [1969] 123 CLR 228, Kitto J at 247. See also *Morganite Ceramic Fibres Pty Ltd v Sola Basic Australia Ltd* (1987) 11 NSWLR 189 (purported release given by the insured to a party causing the loss is not a good defence for that party to the insurer's assertion of subrogatory rights).

43 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, Latham CJ at 324; *Re Matheson* (1994) 121 ALR 605, Spender J at 608.

because of the ability of trustees themselves to resort to the trust fund for discharge of liabilities incurred in the authorised execution of trust business.[44] Unnecessary litigation is thus saved. Creditors do not have to proceed against trustees until they are placed in bankruptcy in order to enjoy the fruits of the trustees' indemnities. In Tasmania, Victoria and Western Australia, however, the same right may be excluded by a contrary term in the trust deed.[45]

Sometimes a trustee may also be entitled to be indemnified by the beneficiaries of the trust personally (where they are sui juris and absolutely entitled),[46] to avoid the "injustice" of persons like the beneficiaries enjoying the benefits of trade without having to bear any of its burdens (*Re Johnson* (1880) 15 Ch D 548, Jessel MR at 552). Creditors are allowed to proceed directly against beneficiaries who are liable, comparably to the way in which they can proceed directly against a trust fund (*Ron Kingham Real Estate Pty Ltd v Edgar* [1999] Qd R 439 at 443-444 (CA)). When creditors have exhausted a trust fund with their claims, they may be subrogated to the trustees' right to be indemnified by those who benefit.

[1512] Subrogation against the trust fund or the beneficiaries personally is often sought in the event of a trading trust becoming insolvent. Priorities between all persons interested in the trust assets will then be significant. The following principles summarise equitable doctrine on priority rights in the insolvency of a trading trust:

- As between trust creditors entitled to subrogation against the trust estate, and non-trust creditors of an insolvent trustee, assets forming part of the trust fund can only be applied to satisfy the claims of trust creditors.[47]

44 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, Stephen, Mason, Aickin and Wilson JJ at 371.

45 *Trustees Act* 1898 (Tas), s 24; *Trustee Act* 1958 (Vic), ss 2(3) and 36(2); *Trustees Act* 1962 (WA), ss 4(3) and 71: see *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, Brooking J at 395. The directors of a corporate trustee may be liable personally for debts incurred by the trustee while it was not fully indemnified out of the assets of the trust: see *Corporations Act* 2001 (Cth), s 233.

46 See *J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd* [1985] VR 891, McGarvie J at 936-937. Where the beneficiaries are several, the trustee may need to have been requested to incur the liability in question: see Ford H A J, "Trading Trusts and Creditors' Rights" (1981) 13 *Melbourne University Law Review* 1 at 6-9.

47 Decisions conflict on this. Most commentators favour *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99 (FC); following *Re Byrne Australia Pty Ltd* [1981] 1 NSWLR 394; and this proposition is advanced accordingly. See Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [2114]; Horrigan B, "Trust Asset Wars — the Liquidator Strikes Back" (1988) 15 *University of Queensland Law Review* 60 at 63-67; but see *Re Enhill Pty Ltd* [1983] 1 VR 561 (FC) contra.

- As between trust creditors inter se, whilst there is no binding authority on who should take priority, it has been suggested that priority should reflect the order in which the rights to subrogation arose.[48]
- A testamentary trading trust usually conducts a business formerly carried on by a testator. In the case of creditors' claims against a testamentary trading trust, a distinction is to be drawn between rights arising before and rights arising after the testator's death. Rights arising before death have priority, unless the creditors concerned assented to the continuance of the business after the death of the testator. After making such an assent, the pre-death creditors will be postponed to the post-death creditors.[49]

Creditors' rights of subrogation of either type may be lost, or be of no value, if the trustee is in default to the trust estate and has no right to be indemnified.[50] This will occur if the trustee had no right to incur the debt in question, or the trustee's actions were not restricted to the purposes of the trust.[51]

Invalid loans

[1513] A lender may be subrogated to a creditor's previous rights if moneys lent under an invalid transaction are used to discharge obligations owed to the creditor.[52] There are two main ways in which loan transactions may be invalid where the lender is still able to obtain repayment.

First, where an invalid loan is made to a minor or a lunatic, an otherwise unenforceable or void contract may be enforceable in its entirety if "necessaries" are thereby supplied either to such a person or to a person responsible. "Necessaries" are described in a quaint Victorian phrase as "those items required to maintain the person in the condition in life in which he moves".[53] A creditor may proceed against a minor at common law for the supply of necessaries and equity has extended this rule to lenders. Lenders may be subrogated to the rights of suppliers to

48 See Williams D R, "Winding-up Trading Trusts: Rights of Creditors and Beneficiaries" (1983) 57 *Australian Law Journal* 273 at 276-277.

49 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, Latham CJ at 324-325; Dixon J at 339-340.

50 *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385; *Rinbar Pty Ltd (in liq) v Nichevich* (1987) 11 ACLR 737, Rowland J at 746-747 (SC WA).

51 See dicta in *Corozo Pty Ltd v Total Australia Ltd* [1987] 2 Qd R 11, Connolly J at 63-67.

52 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [901]-[911].

53 See *Bojczuk v Gregorcewicz* [1961] SASR 128, Ross J at 131; *Peters v Fleming* (1840) 6 M & W 42; Parke B at 46-47, 151 ER 314. See also Seddon N C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney, 1997), pp 635-641.

the extent that the proceeds of unenforceable loans are used in the purchase of necessaries.[54] Secondly, where an invalid loan is made through an agent who lacks authority, and its proceeds are applied in the authorised discharge of the principal's debts, a lender may be allowed a right analogous to subrogation. He or she is permitted to stand in the same position as if the money had been validly borrowed by the principal.[55] It is essential that the benefit of a loan is "adopted" by the borrower and that a valid debt is paid off by the borrower or by her or his authorised agent.[56] The principle applies to agents who are partners,[57] as well as to directors of companies.

Unsecured loans

[1514] Where a lender makes an unsecured loan which pays out a secured creditor, the lender may be subrogated to the secured rights. Equity makes the rebuttable presumption that the security is to be kept alive for the lender's benefit.[58] Sometimes it is said that this form of subrogation is only attracted if the whole circumstances of the lending transaction make it clear that the parties intended the lender to have security for the loan.[59] However, the better view may be that a lender will be subrogated to security rights of a paid-out creditor unless the circumstances of the transaction indicate a contrary intention. In effect, the

54 See *Orakpo v Manson Investments Ltd* [1978] AC 95, Lord Diplock at 104; *Morris v Ford Motor Co Ltd* [1973] QB 792, James LJ at 809 (CA); *Re Beavan; Davies, Banks & Co v Beavan* [1912] 1 Ch 196. See also Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 151-161.

55 *Blackburn Building Society v Cunliffe Brooks & Co* (1882) 22 Ch D 61, Lord Selborne LC at 71 (CA); affd *Cunliffe Brooks & Co v Blackburn & District Benefit Building Society* (1884) 9 App Cas 857.

56 The payment may be subsequently ratified. Where the person dealing with a company's agent knows (or ought to know) of the agent's excess of authority, the company may not be bound: see Ford H A J, Austin R P and Ramsay I M, *Ford's Principles of Corporations Law* (10th ed, Butterworths, Sydney, 2001), p 651. Where a borrower company neither knew of nor acquiesced in a lender's payment of its debts when they were paid and subsequently the company was unable to validly ratify the payments, no equity arises to assist the lender: see *Re Cleadon Trust Ltd* [1939] Ch 286 (CA). The borrower should have an opportunity to accept or decline the benefit of payment of her or his debts: see *Public Trustee v Schultz* [1973] 1 NSWLR 564, Helsham J at 583.

57 A lender to a partner may claim subrogation to the indemnity which the Partnership Acts provide: see *Partnership Act* 1963 (ACT), s 29(10); *Partnership Act* 1892 (NSW), s 24; NT: *Partnership Act* 1891 (SA), s 24, applied by *Northern Territory (Administration) Act* 1910 (Cth), s 5; *Partnership Act* 1891 (Qld), s 27; *Partnership Act* 1891 (SA), s 24; *Partnership Act* 1891 (Tas), s 29; *Partnership Act* 1958 (Vic), s 28; *Partnership Act* 1895 (WA), s 34.

58 *Ghana Commercial Bank v Chandiram* [1960] AC 732, Lord Jenkins (for the Privy Council) at 745.

59 *Evandale Estates Pty Ltd v Keck* [1963] VR 647, Hudson J at 652; *Cid v Cortes* (1987) 4 BPR 9391, Young J at 9393-4 (SC NSW). See also *Paul v Speirway Ltd (in liq)* [1976] 1 Ch 220, where a lending transaction was examined to see whether it was such as to pay off a secured lender and obtain his security, or to be an "out and out unsecured loan". Oliver J held it to be within the latter category and disallowed the subrogation claim.

defendant bears the burden of rebutting the doctrine's application.[60] It is immaterial that an intended security was of a different nature from the one discharged, or that the intended security related to different property.[61] This application of the doctrine is subject to the condition (referred to above) that a party cannot use the doctrine to improve the security of her or his position beyond what was intended by the parties to the lending transaction.

Where a lender paying out a secured creditor clearly intends to make an unsecured loan, the remedy of subrogation may still be granted in England in order to prevent unjust enrichment. In *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 BFC lent money to Parc to enable it to repay part of a loan from another bank, Royal Trust Bank of Switzerland (RTB), which was secured by a first charge over Parc's property. Parc was a member of the Omni group of companies, along with Omnicorp Overseas Ltd (OOL), to which Parc owed a substantial amount of money secured by a second charge over Parc's property. BFC did not intend to take any security for the loan made to Parc, but did obtain an undertaking that other companies in the Omni group would not demand repayment of their loans until BFC had been repaid in full. That undertaking was given without OOL's authority and was not binding on OOL. BFC sought to be subrogated to the rights of RTB under its charge in order to obtain priority over OOL. The House of Lords held that OOL had been unjustly enriched at the expense of BFC. OOL was enriched by the making of BFC's loan, since the loan reduced Parc's indebtedness to RTB secured by the prior charge. That enrichment was unjust because BFC advanced the money to Parc on the mistaken assumption that it was obtaining priority over intra-group loans. In order to prevent that enrichment, the House of Lords held that BFC should, as against OOL, be treated as though it was entitled to the benefit of RTB's charge. Subrogation in this case operated only as a personal remedy against the party unjustly enriched. BFC could not exercise any of RTB's proprietary rights under the charge, either against Parc itself or to give it priority over creditors outside the Omni group.

60 Discussed in *State Bank of New South Wales v Geeport Developments Pty Ltd* (1991) 5 BPR 11,947, Cohen J at 11,950-4 (SC NSW).

61 *State Bank of South Australia v Rothschild Australia Ltd* (1990) 8 ACLC 925, Tadgell J at 942-943 (SC Vic).

CHAPTER SIXTEEN

MARSHALLING

Barbara McDonald

INTRODUCTION

Definition

[1601] The doctrine of marshalling applies when, in respect of two funds in the hands of one person, there is a double claimant (A) who can claim against both funds and a single claimant (B) who can claim against only one of the funds. The fund against which both A and B may claim is described henceforth as "the double fund"; the fund against which only A may claim is described as "the single fund". If A chooses to satisfy her or his claim out of the double fund, B has a right to stand in A's place in respect of the single fund, to the extent that the double fund would have satisfied B's claim if A had not claimed upon it first.[1] Thus, marshalling is closely allied to the doctrine of subrogation.[2] Marshalling operates in the administration of deceased estates, and in respect of securities such as mortgages, liens or charges. There are no generic differences in the operation of the doctrine in these two areas,[3] and authorities from one area are freely applied in the other.

1 See Meagher R P, Gummow W M C, and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Ch 9, esp paras [282]-[283]; Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), Ch 31; Ali P A U, *Marshalling of Securities* (Clarendon Press, Oxford,1999), para [1.01].

2 *Aetna Life Insurance Co v Middleport* 124 US 534 (1888), Miller J at 548-549; *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249, McCardie J at 252. See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Ch 9; *Orakpo v Manson Investments Ltd* [1978] AC 95, Lord Diplock at 104. See also Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), Ch 31.

3 See below, para [1604].

Nature and purpose of doctrine

[1602] Marshalling is a remedial rule to allow the courts of equity to do justice between competing claimants as far as possible. The rationale of the doctrine is seen most clearly in the administration of deceased estates where legatees, descendants and creditors may all have "claims" upon the different parts of the estate. A double claimant may have, in effect, the power to exclude a single claimant by arbitrarily selecting the double fund to satisfy her or his claim. By the use of marshalling, the courts will prevent this power being made "an instrument of caprice, injustice or imposition".[4] Such an exercise of the power is seen by the courts of equity as unjust and unconscientious (*Balkin v Peck* (1998) 43 NSWLR 706 at 712).

[1603] The right to marshall is commonly referred to as an "equity"[5] to marshall or as an "equitable right". It is no more than a right to seek an equitable remedy which the court will grant in certain circumstances.[6] The doctrine, therefore, does not confer upon the single claimant an equitable right of property in the alternative fund.[7] Nor does the double claimant become a trustee for the single claimant in respect of the alternative fund or its proceeds, and thereby liable for a breach of trust for failing to make the fund available to the single claimant before it is otherwise distributed or released (*Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 122, 132).[8] It is distinguishable, therefore, from the

4 Randall A E (ed), *Story's Commentaries on Equity Jurisprudence* (3rd English ed, Sweet & Maxwell, London, 1920), p 239.

5 *Flint v Howard* [1893] 2 Ch 54, Kay LJ at 73 (CA); cited in *Bank of New South Wales v City Mutual Life Assurance Society Ltd* [1969] VR 556, Gillard J at 557. See also *Chase Corp (Australia) Pty Ltd v North Sydney Brick & Tile Co Ltd* (1994) 35 NSWLR 1, Cohen J at 21: "It seems to me that the authorities generally treat the principle of marshalling as requiring the parties to act equitably and that the role of the court has been, where necessary, to enforce that equitable conduct."

6 *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 130; *Chase Corp (Australia) Pty Ltd v North Sydney Brick & Tile Co Ltd* (1994) 35 NSWLR 1, Cohen J at 20.

7 *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 125, 128; with the consequence that the right to marshall does not give rise to a caveatable interest (at least not until the court makes an order for marshalling): *Sarge Pty Ltd v Cazihaven Homes Pty Ltd* (1994) 34 NSWLR 658, Young J at 665. The single claimant is also therefore limited in the ability to follow the fund into the hands of third parties: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [110]. See also below, para [1609].

8 But see *South v Bloxam* (1865) 2 H & M 457; 71 ER 541, and the texts cited in Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1104], which support the contrary view. *South v Bloxam* is also accepted as correct in Francis E A and Thomas K J, *Mortgages and Securities* (3rd ed, Butterworths, Sydney 1986), p 370, and in Cousins E F and Ross S, *The Law of Mortgages* (Sweet & Maxwell, London, 1989), p 437. See also below, para [1606] on an alternative basis of liability.

equitable interest of a subsequent mortgagee of land, sold under a prior mortgage, to be paid the balance of the proceeds by the prior mortgagee.

Operation of the doctrine

[1604] The right to marshall operates against the common debtor or mortgagor, not against the double claimant. The double claimant or first mortgagee is not to be restrained, delayed or inconvenienced in satisfying her or his charge against whichever fund he or she chooses. The court will not control that choice.[9] Any implications that the court may compel the double claimant to resort to a particular security or restrain her or his choice,[10] have been described as misconceived.[11] This contrasts with the position in the United States, where injunctive relief will prevent the double claimant from proceeding against the sole fund open to the single claimant.[12]

However, once the double claimant has satisfied her or his claim from the double fund, the single claimant may move, by marshalling, to stand in the double claimant's place to claim from the single fund. Although the equity to marshall is said to be enforced against the mortgagor of the single fund, in the sense that it is the mortgagor who is disadvantaged or dispossessed by the operation of marshalling, at this point, the first mortgagee will also be bound by a marshalling order of the court. This may occur where her or his participation is necessary for carrying out the court's order or where the first mortgagee is in possession of the alternative fund or its proceeds (*Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 131). It may, for example, be necessary for the

9 *Jenkins v Brahe & Gair* (1902) 27 VLR 643, A'Beckett J at 648; *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 130-131; *Mir Bros Projects Pty Ltd v Lyons* [1977] 2 NSWLR 192, Waddell J at 196; *Chase Corp (Australia) Pty Ltd v North Sydney Brick & Tile Co Ltd* (1994) 35 NSWLR 1, Cohen J at 18. See also Sykes E I and Walker S, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), p 183; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1102]; Ali P A U, *Marshalling of Securities* (Clarendon Press, Oxford,1999), paras [3.18]-[3.20]. See similarly in Canada: *Ernst Bros Co v Canada Permanent Mortgage Corp* (1920) 47 DLR 362, Orde JA at 368.

10 See *Webb v Smith* (1885) 30 Ch D 192, Cotton LJ at 200 (CA); *The Arab* (1859) 5 Jur NS 417.

11 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1102].

12 *Waff Bros Inc v North Carolina* 221 SE 2d 273 (1976) at 281. See for example *Burnham v Citizens' Bank of Emporia* 40 P 912 (1895) (SC Kans), where the rule applicable in the United States was said by the court to be that "the prior creditor, when chargeable with actual notice of the rights of the junior creditor, is bound to exhaust his security on the property not covered by the junior lien" (at 914).

single claimant to apply to the court for an injunction to restrain the double claimant from releasing or discharging the alternative security until the single claimant has marshalled against it (*Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, Fullagar J at 192).

MARSHALLING OF SECURITIES

Conditions for the marshalling of securities

[1605] The two funds must be the property of the same person and charged by a common debtor or debtors. If there is more than one debtor, the principle will not operate where only one of the funds has been charged by a debtor jointly with another. For example, in *Ex parte Kendall* (1811) 17 Ves Jun 514; 34 ER 199, four partners had previously been in partnership with a fifth partner. The creditors of the four bankrupt partners were not able to rely on the principle of marshalling to compel those creditors who could also claim on the five-person partnership to seek payment from the fifth partner's solvent estate, as each partnership had different common debtors.

An exception applies where, as between the debtors, there is an agreement that one debtor will be the principal, or primary debtor, in which case the creditors of the secondary debtor will be able to marshall against the remaining fund of the primary debtor; but the equity to marshall will only arise where there is a duty on the primary debtor to pay the debts of the secondary debtor,[13] or some agreement between them (as in the case of principal and surety) (*Carter v Tanners Leather Co* 81 NE 903 (1907)).

[1606] The alternative fund must be on foot at the time of marshalling. The single claimant must exercise the right to marshall (or presumably move to restrain the release until the marshalling takes place) before either the alternative fund is released to other general creditors or the debtor discharged by the first mortgagee.[14] Where the fund has been distributed or dispersed, it appears that there will not be any personal liability on the double claimant to account to the disappointed single claimant

13 *Sarge Pty Ltd v Cazihaven Homes Pty Ltd* (1994) 34 NSWLR 658, Young J at 662.

14 See, for example, *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, where the first mortgagee had in effect discharged the common mortgagor and the right to marshall was no longer available to the second mortgagee.

as a trustee (*Chase Corp (Australia) Pty Ltd v North Sydney Brick & Tile Co Ltd* (1994) NSWLR 1, Cohen J at 20). The question of whether or not there is any liability to account or pay damages or compensation as a fiduciary to the single claimant, for the loss occasioned by the release of the alternative single fund, may depend on whether there is any inequitable or unconscionable conduct surrounding the release of the security with full knowledge of the right to marshall being asserted by the other mortgagee.[15]

[1607] The double claimant must have free and equal recourse to either fund. *Equal* recourse entails that the double claimant have the same type of rights against each fund. Therefore, the doctrine did not operate in *Webb v Smith* (1885) 30 Ch D 192,[16] where the defendant auctioneers had a lien upon a fund from the sale of a brewery and a right of retainer by way of set-off against a fund from the sale of furniture. The plaintiff, who also had a charge upon the brewery, argued that the defendants were bound to obtain payment out of the furniture fund so that he could obtain payment out of the brewery fund. This action by the plaintiff failed. The defendants' right of lien was superior to their mere right of set-off. The plaintiff could not prejudice the defendants' rights by compelling them to adopt an inferior position (Cotton LJ at 200).

Free recourse entails that the double claimant has an unfettered choice of which fund to resort to or exhaust first. The principle does not apply if the double claimant is obliged to resort to the double fund before the other.[17] For example, in *Miles v Official Receiver in Bankruptcy* (1963) 109 CLR 501, a mortgagee of land took as a further security an assignment of the mortgagor's life assurance policy and, on his death, acted in accordance with its express obligations under the mortgage, and as assignee, to resort to the proceeds of the policy as the primary fund for the satisfaction of the debt. The estate was administered in bankruptcy and the trustee in bankruptcy, after liquidating the mortgages on the land, was left with a fund to distribute. The mortgagor's executor, who had an interest in the policy only, sought to

15 *Chase Corp (Australia) Pty Ltd v North Sydney Brick & Tile Co Ltd* (1994) NSWLR 1, Cohen J at 21, dealing with the suggestion made in Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1105]. See also the discussion by Young J in *Sarge Pty Ltd v Cazihaven Homes Pty Ltd* (1994) 34 NSWLR 658 at 664-665 and the discussion in Ali P A U, *Marshalling of Securities* (Clarendon Press, Oxford, 1999), paras [3.09]-[3.17].

16 Brett MR at 199 (CA): "I cannot think that the doctrine of marshalling applies where there are different funds as to which different rights exist." See below, para [1608].

17 *The Priscilla* (1859) Lush 1; 167 ER 1, Dr Lushington at 5; *Re Holland* (1928) SR NSW 369, Long Innes J at 378-379.

marshall against the fund from the sale of the land, but the High Court of Australia rejected her claim. One of the grounds stated was that there was no basis for the application of the doctrine of marshalling where the double claimant had no option but to resort to the double fund.

[1608] The principle appears to operate only where the single claimant has a proprietary interest in the double fund, although the principle was often expressed in early cases in much more general terms, or as depending on a much broader principle of fairness between creditors in general.[18]

In the case of an insolvent debtor, it is the claimant's proprietary interest which gives priority over the general body of unsecured creditors. However, since an "interest" in the assets of an unadministered estate falling short of a full proprietary interest may be recognised for some purposes (for example, devisability and bankruptcy),[19] some commentators suggest that:[20]

> "Perhaps the position is better expressed by saying that if the subject matter of the claims is not in the administration of the court as with a deceased estate, the rights of the single claimant must be enforceable in respect of distinct property of the debtor as compared with actions against him a judgment in which will be executed upon his general property in the usual way."

The single claimant may be a volunteer in the sense that her or his interest arises from a voluntary disposition such as an assignment or legacy by the owner of the common fund (*Dolphin v Aylward* (1870) LR 4 HL 486).

[1609] The granting of the remedy is dependent upon the funds being in the control of the court (*Webb v Smith* (1885) 30 Ch D 192 (CA)). This condition has its origin in the use of marshalling in the administration of deceased estates. In *Jenkins v Brahe & Gair* (1902) 27 VLR 643 at 648, A'Beckett J observed that:

> "[I]t appears to be settled law that the jurisdiction of the Court is not ousted by the act of the mortgagee when the Court can obtain control of the assets which the mortgagee could have applied to the discharge of his debt and out of which other creditors can be satisfied."

18 *Aldrich v Cooper* (1803) 8 Ves Jun 382; 32 ER 402; *Trimmer v Bayne* (1803) 9 Ves Jun 209; 32 ER 582. See above, paras [1602]-[1603].

19 See above, Chapter 3: "Equity and Property".

20 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1118].

In *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120 at 128,[21] Neasey J concluded:

> "It seems therefore that the operation of the marshalling principle depends upon the assets being subject in some way to the control of the court, which reinforces the view that the doctrine depends not upon the creation of any equitable right of property in the fund over which the claimant has otherwise no security, but upon the grant by the court of an equitable remedy in certain circumstances, and I so hold."

He went on to define control as "either being in court or in the hands of some person subject to direction by the court as to its application" (*Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 128). This could be seen as no more than an application of the general rule that a court will not grant orders concerning persons who are not among the parties to the proceedings before it, as only the latter are bound by the decision.

Limitations on marshalling

[1610] There are a number of limitations on the right to marshall. These include:

Covenants against marshalling

The right to marshall may be restricted by a suitable covenant by the single claimant in the second mortgage or other security document.[22]

Intervention of other parties

Although the right to marshall operates not only against the common mortgagor, but also against persons claiming under the mortgagor, such as general creditors, the trustee in bankruptcy and personal representatives, it will not operate against third parties who take an assignment of the single fund by way of purchase, mortgage or charge.[23] This is so even where they have

21 Neasey J also referred to *Webb v Smith* (1885) 30 Ch D 192 (CA), and *The Arab* (1859) 5 Jur NS 417.

22 See Ali P A U, *Marshalling of Securities* (Clarendon Press, Oxford, 1999), paras [12.03]-[12.08].

23 See *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120 at 130, where Neasey J stated: "The rule is often stated in the books that the court will refuse to marshall where in aiding one incumbrancer it would injure another." See also Francis E A and Thomas K J, *Mortgages and Securities* (3rd ed, Butterworths, Sydney, 1986), p 371.

notice of the claimant's rights to marshall.[24] The right to marshall will also not operate against mere volunteers who take an interest in the single fund without notice of the rights.[25] Where the common mortgagor has given a second mortgage of the previously singly charged fund, marshalling will not be possible, but a related principle, such as marshalling by apportionment, may apply.[26]

Life insurance policies

The *Life Insurance Act* 1945 (Cth), s 92(1),[27] does not exclude the right of a creditor to marshall against a life policy. Such a possibility was referred to by the High Court of Australia in *Miles v Official Receiver in Bankruptcy* (1963) 109 CLR 501, where, apart from the parties to the action, there was also a second mortgagee of the land. As between the first mortgagee (who also had security over a life policy) and the second mortgagee (who only had security over the land), the court envisaged that the second mortgagee would be able to marshall against the policy moneys, thus posing a further obstacle to the success of the plaintiff executor.[28]

Marshalling by apportionment

[1611] Where a common mortgagor has given a second mortgage of a previously singly charged fund, the single claimant will no longer be able to marshall against that fund. For example, a common mortgagor may give first mortgages over properties A and B to X, then a second mortgage over property A to Y and later a second mortgage over property B to Z. If the double claimant X chooses to enforce the mortgage against property A, Y's right to marshall against property B would be defeated by the intervening mortgage to Z, even where Z took with notice of the

24 *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120 at 128, where Neasey J explained the power of the double claimant to diminish the position of the single claimant as an indicator of the lack of proprietary interest of the single claimant. See above, para [1603].

25 In *Dolphin v Aylward* (1870) LR 4 HL 486, Lord Hatherley LC at 502 said: "[T]he rule … that the doctrine of marshalling shall not be applied to prejudice third parties, has a distinct and clear application in this case, because the volunteers are in this position; they have intermediate rights."

26 See below, para [1611].

27 This section provides that "the property and interest of any person in a policy effected … upon his own life shall not be liable to be applied or made available in payment of his debts by any judgment order or process of any court".

28 But see *Bank of New South Wales v City Mutual Life Assurance Society Ltd* [1969] VR 556, Gillard J at 559-560; *Commonwealth Trading Bank v Colonial Mutual Life Assurance Society Ltd* [1970] Tas SR 120, Neasey J at 125.

previous mortgages to X and Y,[29] unless the mortgage to Z is expressly stated to be subject to the mortgages to X and Y (*White v London Chartered Bank of Australia* (1877) 3 VLR 33). Similarly, if X chose to move first against property B, Z's rights to marshall against property A would be prejudiced by the rights of Y.

Once again, equity intervenes, having the same general object of overcoming the caprice of the double claimant (*Mir Bros Projects Pty Ltd v Lyons* [1977] 2 NSWLR 192, Waddell J at 196).[30] In such a case, "marshalling by apportionment" will apply; that is, the mortgages of X will be apportioned rateably between the two properties A and B according to their respective values, leaving the residue of each available to satisfy the mortgages to Y and Z respectively. Y may be entitled to call on Z to make good out of property B the proportion of X's debt which has been apportioned to it and is in that sense entitled to marshall against property B.[31]

If the later second mortgage to Z was over both properties, the result will be that, after the mortgages of X are apportioned rateably, Y will resort to the residue of property A, and Z will then resort to what is left of both properties.[32]

As in the case of marshalling, the option of the first mortgagee to exercise her or his rights against whichever property she or he chooses is not to be fettered (*Mir Bros Projects Pty Ltd v Lyons* [1977] 2 NSWLR 192, Waddell J at 197). For example, the court will not, at the suit of the later mortgagees, prevent the first mortgagee from resorting to the proceeds of the sale of one property before the value of the other property, for the purposes of the apportionment, is ascertained by its sale.

ASSETS IN THE ADMINISTRATION OF DECEASED ESTATES

[1612] Marshalling of assets in the administration of deceased estates has the purpose of regulating the order in which different classes

29 *Barnes v Racster* (1842) 1 Y & C Ch 401; 62 ER 944; Sykes E I and Walker S, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), p 184.

30 See also Sykes E I and Walker S, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), p 184, where marshalling by apportionment is described as a "limited right of marshalling". See also the discussion of marshalling by apportionment in *National Bank of New Zealand v Caldesia Promotions Ltd and Jenkins Roberts & Associates Ltd* [1996] 3 NZLR 467.

31 Sykes E I and Walker S, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), p 184.

32 *Barnes v Racster* (1842) 1 Y & C Ch 401; 62 ER 944. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1124]-[1126].

of assets will bear the debts of the deceased (*Ramsay v Lowther* (1912) 16 CLR 1, Isaacs J at 23).[33] While it shares with marshalling of securities the general rationale of equity between claimants,[34] the doctrine also has a further function of aiding the due administration of the testator's estate.

The doctrine of marshalling operates against the background of two fundamental rules, which are that the creditors of the deceased are entitled to satisfaction out of the first available funds coming into the hands of the deceased's legal personal representatives, and that payment should be borne by the assets in the order intended by the testator, or, where no such intention can be determined, in the order prescribed by statute in all jurisdictions.

Marshalling operates between creditors and now, more commonly, between beneficiaries. However, because the beneficiaries take subject to the payment of debts, it is not possible for a beneficiary to marshall against a creditor.

Creditors

[1613] Reforms to the law of administration of assets have generally[35] obviated the need for marshalling between creditors, except in the case of life insurance policies.[36] Before these reforms abolished any distinction between realty and personalty for the payments of debts and expenses, marshalling was used so that creditors who had access to both personalty and realty should not, by resorting first to personalty, disappoint creditors with access to personalty alone.

Beneficiaries

[1614] Equity will not restrain the creditors' access to the first available funds, but recognises that the actual order of payment may alter the order intended by the testator or laid down by statute. The principle was expressed by Lord Eldon LC in *Aldrich v Cooper* (1803) 8 Ves Jun 382; 32 ER 402, Lord Eldon LC at 396-397:

33 It is to be distinguished from the rule on contribution between assets of the same class.

34 *Balkin v Peck* (1998) 43 NSWLR 706 at 712.

35 But see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1149] (exceptional case of where a mortgage is expressly made payable from either land or other assets, giving the mortgagee the power to disappoint the general creditors).

36 See below, para [1615].

> "[T]he choice of the creditors shall not determine, whether the legatees shall be paid, or not ... by making the option to go against the one [fund] they shall not disappoint another person, who the testator intended should be satisfied ... wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator."

Once the creditors have been paid, the legal personal representatives must then, by marshalling, adjust the burden of these debts against the entitlements of the beneficiaries of the estate to restore the intended or statutory order.[37]

Life insurance policies

[1615] The relationship between the doctrine of marshalling and the *Life Insurance Act* 1945 (Cth), s 92(2) has given rise to some uncertainty. Section 92 protects policies of life insurance on the death of the insured against payment of debts in the administration of her or his estate. However, there are a number of qualifications to the protection. For example, the policy holder may mortgage or charge the policy or direct in the will that the policy proceeds are to be available to pay debts.

The doctrine of marshalling becomes relevant where a mortgage is secured over the policy and some other unprotected assets, and the mortgagee is satisfied from the unprotected assets, so that the unsecured creditors will be competing with the beneficiaries in the estate for access to the policy proceeds. Three approaches have been identified.[38] First, the doctrine of marshalling would operate to allow the unsecured or general creditors to marshall against the policy proceeds.[39] Secondly, a form of marshalling by apportionment would apportion the debt rateably over the policy and the unprotected assets, thus giving the unsecured creditors and beneficiaries equal standing (*Re Crothers* [1930] VLR 49 (FC)). Thirdly, the legislative protection over the policy is

37 See Woodman R A, *Administration of Assets* (2nd ed, Law Book Co, Sydney, 1978), for a detailed explanation and analysis of the operation of marshalling in this area, depending on the different orders of administration that may be applicable. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1141]ff.

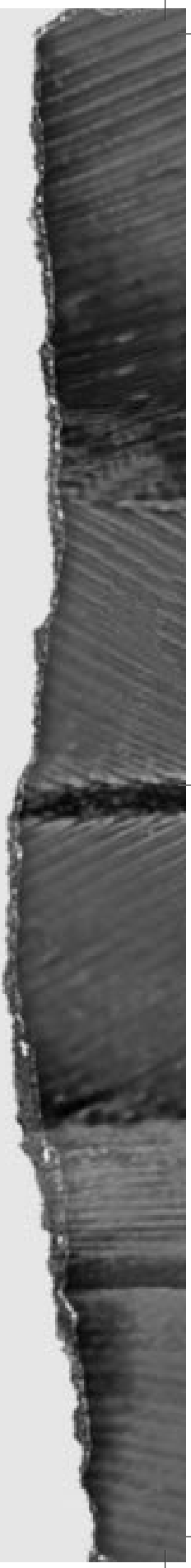
38 See Woodman R A, *Administration of Assets* (2nd ed, Law Book Co, Sydney, 1978), p 130; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1151]-[1159].

39 *Re W (a lunatic)* (1901) 11 QLJ 108; *Jenkins v Brahe Gair* (1902) 27 VLR 643. See also *Bank of New South Wales v City Mutual Life Assurance Society Ltd* [1969] VR 556. This approach is treated as correct by Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1151]-[1156].

extended so that the mortgage debt is thrown primarily on the unprotected assets, giving the beneficiaries of the policy greater protection and an advantage over the unsecured creditors (*Re Watkins* [1938] NZLR 847 (CA)). In *Miles v Official Receiver in Bankruptcy* (1963) 109 CLR 501, Dixon CJ, Menzies and Windeyer JJ at 515, the High Court left open the question of whether the second approach was correct, noting that it was a question of difficulty and far-reaching importance which would require the court's fullest consideration.

PART V

Remedies



CHAPTER SEVENTEEN

SPECIFIC PERFORMANCE

Samantha Hepburn

INTRODUCTION

Definition

[1701] Specific performance is an equitable remedy by which the court compels the defendant to perform obligations under a contract. The remedy is a discretionary one, and is available only when certain prerequisites are satisfied.[1] The specific performance is the actual execution of the contract according to its stipulations and terms. Equity directs the party in default to do the very thing which he or she contracted to do.

[1702] Australian courts have drawn a distinction between two different types of specific performance which may be ordered. The first has a more limited application. It refers to the situation where the court issues an order compelling one party to an executory contract to execute some document or do some act which will put the parties in the position, relative to each other, in which, by the preliminary agreement, they were intended to be placed.[2] This limited approach to specific performance is described by Dixon J in *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 297 in the following manner:

> "Specific performance, in the proper sense, is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties rights are settled and defined in the manner intended."

1 See below, paras [1721]-[1725].

2 *Wolverhampton & Walsall Railway Co v London & North Western Railway Co* (1873) LR 16 Eq 433, Lord Selborne at 439. See also *Packenham Upper Fruit Co v Crosby* (1924) 35 CLR 386, Isaacs and Rich JJ at 394; *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, Dixon J at 297.

A broader approach to specific performance, which may also be labelled specific relief analogous to specific performance, occurs in situations where the court orders a party to an executed contract to perform obligations due under that contract according to its terms. In this situation, the specific performance is broader because the court is in a situation where it may enforce either the entire completed contract or individual contractual obligations owing under the completed contract.

A reference to specific performance will generally cover both the limited and broader notions of specific performance. Although several reasons have been put forward in favour of sustaining a clear distinction between each form of specific performance, the distinction is not of great importance in practice.

In the first place, in order to obtain the decree of specific performance in the limited sense, a party must prove that he or she has performed, or is ready, willing and able to perform, the obligations under the contract. This requirement will obviously be unnecessary under the broader form of specific performance, because the contract has already been executed (*Sydney Consumers' Milk & Ice Co Ltd v Hawkesbury Dairy & Ice Society Ltd* (1931) 31 SR (NSW) 458 at 462-463). This distinction is, however, increasingly losing its significance. The court is unlikely to refuse an order for specific performance pursuant to an executed contract purely on the basis that the "ready and willing" rule only applies to executory contracts. Furthermore, the requirement that the party be "ready and willing" is becoming less important as courts pursue a more discretionary approach to this whole issue. This point was recognised in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 640,[3] where Wilson and Toohey JJ concluded that "the absence of a plea of readiness and willingness to perform is not inevitably fatal to a plaintiff's claim for specific performance".

Secondly, specific performance in the more limited sense can only be issued for the entire contract, whereas, under the broader doctrine, a court can compel performance of individual contractual obligations.[4] Whilst this remains important for the practical operation of specific performance, it does not really constitute a sufficient ground for distinction. Other factors, apart from the nature of specific performance, will also be relevant in determining whether obligations owed under part of a contract should be compelled. These factors include the ability to sever the contractual obligations, whether there has been or is likely to

3 See also Mason CJ and Dawson J at 619.

4 See generally Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co, Sydney, 2001).

be a failure by either party to perform an essential term of the contract, the degree of hardship which might be caused by the grant or denial of relief, and the extent of the burden that the court may assume if enforcement of part of a contract is undertaken. Critics of this distinction argue that the issue is too minor to justify the rigid division between the two very similar forms of specific performance which are substantially alike in all other respects.[5]

Finally, it is said that a distinction is merited because specific performance in the wider sense should be governed by principles regulating the award of a prohibitory injunction against a breach, or a mandatory injunction to perform, rather than by those principles which determine the award of the narrower form of specific performance.[6] It is said that specific performance in the broader sense is indistinguishable from such injunctive relief, and, in most situations, the remedy sought is more frequently obtained by way of injunction to prevent some breach of the contract, which in this way indirectly compels the performance of the contract.[7] This distinction may also be criticised, since in practical terms both the narrow and the broader forms of specific performance are akin to a mandatory injunction. It is difficult to distinguish between the two forms of specific performance on this basis.

Specific performance, whether its character is limited or broad, is a part of the general equitable jurisdiction. If the defendant comes within the jurisdiction of the court and can be compelled to perform her or his obligations personally, then the court may so compel her or him. The significance of the distinction between the different forms of specific performance has been the subject of much debate in recent years.[8] Ultimately, however, whether the relief is an order compelling the performance of obligations under an executory or an executed contract, the substance of the relief is the same. For this reason alone, encouraging arbitrary distinctions is unnecessary and superfluous.[9]

5 Heydon J D, Loughlan P L, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 2002), para [38.1].

6 See *Burns Philp Trust Co Ltd v Kwikasair Freightlines Ltd* [1964] NSWR 63.

7 See Heydon J D, and Loughlan P L, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 2002), para [38.1].

8 See Heydon J D, and Loughlan P L, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 2002), para [38.1]; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2001]-[2004].

9 See *Australian Hardwoods Pty Ltd v Commissioner for Railways* [1961] 1 All ER 737 where Lord Radcliffe (for the Privy Council) felt that there was no obvious reason why the equitable right to specific performance for executory contracts should be tried by principles which are any different from those applicable to executory contracts: at 743. See also *Sydney Consumers' Milk & Ice Co Ltd v Hawkesbury Dairy & Ice Society Ltd* (1931) 31 NSWLR 458, Long Innes J at 468.

A personal remedy

[1703] A decree of specific performance is a personal remedy, applicable against an individual defendant. This means that specific performance is issued against a person directly, focusing upon the unfairness of the particular conduct of that person.[10] When a court issues a decree of specific performance, it is acting in personam because it is directing the particular defendant to fulfil her or his obligations. Hence, the court can effectively compel a defendant who is within the jurisdiction to perform a contractual obligation personally.

[1704] It is imperative that the defendant against whom specific performance is being decreed is within the jurisdiction of the court and is capable of personally carrying out the contractual obligations (*Jackman v Broadbent* [1931] SASR 82).[11] Where the defendant is a person over whom the court has no jurisdiction, there can be no relief. No specific performance can be awarded against a foreign government concerning a contract entered into by that government and an individual.[12]

It is not necessary for the actual contract to be within the jurisdiction of the court. The fact that equity acts in personam in directing an individual defendant to perform contractual obligations means that it is not concerned with the issue of where the contractual obligations arose; all the court is concerned with is the location of the person required to perform the contractual obligations.

It follows from this that a contract outside the court's jurisdiction may be enforced against a defendant within the jurisdiction; the remedies for a breach of contract are clearly governed by the lex fori (law of the place) where the action is brought. It would be no objection to the court awarding a decree of specific performance to argue that foreign law might have given no such remedy. Hence, in *Foubert v Twist* 1 Bro PC 129, a marriage contract made in France was capable of being specifically executed in England as the parties had arrived in England as refugees.

10 See *Carnell v McLennan* (1880) 1 LR (NSW) Eq 61 (FC). See further, A. Phong, "Specific Performance — Exploring the Roots of Settled Practice" (1998) 61 *Modern Law Review* 421.

11 See further "Substituted Service — Specific Performance of Contracts Relating to Foreign Land" (1931) 5 *Australian Law Journal* 194.

12 See *Smith v Weguelin* [1869] LR 8 Eq 198.

The court must, however, be careful to restrict its jurisdiction to relief of a personal nature. It cannot affect rights relating to a proprietary interest outside the jurisdiction. While the general principle, however, is that the court will not grant specific performance of contracts relating to land or property which are situated outside of the jurisdiction, there are exceptions. A decree of specific performance can in fact affect property which is outside the jurisdiction of the court, but only as an incidental part of issuing the decree against a particular defendant.[13] Thus, where a contract contains a personal obligation to execute a conveyance of foreign land, the court may award specific performance. The court emphasises the contractual obligation to convey, and the actual effect this has upon the land is considered to be an incidental consequence of the award. Nevertheless, relief may still be refused if the law of the jurisdiction in which the land is situate does not recognise the validity of the conveyance.[14]

In summary, service of a writ or notice of a writ of summons may be allowed out of the jurisdiction when any contract affecting property within the jurisdiction is sought to be enforced in the actions, or when the action is founded on any breach or alleged breach of any contract within the jurisdiction, wherever that contract might be made.[15]

Specific performance may be absolute or conditional

[1705] Specific performance may be ordered as an absolute decree or subject to certain conditions imposed by the court. The conditions which may be attached to the decree will depend upon the particular circumstances. For example, a condition may be imposed that the plaintiff be required to pay interest in order not to obtain an unjust benefit from the decree of specific performance (*Harvela Investments Ltd v Royal Trust Co, of Canada (CI) Ltd* [1986] AC 207).

The hardship that an award of specific performance may cause sometimes encourages the court to make the decree conditional. In certain situations, the court might feel that the circumstances

13 *British South Africa Co v Companhia de Mocambique* [1893] AC 602; *Buttes Gas & Oil Co v Hammer* [1982] AC 888, Lord Wilberforce at 925-926.

14 See *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132; *Re Courtney; Ex parte Pollard* (1840) Mont & C 239, Lord Cottenham at 250.

15 See Northcote G R (ed), *Fry on Specific Performance* (6th ed, Stevens & Sons, London, 1921), p 59.

are insufficient to warrant the rejection of the decree; however the circumstances still justify imposing conditions. Contracts which are particularly vulnerable to a conditional decree of specific performance are those dealing with specific subject matter. In land contracts for example, it is often the case that both the vendor and the purchaser want the contract to go ahead: the vendor wants to sell the land, the purchaser wants to purchase it and the conveyance is really only prevented by some unfortunate mishap or difficulty. In such situations, it is clear that specific performance is an appropriate award and should not be precluded merely because of minor contractual or discretionary difficulties. Hence, specific performance may be ordered of a contract for the sale of land even though there has been a misdescription of the title or the actual amount of land being sold. In such circumstances, the courts will generally impose a condition that specific performance be ordered subject to the requirement that adequate compensation be paid by the vendor, or that there be an abatement of the purchase price.[16]

Where fairness considerations are in issue, the court will generally attempt to fashion the most appropriate form of specific performance so that the ultimate transactional objective is reached and the contractual difficulty resolved.[17] Given that the jurisdiction to award specific performance is essentially equitable in nature, there is no reason why a decree of specific performance cannot be tailored to meet the particular circumstances and needs of the parties involved.

Distinction between specific performance and other forms of relief

[1706] It is important to distinguish specific performance from other forms of specific relief. Relief which is similar in substance to specific performance includes specific restitution, prohibitive and mandatory injunctions, and relief under various statutory provisions.

Specific restitution

[1707] Courts of equity commonly order the return to their owners of deeds and chattels which have a special value, in cases where

16 See *Peacock v Penson* (1848) 1 Beav 355; 50 ER 854; *Gall v Mitchell* (1924) 35 CLR 222. This matter is referred to by Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co, Sydney, 2001), p 199.

17 See *Goldsmith v Smith* (1951) 52 SR (NSW) 172, where the issue of compensation/abatement of purchase price for an error arising from a misdescription in a land contract was considered.

damages do not constitute an adequate remedy. In an action for detinue, a court of equity has a discretionary power to order specific restitution of a chattel.[18] In *Burr v Bloomsburg* 101 NJ Eq 615; 138 A 876 (1927), Berry V-C, in the New Jersey Court of Chancery, ordered the return of a diamond ring having sentimental value to the daughter of the owner. During the course of his judgment, he quoted from Story, *Equity Jurisprudence*:[19]

> "Specific delivery may be ordered of any chattel of peculiar value and importance; and any other chattel, whose principal value consists in its antiquity; or its being the production of some distinguished artist; or in its being a family relic, ornament or heirloom."

It is important to remember that an order for specific restitution will be subject to the same discretionary procedures as those applicable to a grant of specific performance. In order to establish the requisite grounds for a restitutionary order, it must be shown that the particular chattel has an individual and special significance which cannot be easily substituted.

Prohibitive and mandatory injunctions

[1708] Prohibitive and mandatory injunctions can have an analogous effect to an order for specific performance. Particular contractual stipulations may be enforced by the imposition of a prohibitory injunction or through a mandatory injunction (*Wolverhampton & Walsall Ry Co v London & NW Ry Co* (1873) LR 16 Eq 433 at 440). An injunction to enforce a negative covenant may operate as an alternative to specific performance. For example, as specific performance of a contract for personal services is not generally available, it may be possible to obtain an injunction which prohibits the provisions of services to other persons which are inconsistent with the services agreed to be performed for the plaintiff. The same sort of discretionary considerations which are appropriate in the determination of whether to award a decree of specific performance will be applicable to injunctive relief.

18 Detinue is a cause of action for the recovery of possession of specific personal chattels from one who acquired possession of them lawfully (for example, a bailee), but retains them without right, together with damages for wrongful detention. The relevant statutory provisions in all Australian jurisdictions are derived from s 78 of the *Common Law Procedure Act* 1854 (Imp).

19 *Story's Commentaries on Equity Jurisprudence* (11th ed, Little, Browne & Co, Boston), Vol 1, p 757, para [509].

Statutory provisions

[1709] Various different statutes give the courts power to order what is effectively a specific performance order. In particular, the Sale of Goods legislation in most jurisdictions empowers a court to order delivery of specific or ascertained goods. In all jurisdictions other than New South Wales, it is provided that:[20]

> "In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit … direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

The better view is that this legislation does not, by implication, restrict the equitable jurisdiction of the court to grant specific performance of contracts for the sale of goods, but in fact provides legislative indorsement of the availability of the remedy for such contracts. The powers conferred under the various different legislative provisions will, therefore, be exercised according to the same principles as are applied in the determination of whether an ordinary equitable award for specific performance should be granted.[21]

In New South Wales, the *Sale of Goods Act* 1923, s 56, provides that nothing in the Act shall affect any remedy in equity of the buyer or seller in respect of a breach of contract for the sale of goods. It would seem that the New South Wales legislation allows for specific enforcement of a contract for the sale of goods in any circumstance in which a remedy at common law would be inadequate.

THE REQUIREMENTS FOR AN AWARD OF SPECIFIC PERFORMANCE

Enforceable contract

[1710] Generally, it will only be when a subsisting contract, which is enforceable at law, is established that a decree of specific

20 *Goods Act* 1958 (Vic), s 8; *Sale of Goods Act* 1895 (WA), s 1; *Sale of Goods Act* 1954 (ACT), s 5; *Sale of Goods Act* 1972 (NT), s 6; *Sale of Goods Act* 1896 (Tas), s 6; *Sale of Goods Act* 1895 (SA), s 1; *Sale of Goods Act* 1896 (Qld), s 53.

21 See *Re Wait* [1927] 1 Ch 606, Atkin LJ at 635.

performance can be awarded. If the contract is not enforceable at common law, then generally the decree will not be awarded.[22] In these instances, equity is operating in its auxiliary jurisdiction and is not adjudicating upon the validity of the plaintiff's claim. Rather, it is assisting in the enforcement of the claim. Nevertheless, there are some situations where proceedings for specific performance are brought in order to establish whether the contract is enforceable. Equity will not reject such applications because, under the Judicature Act system, it is no longer regarded as essential that a separate proceeding for the establishment of the contract's enforceability should occur.[23]

Valuable consideration

[1711] It must be clearly shown that an applicant for the award of specific performance has provided valuable consideration. Simply because the agreement to be enforced has been made under seal does not mean that valuable consideration has been provided (*Mountford v Scott* [1975] Ch 258 at 265). The justification for this rule lies in the fact that equity has traditionally regarded the failure to perform a mere promise as being insufficiently inequitable to warrant an award of specific performance.

Generally, equity has adopted the same approach to the sufficiency of consideration as that of the common law.[24] There are, however, a few exceptions to this … equity has recognised a few anomalous forms of consideration which have not been accepted under the common law. First, an agreement made in contemplation and consideration of marriage, or made after marriage in the pursuance of an antenuptial covenant, may be enforced in equity. Both the spouses and the issue of the marriage may enforce the agreement. The next of kin, however, may not do so.[25] Secondly, agreements which are extensions of contracts originally made for consideration may be specifically enforced. Hence, an option to purchase land in a contract is specifically enforceable provided that valuable consideration has been given for the original grant. In this situation, the option is enforceable because it forms a part of the original contract pursuant to which valuable consideration was given (*Alexander v Tse* [1988] 1 NZLR 318, Somers J at 327 (CA)).

22 But see below, paras [1713]-[1715].

23 See *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, Dixon J at 632-633.

24 See Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., 2001), p 56.

25 See *Re Cook's Settlement Trusts* [1965] Ch 902; *Attorney-General v Jacobs Smith* [1895] 2 QB 341.

Both common law and equity take the view that the presence of valuable consideration will be sufficient to enforce a contract. Provided that something of value has been given, specific performance of the contract will not be denied. The value may well be less than expected, or indeed completely unsuitable, but this will not, per se, prevent specific performance from being granted.[26] Inadequate consideration may, however, operate as an effective discretionary consideration for the court and specific performance may be rejected on this basis. Inadequate consideration given for a contract may provide evidence of hardship or unfairness to the extent that the court, in its discretion, may decide that the contract should not be enforced.[27]

Privity of contract

[1712] A number of decisions concerning the continuing existence of the doctrine of privity of contract have rendered unclear the impact of the doctrine on the availability of specific performance.

First, it is well-established that a contract for the benefit of a third party will be enforceable at the behest of a party to the contract even though that party has not suffered personal loss as a result of the failure to perform the contract. In particular, the judgments of Barwick CJ and Windeyer J in *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460 recognise that it is possible to grant specific performance in favour of a third party. During the course of his judgment, Barwick CJ made the following comments (at 477):

> "I would myself, with great respect, agree with the conclusion that where A promises B for a consideration supplied by B to pay C that B may obtain specific performance of A's promise, at least where the nature of the consideration given would have allowed the debtor to have obtained specific performance. I can see no reason whatever why A in those circumstances should not be bound to perform his promise. That C provided no part of the consideration seems to me irrelevant."

It is, however, made quite clear that the only person able to seek specific performance is the promisee.[28] The further question arises

26 See *Mountford v Scott* [1975] Ch 258.

27 See generally *Axelsen v O'Brien* (1949) 80 CLR 219; *Slee v Warke* (1949) 86 CLR 271; *Dowsett v Reid* (1912) 15 CLR 695, Griffith CJ at 705.

28 See also the House of Lords on this point in *Beswick v Beswick* [1968] AC 58.

as to whether it is ever possible for the third party beneficiary of the promise to bring her or his own action on the contract, seeking specific performance. One way in which this might be possible is where it is held that the promisee under the contract is a trustee of that promise for the third party beneficiary. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, members of the High Court affirmed the possibility that a trust of the chose in action could be established if there was sufficient evidence of intention to create such a trust (Mason CJ and Wilson J at 121; Brennan J at 140; Deane J at 147-148). In this situation, rather than enforcing a contract for the benefit of a third party, in substance the court is actually recognising the existence of a trust over the contractual obligations.[29]

If a trust over a contractual obligation to a third party arises, the promisee will become a trustee of the contract and the third party, to whom the contractual obligations are owed, will be the beneficiary. In this situation, the trustee may be obliged to seek specific performance of the contract in order properly to carry out her or his equitable duties, and the beneficiary has an equitable right to enforce this duty.

In *Trident General Insurance Co v McNiece Bros Pty Ltd* (1988) 165 CLR 107, some of the members of the High Court went even further to suggest that the third party, for whom the contract was meant to benefit may be capable of obtaining specific performance of the contract without the existence of a trust. Mason CJ and Wilson J both claimed that the third party should be capable of protecting a contract which is made for their benefit (at 120). Gaudron J reached a similar conclusion stating (at 176):[30]

> "[T]he possibility of unjust enrichment is obviated by recognition that a promisor who has accepted agreed consideration for a promise to benefit a third party owes an obligation to the third party to fulfil that promise and that the third party has a corresponding right to bring an action to secure the benefit of the promise."

It is, however, unclear how far the decision in *Trident* can be taken to modify the doctrine of privity of contract beyond the facts of the case. On the particular facts, the High Court by a narrow majority (Mason CJ, Wilson, Toohey and Gaudron JJ;

29 See *Re Cook's Settlement Trusts* [1965] Ch 902; *Fletcher v Fletcher* (1844) 4 Hare 67; 67 ER 564.

30 But see the criticism of this approach by Soh K B, "Privity of Contract and Restitution" (1989) 105 *Law Quarterly Review* 4; Jackman I M, "Contract — Rights and Liabilities of Third Parties" (1989) *Australian Law Journal* 368.

Brennan, Deane and Dawson JJ dissenting) affirmed the decision of the New South Wales Court of Appeal, and held that a third party could recover damages directly against a party to the contract if that party had issued a policy of insurance to the other contracting party which was intended to benefit the third party. Whether this means that the doctrine of privity no longer applies to other kinds of contract for the benefit of third parties remains to be determined. Insurance contracts are generally not affected by the doctrine of privity in any case, as a result of the *Insurance Contracts Act* 1984 (Cth).[31]

In Queensland and Western Australia, the doctrine of privity has been abrogated by statute.[32] As a result, in those States, parties who are not privy to a contract which was intended to operate for their benefit may still sue for specific performance of the contract.

Specific performance in the absence of a contract which is valid at law

[1713] In two situations, it is possible for specific performance to be granted even though there is not a contract which is valid at law. The first is where the contract is unenforceable because the statutory writing requirements have not been satisfied. In this situation, it may be possible to enforce the contract by relying on the doctrine of part performance. The second is where a party is estopped in equity from denying the existence of a valid contract.

Part performance

[1714] It is possible that an applicant may obtain specific performance of an agreement in equity, in the absence of any compliance with the statutory formalities, if it can be shown that the applicant has carried out acts of part performance.[33] The primary justification underlying the enforcement of the agreement is that, in such circumstances, it would be unconscionable to allow a defendant to rely upon statutory formality requirements and thereby to deny the existence of a valid agreement.[34]

31 The *Insurance Contracts Act* 1984 (Cth) governs insurance contracts generally, and s 48 of that Act abrogates the effect of the doctrine of privity as far as it concerns insurance contracts.

32 *Property Law Act* 1974 (Qld), s 5; *Property Law Act* 1969 (WA), s 11(2) and (3). The doctrine has also been abrogated in England: *Contracts (Rights of Third Parties) Act* 1999.

33 See *Maddison v Alderson* (1883) 8 App Cas 467.

34 See *Broughton v Snook* [1938] Ch 505; *Steadman v Steadman* [1976] AC 536.

In order to prove part performance, a number of factors must be demonstrated. It must be shown first that the acts of the plaintiff were actually carried out for the purpose and in the course of performing the contract. It will be sufficient if it can be shown that the act was "permitted" by the contract; there is no need to prove that the act has been expressly authorised.[35]

Secondly, the acts must be referable to the alleged agreement. The test has been expressed in different ways. In *Maddison v Alderson* (1883) 8 App Cas 467 at 479, Lord Selborne LC said that "the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged." In the High Court of Australia, this test has often been quoted,[36] but different formulations have also sometimes been offered. Thus Dixon J in *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 297[37] said that equitable relief is available if the party "has done acts of part performance consistent only with some such contract subsisting". Fry, in his book on specific performance,[38] expressed the view that the acts must be "such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged." This test was adopted by Upjohn LJ in *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169, and a number of members of the House of Lords expressed themselves in similar terms in *Steadman v Steadman* [1976] AC 536.[39] In particular, the word "unequivocally", as used by Lord Selborne, was interpreted by some judges as requiring only that the acts point to the existence of a contract on the balance of probabilities (*Steadman v Steadman* [1976] AC 536, Lord Reid at 541-542; Lord Simon at 563-564). It remains to be seen whether *Steadman v Steadman* will be adopted in Australia.

Payment of the purchase price is generally held to be an insufficient act of part performance because it is not clearly referable to a particular agreement (*Francis v Francis* [1952] VLR 321). This was affirmed by the House of Lords in *Steadman v Steadman* [1976] AC 536, which established that, payment of the purchase price for a contract for the sale of land would, by itself,

35 See Hutley JA in *Millet v Regent* [1975] 1 NSWLR 62 at 65-68.

36 See, for example, *McBride v Sandland* (1918) 25 CLR 69, Isaacs and Rich JJ at 78; *Cooney v Burns* (1922) 30 CLR 216, Knox CJ at 222; Starke J at 243; *Regent v Millett* (1976) 133 CLR 679, Gibbs J at 683.

37 For other formulations, see *Francis v Francis* [1952] VLR 321, Smith J at 340; *Watson v Delaney* (1991) 22 NSWLR 358, Meagher JA at 366.

38 Northcote G R (ed), *Fry on Specific Performance* (6th ed, Stevens & Sons, London, 1921), p 278.

39 For another interpretation of this case, see Meagher R P, Gummow W M C, and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, 1992), paras [2039]-[2040].

be insufficient to prove the particular agreement alleged,[40] although it may constitute one act of part performance among others. In that case, an agreement was made between a husband and wife outside the court whereby upon their divorce, the wife was to transfer to the husband her interest in the matrimonial home in return for a payment of £1500, an existing maintenance order against the husband was to be discharged and outstanding arrears of maintenance would be waived by the wife with the exception of £100 which the husband had to pay by a specified date. This agreement was never put into writing. The wife subsequently refused to transfer the house. The husband sought to enforce the agreement on the basis of part performance. The acts of part performance relied upon were the husband's payment of the £100 and the fact that the husband's solicitor had sent a transfer to the wife's solicitor for execution. The House of Lords upheld an order of specific performance in favour of the husband (Lord Reid, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Salmon; Lord Morris dissenting).

In *Pejovic v Malinic* (1960) 60 SR (NSW) 184, it was held that the act of a lessee in continuing in possession of property after the expiration of her or his term will of itself be insufficient to prove an agreement for a further lease, although if possession is coupled with the payment of rent or the performance of obligations which had existed under the previous lease, the agreement may be enforced.

A third requirement for the establishment of part performance has been suggested. It is that the act relied upon must have been done on the faith of the agreement, and that it must result in a change of position to such an extent that it would be unconscionable, and the plaintiff would be unfairly prejudiced, if the defendant were able to rely upon the absence of written evidence (*Francis v Francis* [1952] VLR 321, Smith J at 340). Generally, this requirement will be satisfied by simply proving that sufficient acts of part performance exist. It is possible that the doing of sufficient acts of part performance will not make it inequitable for the defendant to rely upon the absence of any writing, although there does not appear to be any reported decision. It would seem to be better to regard this requirement as the rationale underlying the whole doctrine, rather than a separate requirement in the establishment of the doctrine.[41]

40 For the view that it might be sufficient, see *Steadman v Steadman* [1976] AC 536, Lord Reid at 541; Lord Salmon at 570-571.

41 See Meagher R P, Gummow W M C, and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, 1992), para [2042].

The doctrine of part performance will apply to all contracts in which a court of equity would have entertained a suit for specific performance if the contract had been in writing. There has been some suggestion that specific performance on the basis of part performance should be restricted to contracts for the sale of land. However, whilst an action for enforcement of a contract based upon acts of part performance will most commonly be taken with respect to land contracts (because contracts for the sale of land need to be in writing), such a limitation has not been fully accepted (*McManus v Cooke* (1887) 35 Ch D 681, Kay J at 697).

In *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 300-301, Dixon J held that, if a particular provision, rather than the entire contract, is sought to be enforced, the act of part performance would have to refer to this provision.

Once sufficient acts of part performance have been established, the plaintiff will acquire an equity specifically to enforce the provisions of the agreement which would otherwise have been unenforceable on the basis of an absence of writing. In this sense, the doctrine of part performance can be described as a substantive principle actually creating an enforceable interest, rather than an evidentiary tool used to prove the existence of an oral agreement.[42]

Estoppel

[1715] The other situation where specific performance might be granted despite the absence of a valid contract at common law is where one of the parties is estopped from denying the existence of an enforceable contract. In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, the court held that pre-contractual conduct was capable of forming the basis of an estoppel in equity and that damages should be awarded in substitution for specific performance. The court did not expressly exclude the possibility that specific performance could be awarded. Whether or not specific performance would be awarded on the basis of an estoppel is dependent in part on the question of the basis upon which the relief in estoppel cases is to be determined. In *Waltons*, the High Court made it clear that the appropriate relief for an equitable estoppel is to reverse the detriment rather than, necessarily, to fulfil the expectation (Mason CJ and Wilson J at 405; Brennan J at 419). In *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ suggested that common law and equitable estoppel should be merged to create a single united action.

42 See *Steadman v Steadman* [1976] AC 536, Lord Simon of Glaisdale at 559.

Consistently with the position in relation to equitable estoppel, he said that the appropriate remedy will be based upon the detriment which the person has suffered as a result of her or his direct reliance upon the correctness of the assumption (at 415). Under this approach, the limiting effect of the "direct reliance" test may ultimately mean that specific performance of an estoppel action is rarely granted.

On the other hand, the approach of Deane J in *Verwayen* is potentially a lot wider. Whilst Deane J also advocated the merger of all legal and equitable estoppels, he held that the merged principle can only operate as a defence to prevent the unfair assertion of strict legal rights. The remedy to be applied for such a defence will be that which is most appropriate in the circumstances, although clearly, in order for the principle to function effectively as a defence, the usual award will be the enforcement of the representation (at 461).[43] Following these decisions, it is possible that some expectations created under the estoppel principles may be enforced, despite the absence of consideration, on the basis that it would be unconscionable to deny enforcement in circumstances where the plaintiff has been induced to rely to her or his detriment upon a representation made by the defendant.[44]

Breach of contract

[1716] A claim for specific performance will only succeed if it can be established that there has been a breach of contract constituted either by a failure to perform the contract or an anticipatory breach.[45] The real question to consider is whether the acts and conduct of the defendant manifest a clear intention not to be bound by the contract. This will depend upon the individual circumstances of the case. Specific performance may be awarded where a breach of contract has occurred, although no cause of action for damages has accrued.[46]

It is not necessary to prove that the breach is fundamental; provided the contract is capable of being enforced, an actual or anticipatory breach of any term of the contract will provide

43 See also the judgments of Brennan J at 429; Toohey J at 475; McHugh J at 501; Dawson J at 461; Gaudron J at 487. See further *Commonwealth v Clark* (1993) ATR 62,127 and *Giumelli v Giumelli* (1999) 196 CLR 101. See also Edelman J, "Remedial Certainty or Remedial Discretion in Estoppel after Giumelli" (1999) 15 *Journal of Contract Law* 179.

44 See further above Chapter 7: "Estoppel".

45 See *Frost v Knight* (1872) LR 7 Ex 111; *GSS Investments Pty Ltd v Lopiron Pty Ltd* (1987) 16 FCR 15.

46 See *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (A'asia) Pty Ltd* (1954) 90 CLR 235.

sufficient justification for the award of specific performance. The basis of the jurisdiction does not lie in the character of the breach but in the inequity arising from the fact that a breach has occurred. The requirement of an actual or threatened failure to perform has been clearly set out by the High Court in *Turner v Bladin* (1951) 82 CLR 463, Williams, Fullagar and Kitto JJ at 472:

> "Proceedings for the specific performance of a contract which is of such a kind that it can be specifically enforced can be commenced as soon as one party threatens to refuse to perform the contract or any part thereof or actually refuses to perform any promise for which the time of performance has arrived."

In *Hasham v Zenab* [1960] AC 316 at 329, the court concluded that the breach of contract requirement is simply an indication that circumstances exist which will justify the intervention of equity. The most important question to consider is whether or not specific performance should, in fairness, be awarded. Usually, a breach of contract will provide a sufficient level of unfairness to warrant the enforcement of the contract, however this is not a blanket rule. In some situations, even if a breach is established, specific performance may be denied.

Inadequacy of damages

[1717] Equity will not grant specific performance if an award of damages at common law will provide sufficient compensation for the plaintiff. This principle was clearly enunciated in *Harnett v Yielding* (1805) 2 Sch & Lef 549 where Lord Redesdale stated (at 553):

> "Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled, that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed."

There are, however, a number of recent decisions indicating an increasing reluctance by the courts to decline specific performance purely by reference to the adequacy of damages. The current tendency is to refuse a decree of specific performance only where it can be shown that the relief which is provided by an award of damages would achieve substantially the same effect.[47]

47 See Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 62. See also *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576.

The whole issue concerning adequacy of damages appears to have become more of a discretionary matter rather than a threshold jurisdictional question.[48] Nevertheless, even in the exercise of its discretion, the court will generally decline specific performance of a contract where damages are proven to be adequate.[49] In *Attorney-General v Blake* [2001] 1 AC 268, the House of Lords emphasised the discretionary nature of the decree of specific performance and noted that the discretion will generally be exercised in favour of innocent parties who suffer a loss from breaches of contract which are not, after a careful examination of all of the circumstances, adequately remediable by an award of damages.

The first matter to be considered by the court will be whether damages are, on the facts, the most suitable form of relief. This is established by taking into account the circumstances and jurisdictional character of the action. In making this assessment, the court is exercising its broad discretion with respect to the award of equitable relief generally. If it becomes apparent that damages are inappropriate on the facts, this will not automatically mean that an award of specific performance will be made. A further analysis of other relevant discretionary considerations will also need to be carried out.

Circumstances in which damages are inadequate or inappropriate are numerous and varied in content. In each situation, the proper inquiry is to ask whether the plaintiff ought to be just as satisfied with an award of damages as he or she would with a decree of specific performance.[50] The particular circumstances of each case must be carefully examined. Thus in *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd* [1989] ASC 58,402 (NSW SC), the court held that the entire enterprise of the plaintiffs would be lost if the defendants did not have the contract enforced and, consequently, damages were inappropriate in the circumstances. If the defendant is insolvent or has a doubtful solvency status, damages may be inadequate.[51] In considering this issue, the

48 Note the discussion by Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 62.

49 Note the decision of *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, where Windeyer J stated: "[W]hen specific relief is given in lieu of damages it is because the remedy, damages, cannot satisfy the demands of justice" (at 503). This tends to indicate a possible replacement of the jurisdictional "appropriateness" test with a general "justice" test. This approach was also endorsed by Lord Upjohn in *Beswick v Beswick* [1968] AC 58.

50 This has been well summarised in *Wight v Haberdon* (1984) 2 NSWLR 280, where Kearney J held that specific performance will be available for a contract where, in the particular circumstances, a remedy in damages is not adequate to satisfy the demands of justice.

51 See *Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S (The Oakworth)* [1974] 1 Lloyd's Rep 581 (CA).

court must examine the consequences of issuing specific performance on other creditors, because it may effectively result in one creditor being given an unfair preference over the others (*Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122).

Damages may also be inappropriate because the circumstances reveal multiple contractual breaches requiring successive actions. If the substance of the plaintiff's action is to prevent the breaches from continuing, specific performance may be a more appropriate form of relief. Specific performance is a single decree, and it may be more appropriate than continuing awards of damages. In light of this, it has been held that a decree of specific performance is the more appropriate form of relief for a contract to pay an annuity.[52]

It may be the case that only a nominal award of damages would be available on the facts. For example, in a situation where one party sues for a breach of an obligation owed towards a third party, who is not privy to the contract, that party will generally only be able to recover nominal damages.[53] Damages will be inadequate unless they are at least of such an amount that the plaintiff can adequately compensate the breach and any loss accruing to third parties. If such compensation cannot be achieved, a court of equity may clearly prefer specific performance over an award of damages.

In *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 the Privy Council considered whether a decree of specific performance was available to enforce a tenant's obligation to repair leased premises. The court noted that as a general rule, equity will not issue a decree of specific performance in circumstances where a breach of an essential term has occurred and that it was important to adhere to this general principle in order to uphold commercial certainty. Lord Hoffman noted at 519 that

> "the existence of an undefined discretion to refuse to enforce the contract on the ground that this would be 'unconscionable' is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case."

52 See *Beswick v Beswick* [1968] AC 58. See also *Hodgson v Duce* (1856) 2 Jur NS 1014.

53 See *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460.

The type of contract

[1718] The availability of specific performance may also depend upon the particular type of contract involved. In some contracts, such as for land, specific performance is awarded almost as a matter of course, whereas in others, it is only awarded in special circumstances. However, the tendency to determine the availability of specific performance according to the character of the contract is diminishing. The courts are increasingly applying the same equitable considerations to all contracts, whatever their character and form. This has been well summarised by Windeyer J in *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460 at 503: "there is no reason today for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made." This approach directs the court's attention to the actual circumstances under which the contract was made, thereby preventing a refusal from occurring without a proper assessment of the facts.

Contracts for the sale of land

[1719] An important area where specific performance is often awarded is in respect of contracts for the sale of land. A court of equity will almost always issue a decree of specific performance of a contract for the sale of land, in the absence of other discretionary considerations working against it, because each piece of land is considered to be unique; an award of damages is inappropriate because monetary relief will not necessarily replace the actual form of the land and is not an equivalent substitute. It may also be the case that damages cannot adequately compensate a purchaser for the time-consuming process of seeking out and purchasing another comparable property.[54] Specific performance should not, however, be granted as a matter of course for the enforcement of land contracts. As noted by Sopinka J in *Semelhago v Paramadevan* (1996) DLR (4th) 1 at 11, the decree of specific performance should not be granted for the enforcement of a contract for the sale of land without clear proof that the land is unique and a substitute is not readily available.

Specific performance of a contract for the sale of land will generally be awarded whatever the nature of the estate or interest. Hence, an agreement to sell an interest under a tenancy in common, an agreement for a lease, and a contract for sale

54 See Heydon J D, and Loughlan P L, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 2002), para [38.22]. See also *Shaw v Harris (No 2)* (1992) 3 Tas R 167.

under a mortgagee's power may all be specifically enforced.[55] A contract for the sale of land may be specifically enforced even if the land is subject to the approval of subdivision (*Ex parte Minister for Education; Re Henry Lawson Development Pty Ltd* [1970] 2 NSWLR 204).

Leases of a very short duration are unlikely to be specifically enforced,[56] although leases for yearly tenancies have been specifically enforced.[57] It is also possible that contractual licences may be specifically enforced. In *Verrall v Great Yarmouth* [1981] QB 202, a decree of specific performance was awarded requiring the licensor to permit the licensee to use local facilities for a conference. Specific performance will not be awarded if the person is in a position immediately to forfeit the lease, or if the renewal of the lease is conditional. For example, in *Booker Industries Pty Ltd v Wilson Parking* (1982) 149 CLR 600, the High Court held that specific performance of an option to renew a lease, which was conditional upon an appropriate rent being fixed, could not be specifically enforced until the rent was fixed. Once the condition was complied with and the rent was fixed, the lessee was entitled to a decree of specific performance requiring the lessor to grant a further lease.

Specific performance of a contract for the sale of land will not generally be awarded where the memorandum containing the contractual terms is inadequate[58] or where the arrangement is, in substance, a contract of loan rather than a contract for the sale of land (*Loan Investment Corp of A/Asia v Bonner* [1970] NZLR 724).[59] There is no justification for refusing specific performance simply because the plaintiff happens to be a land developer.[60]

Specific performance of a contract concerning land is available to the vendor as well as the purchaser. In *Turner v Bladin* (1951) 82 CLR 463 at 470, the High Court stated:

55 See *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361, where Young J held that a purchaser from a mortgagee may obtain specific performance where there is no material to suggest that the price is improper or that the purchaser knew of the non-compliance at the time of the contract, and where the mortgagor does not seek to set aside the sale.

56 See *Linfield Linen Pty Ltd v Nejain* (1951) 51 SR (NSW) 280, where Roper CJ held that specific performance would not be granted for a weekly tenancy because there was no intention by the parties that the arrangement be permanent in nature.

57 See *Lever v Koffler* [1901] 1 Ch 543.

58 *Smith v Lush* (1952) 52 SR (NSW) 207.

59 Note especially the dissenting judgment of Sir Garfield Barwick at 735.

60 See *Pianta v National Finance & Trustees Ltd* (1964) 38 ALJR 232.

> "Where a contract of sale is of such a kind that the purchaser can sue for specific performance, the vendor can also sue for specific performance although the claim is merely to recover a sum of money and he can do so although at the date of the writ the contract has been fully performed except for the payment of the purchase money or some part thereof."

Contracts for the sale of chattels

[1720] Contracts for the sale of chattels will only be enforceable once it is clearly shown that damages are inadequate. In most situations, the court will not decree specific performance with regard to personal chattels because the remedy at law will be sufficient. This is particularly likely to be the case where the chattel involved is of an ordinary, domestic or commercial nature and is easily replaced. In *Adderley v Dixon* (1824) 1 Sim & St 607; 57 ER 239 (CE), Sir John Leach stated (at 610):

> "[A] court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods."

This will, however, not always be the case. There are many circumstances where an award of damages will not put the plaintiff into as favourable a position as a decree of specific performance. This has been well-illustrated in regard to contracts for the sale of shares or stock.[61] A contract for the sale of shares may be enforced if the shares are not readily available in the market, but if it is possible for anyone to purchase the shares, a plaintiff will generally be left to a remedy in damages.[62] It is not necessary to establish that the chattels are absolutely unavailable in the market; it will be sufficient if it can be shown that the plaintiff would either have some difficulty in obtaining them, or that the price may be greater.[63]

The real emphasis, however, lies not upon whether the contract itself was particularly advantageous, but with the character of the

61 See Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co, Sydney, 2001), pp 60-61.

62 See *Turner v Bladin* (1951) 82 CLR 463, Williams, Fullagar and Kitto JJ at 473; *Re Fada (Aust) Ltd (in liq)* [1930] 55 SASR 458; *CLC Corporation v Cambridge Gulf Holdings Pty Ltd* (1997) 25 ACSR 296.

63 See *Paine v Hutchinson* (1868) LR 3 Ch 388; *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954 (Ch).

property. If the property is unique, rare or not freely available, the court will generally award specific performance.[64] This point was clearly emphasised in *Dougan v Ley* (1946) 71 CLR 142. In that case, the defendant contracted to sell the benefit of his licence to operate as a cab driver in New South Wales. Under New South Wales legislation, the number of licensed taxicabs was restricted, and the transfer had to be approved by the Commissioner for Road Transport.

The defendant subsequently refused to perform the contract and the High Court upheld a decree for specific performance on the grounds that the taxicab licence was valuable and difficult freely to obtain on the market. Dixon J considered that the facts that the taxicab licences were limited and that the plaintiff would have been unable to acquire another without difficulty justified the enforcement of the particular contract.[65]

Contracts for the payment of loan money are generally covered adequately by an award of damages because the subject matter of the contract itself is pecuniary. Hence, there is little possibility of damages being an inappropriate remedy. The general principles relating to the enforcement of loan contracts have been referred to by Young J in *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd* [1989] ASC 58,402 at 58,404:[66]

> "The general rule is that ordinarily damages are an adequate remedy in this class of case but special factors may take a case out of the ordinary category and, where those special factors exist, equity will grant specific performance. Those special factors include the case where an agreement is fully performed on one side and also the case where the plaintiff's whole enterprise would be lost if the defendant did not fulfil its promise."

In *Borg v Howlett (No 2)* (1996) 8 BPR 15,535, Young J granted a decree of specific performance for the enforcement of a contract for the purchase of a racehorse noting that damages based upon potential winnings would be too difficult to properly calculate.

Specific performance of a loan contract may be ordered if a loan has already been made in consideration of the defendant's

64 See *ANZ Executors & Trustee Ltd v Humes Ltd* [1990] VR 615 at 629-630.

65 See also *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581, Jacobs J at 588; and *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591. Compare the decision in *Cook v Rogers* (1946) 46 SR (NSW) 229.

66 See also *Pacific Industrial Corporation SA v Bank of New Zealand* [1991] 1 NZLR 368.

promise to execute a mortgage or some other form of security.[67] In this situation, due to the hardship or other circumstances, equity may be prepared to enforce the contract, despite the fact that its subject matter is pecuniary, in order to do justice between the parties.

In some situations, a distinction is made between a contract containing an obligation to repay a sum of money and an obligation to relieve a person from repaying a sum of money. If, in a contract of indemnity, the obligation amounts to an obligation to repay a person a sum of money after it has been paid over, damages at law will generally provide an adequate remedy. On the other hand, if the obligation is to relieve a debtor by preventing that debtor from having to pay the debt, equity may enforce the contract.[68]

DISCRETIONARY CONSIDERATIONS

Readiness and willingness of the plaintiff

[1721] The plaintiff who seeks to enforce a contract must be ready and willing to perform the contract in order for the court to enforce it (*Bishop v Taylor* (1968) 118 CLR 518). The notion of readiness and willingness basically refers to the assessment, at the time when the proposed relief is sought, of the ability of the plaintiff to perform her or his obligations. The assessment is a discretionary one. The court may take into account the past conduct of the plaintiff by considering any past breaches which may have occurred. The presence of such breaches will not necessarily preclude the ability of the court to enforce the contract, but will constitute a relevant factor in the overall assessment.

Obviously, the possibility of future breaches will also be a relevant consideration. In light of the fact that specific performance is granted as a part of the general equitable jurisdiction, it would seem that there are no absolute rules in this area. As Dr Spry[69] has noted, the better view is that both past and prospective breaches, which are not of an essential nature, do not constitute absolute bars to relief but merely amount to relevant

67 See *Lamont v Osborn* (1902) 28 VR 434; *Re Fada (Aust) Ltd (in liq)* [1930] 55 SASR 458.

68 *McIntosh v Dalwood (No 3)* (1930) 30 SR (NSW) Eq 332; *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) Eq 415 (FC).

69 Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 210.

considerations in the discretionary exercise by the court. In *Kyrwood v Drinkwater* [2000] NSWCA 126,[70] Powell JA noted that the requirement is that the plaintiff be ready and willing to perform except to the extent that the defendant dispensed with his performance. His Honour went on to examine the difference in onus of proof between an actual and anticipatory breach of contract. He cited Mason CJ in *Foran v Wright* (1989) 168 CLR 385 at 408:

> "In the case of an anticipatory renunciation accepted by the plaintiff, the requirement of readiness and willingness extends only up to the time of acceptance because then the earlier repudiation results in an early termination of the contract. Accordingly, in the case of actual breach, the requirement of readiness and willingness is more stringent; it continues through to the time for performance. That is because the termination of the contract does not antedate the time for performance. Subject to this difference and to the possibility of a difference in the onus of proof, the principle to be applied in the case of actual breach is consistent with that to be applied in the case of termination for anticipatory breach. The difference in the onus of proof arises because in the case of termination for anticipatory breach, the plaintiff will generally be able to show at the time of termination that he would have been able to perform at the time for performance by demonstrating that he was not then disabled or incapacitated from such performance."

Some consideration needs to be given to the issue of whether the past or prospective breach is of an essential or non-essential term. In this respect, there is a difference between the position at common law and in equity. Under common law, where a plaintiff either wilfully refuses or is incapable of performing an essential term under the contract, this may give rise to an anticipatory breach. In this situation, there is no legal contractual right which equity can enforce, although the defendant has a legal right to repudiate the contract. In equity, where a plaintiff is unable to perform an essential term, the court takes the view that this constitutes a clear lack of readiness and willingness to perform the contract, thereby rendering specific performance inappropriate.[71] This represents a clear application of the equitable maxim that those who come to equity must come with clean hands.[72] This point was clearly emphasised in *Thors v Weekes* (1989) 92 ALR 131, where Gummow J held that a

70 Special Leave Refused, *Kyrwood v Drinkwate*r (2001) 22(12) Leg Rep SL 2.

71 See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

72 See *Green v Somerville* (1979) 141 CLR 594.

plaintiff seeking specific performance of a contract which he or she wishes to keep on foot must be willing to do equity and this can, to a large extent, be proven, where it is established that the plaintiff is ready and willing to perform the contract.

Where a contract is presently existing, but the obligations attaching to it are not to come into existence until a future date, it is possible to consider whether the parties to the contract are ready and willing to perform at the time when the contractual obligations come into existence; if readiness and willingness can be established prior to this, however, it will not be necessary to wait until the contractual obligations come into existence.[73] Furthermore, it is not necessary to prove that the parties are ready and willing to perform *all* of the terms in the contract. As Barwick CJ stated in *Mehmet v Benson* (1965) 113 CLR 295 at 307-308, "it is the essential terms of the contract which the parties must be ready and willing to perform". Hence, in that case, it was held that a failure to pay instalment amounts on time constituted a non-essential breach which did not necessarily prove that the purchaser was not ready and willing to go ahead with the contract. Similarly, in *Green v Sommerville* (1979) 141 CLR 594, it was held that the purchaser was ready and willing to perform the essential terms of the contract and pay the balance of the purchase price; the fact that she did not pay interest amounts which were due on the correct date, as a result of her incorrect construction of the terms of the contract, did not prevent her from being ready and willing to perform the essential substance of the contract.

It is possible to prove actual or potential readiness and willingness to perform the contract. Where the intimation that a party will not perform contractual obligations comes at the time when they are due to be performed, it will constitute an actual lack of readiness and willingness. On the other hand, in a situation where a renunciation of obligation occurs prior to the time for actual performance, it may demonstrate a sufficient amount of evidence to prove a potential lack of readiness and willingness to perform. Demonstrating a potential lack of readiness and willingness will generally only be established in very clear and unambiguous circumstances. A potential lack of readiness and willingness will be shown only if it is clear that the plaintiff was, at the relevant time, substantially incapacitated or had definitively and absolutely resolved not to perform. In *Rawson v Hobbs* (1961) 107 CLR 466, Dixon CJ stated (at 481):

73 See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

> "One must be very careful to see that nothing but a substantial incapacity or definitive resolve or decision against doing in the future what the contract requires is counted as an absence of readiness and willingness."

In *Foran v Wight* (1989) CLR 385, Brennan, Deane and Dawson JJ held that at the time when the vendors intimated that settlement would not be going ahead, the purchasers still had a real chance of obtaining finance for the full amount of the purchase price. For that reason, the purchasers were able to demonstrate their potential readiness and willingness.[74]

The requirement of readiness and willingness relates both to the remedy of specific performance as well as the actual cause of action based upon the breach of contract. In this sense, a plaintiff seeking specific performance as a result of a breach of contract must first of all establish, as an essential element of her or his cause of action, that he or she was ready and willing to perform its obligations. Only if this can be shown may the contract then be specifically enforced. Mason CJ refers to this two-tiered procedure in *Foran v Wight*. His Honour made it clear on the facts that, if the plaintiffs had not been potentially ready and willing at the time of the intimation by the vendors that settlement would not go ahead, they could not succeed in their action, because in that situation the defendant's failure to settle would not constitute a breach of contract. The rules of court often dispense with the actual need to aver the requirement of readiness and willingness in the statement of claim; it has been held that the absence of such a plea is not inevitably fatal to the plaintiff's claim for specific performance.[75]

Doctrine of mutuality

[1722] A court will only grant specific performance in circumstances where the court can adequately ensure that the plaintiff's unperformed obligations will be carried out. This concept is encapsulated in the old equitable principle that specific performance may be denied for want of mutuality. In a situation where it is proven that a plaintiff is unlikely to be able to perform contractual obligations in the future, either because of a disability or due to the fact that the court is not prepared to assume the

74 Note, however, the dissent of Mason CJ who felt that the purchasers would, on the evidence, probably not have been able to acquire the requisite finance and were therefore unable to establish their potential readiness and willingness to complete the contract.

75 See *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, Wilson and Toohey JJ at 640; *McDonald v McMullen* (1908) 25 WN (NSW) 142.

special responsibilities associated with the enforcement of those obligations, specific performance will be denied.

In these situations, specific performance is being refused due to the hardship associated with the enforcement of the contractual obligations. Equity considered it unfair to allow specific performance of a contract against a defendant where the plaintiff's own contractual obligations could not be securely enforced. The principle is set out in Fry's *Specific Performance*:[76]

> "A contract, to be specifically enforced by the Court, must as a general rule be mutual, that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other of them."

In a situation where the performance of the contract requires constant supervision, the court will be unlikely to enforce the contract. The court will only order performance of contractual obligations which are actually capable of being performed and which the court is capable of monitoring. If the claim itself is loose and indistinct, or if the specific work to be done is indefinite and in need of a succession of court orders, the court will generally not order specific performance (*J C Williamson Ltd v Lukey & Mulholland* (1931) 45 CLR 282).[77]

It is possible that the doctrine of mutuality is merely an application of the court's general discretion to consider whether to award specific performance in circumstances of hardship upon the defendant.[78] There is, however, a distinction between the doctrine of mutuality and considerations of hardship; the doctrine of mutuality focuses upon the practical ability of the court to order enforcement, whilst hardship considerations direct attention to the circumstances and consequences of the order upon the defendant. Whilst both queries may be substantially related, each has a distinct focus.

If a contract is not capable of being specifically performed by both parties on the date it was made, it may be specifically performed if it is mutually enforceable on the date the actual suit is instituted (*Dougan v Ley* (1946) 71 CLR 142). If one of the grounds for lack of mutuality at the date when the contract was made is that one of the parties entering into the contract is a minor, and if the contract is ratified upon the party reaching

76 Northcote G R (ed) *Fry on Specific Performance* (6th ed, Steven & Sons, London, 1921).

77 See also *Rampant v Jones* (1887) 9 ALT 50; *Fell v NSW Oil & Shale Co* (1889) 10 LR (NSW) Eq 255.

78 This was referred to in *Price v Strange* [1978] Ch 337, Goff LJ at 354.

majority, that party can still sue for specific performance on the date upon which proceedings are instituted (*Kelly v Harris* (1915) 15 SR (NSW) 473).[79]

Where a contract contains terms which, at the date of entering the contract, could not be performed by one party, but which have subsequently been performed before the action is brought, the contract can be specifically enforced (*Macaulay v Greater Paramount Theatres Ltd* (1921) 22 SR (NSW) 66).

Contracts for personal services

[1723] Contracts for personal services will generally not be enforced. The reason for this is twofold. In the first place, it is generally felt that enforcement of personal service contracts may involve hardship or inconvenience to particular defendants. Secondly, general policy considerations make it undesirable to force individuals to maintain particular personal relationships; this is so even though the parties may have earlier agreed to do so. The court takes the view that the circumstances and attitudes of the parties may have changed since the agreement was first entered into and the court should not interfere in such a situation. Enforcing such a contract may encourage repeated contractual breaches. Ordinarily, in such situations, it is felt that the proper course is to confine the parties to damages (*Johnson v Shrewbury & Birmingham Ry Co* (1853) 3 De GM & G 914).

Whilst these policy considerations will apply to most contracts for personal services, it should be remembered that they only apply to contracts which, in substance, constitute contracts for personal services. It will only be contracts which actually deal with the maintenance of a continued personal relationship between the parties which will be incapable of being enforced (*Stowe v Stowe* (1995) 127 FLR 25). Contracts which merely relate indirectly to personal services, or which do not actually regulate a personal relationship between the parties, are still capable of being specifically performed. Furthermore, in a situation where the plaintiff to a contract has already performed personal services under an agreement, it may be possible for the plaintiff to obtain an order for specific performance against the defendant (*Wilkinson v Clements* (1872) LR 8 Ch App 96).

The most common form of personal service contract for which specific performance is sought is the contract of employment. It is generally felt that the performance of such contracts should

79 Compare with *Boyd v Ryan* (1947) 48 SR (NSW) 163.

not be judicially coerced where the parties are not working well together (*C H Giles & Co Ltd v Morris* [1972] 1 WLR 307). A further practical difficulty with employment contracts is that the court will often refuse specific performance due to a fear that it may stimulate industrial relations problems (*Gregory v Philip Morris Ltd* (1988) 80 ALR 455).

The above-mentioned justification will clearly only apply to contracts which in substance amount to an agreement to employ a person. Where the contract is interpreted as requiring the accomplishment of a particular objective, rather than the maintenance of a continuing relationship, it is possible that the contract may be enforced (*Suttor v Gunowda Pty Ltd* (1950) 81 CLR 418). Furthermore, in a situation where the contract only deals incidentally with employment, or imposes an obligation upon one party to employ a third party, the contract may still be specifically enforceable.

Courts have a similar reluctance in enforcing partnership agreements. The reasons for this relate more generally to the difficulties of enforcing unwilling parties to maintain confidential and intimate relationships (*Dodson v Downey* [1901] 2 Ch 620). Furthermore, partnership agreements may also involve the imposition of fiduciary obligations. Specific performance will generally be refused where the agreement involves the maintenance of fiduciary duties, as equity would consider the likelihood of a breach of such obligations to be high.[80]

The court will, however, generally award enforcement of an agreement to prepare, execute and submit a partnership deed, as this type of agreement does not generally involve the regulation of actual partnership rights (*Renowden v Hurley* [1951] VLR 13). Specific performance of an agreement for a partnership will, however, generally be refused where part of the consideration consists of duties which the court cannot enforce or supervise (*Le Roy v Herrenschmidt* (1876) 2 VLR 189).

Generally then, if the contract directly deals with the maintenance of a personal relationship necessitating an intimate and confidential association, as is the case with partnership and employment agreements, the court will refuse specific performance. It is possible that a court may in special circumstances enforce a contract for personal services, however this will very much depend upon the nature of the contract and the

80 See generally *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538.

significance of the discretionary considerations. An important consideration will be the adequacy of damages. The possibility that a contract for personal services may be specifically enforced cannot be completely ruled out. As Megarry J explained in *C H Giles & Co Ltd v Morris* [1972] 1 WLR 307 at 318-319:

> "I do not think that it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance ... As is so often the case in equity, the matter is one of balance of advantage and disadvantage in relation to the particular obligations in question; and the fact that the balance will usually lie on one side does not turn this probability into a rule."

Impossibility, futility, and illegality

[1724] Specific performance will not be granted where the performance of the contract is impossible. Equity will not enforce a contract which cannot actually be carried out. The mere possibility of a difficulty with contractual enforcement is insufficient; it must be shown that the contract is actually impossible to perform. A contract may be impossible to perform because of a variety of different reasons. It may be impossible to perform because a condition precedent has not been complied with. In that situation, an order for specific performance should also be conditional, because, until the condition is complied with, the actual contractual obligation does not arise (*Brown v Heffer* (1967) 116 CLR 344). Where a condition subsequent exists and is yet to be complied with, the court may make an award of specific performance which is only to operate once the condition is complied with (*Dougan v Ley* (1946) 71 CLR 142, Dixon J at 152).

A different analysis is appropriate where the contractual obligation is absolute but impossible to perform. In this situation, there will generally be no requirement that the order of specific performance be made conditional; the only query will be whether a substantial doubt arises as to the ability of the defendant to carry out the obligation. A substantial doubt may arise where the defendant cannot execute the obligation because of altered circumstances. For example, in a situation where a defendant owing contractual obligations is no longer within the jurisdiction, it may be impossible to enforce such obligations, so specific performance will generally not be awarded.[81]

81 See generally *Jackman v Broadbent* [1931] SASR 82.

There is no concluded opinion concerning when impossibility should be assessed. It would seem to be in accordance with general equitable principles that, if a contract was initially impossible to perform and subsequently becomes capable of performance, specific performance should still be available. On the other hand, in a situation where a contract has become impossible to perform, specific performance should be denied even though it may have been available at an earlier date (*Kennedy v Vercoe* (1960) 105 CLR 521).

In a situation where only a part of a contract is impossible to perform, specific performance will not necessarily be denied. Just because some part of a contract is not immediately performable does not necessarily mean that specific performance will be automatically refused; it will depend upon the circumstances. The precise level of doubt concerning performance will depend upon the discretion of the court and in this respect will vary depending upon the other circumstances of the case.[82]

[1725] Specific performance may be refused if it would be futile to enforce the contract, even though such performance is theoretically possible. The difference between impossibility and futility is essentially one of degree. Impossibility refers to the fact that there is a likelihood that the defendant will be unable to comply with the proposed order of the court. On the other hand, futility refers to the fact that there is an insufficiently high probability that the defendant will be able to comply.[83]

The futility may arise because the defendant would be able to get out of the contractual obligations in some alternative manner even if the contract were enforced. An example arises in a situation where a lease contract expires before the date of the hearing. Whilst such a contract might have been specifically enforceable at an earlier date, it would be futile to award such relief when the time has subsequently expired; in such a situation, the more appropriate relief would be damages (*Rohain Pty Ltd v Ambrose, McMahon, Third Party* [1986] VR 449). This, however, may not always be the case. The primary consideration will be the appropriateness of the remedy and the significance of the loss or damage suffered by the plaintiff. The brevity of the contract will not necessarily preclude an award of specific performance. Hence, if a short-term lease contract remains unexpired at the date of the award, specific performance of the contract may be awarded if the court feels this is the best form of relief in the circumstances.[84]

82 See generally *National Australia Bank Ltd v Dessau* [1988] VR 521.

83 See generally Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001).

84 See *Verrall v Great Yarmouth Borough Council* [1981] QB 202.

Most cases dealing with futility of performance can be described as cases in which damages would be a more adequate remedy. If specific performance will not realistically result in contractual obligations being performed by the defendant, then awarding such relief is fruitless and will not be commensurate with the needs of the plaintiff. In such a situation, damages are generally the more appropriate form of relief.[85]

[1726] Specific performance may be refused where performance of the contract is illegal. It is a well-established principle that specific performance of a contract will not be available unless the plaintiff can show that the contract is valid and legally enforceable at the time when the actual relief is sought (*O'Carroll v Potter* (1928) 29 SR (NSW) 393). Obviously, equity will not enforce a contract if it is invalid at law. Determining whether a contract is illegal will be a matter of construction and will depend upon all of the circumstances. Where specific performance of a contract would result in a breach of a statutory provision, it has been said, by Isaacs J, that:

> "Whatever the penalty for such a breach, the breach itself is unlawful, and no court, in my opinion is empowered to direct any breach of a statute." (*Norton v Angus* (1926) 38 CLR 523 at 534)

If there is some way in which the contract may be validly enforced without infringing the statutory provision, then specific performance may be granted. For example, in *Norton v Angus* (1926) 38 CLR 523, the High Court concluded that a contract was not rendered illegal and therefore unenforceable merely because the appropriate transfer had not been executed, nor by the fact that the total area of the two land selections was greater than the maximum area which in the particular district, according to the *Land Act* 1910 (Qld), might be held by one person. The court held that the contract might be legally carried out by a transfer to two persons, and hence specific performance was awarded.

Illegality does not only refer to statutory infringements; if the defendant can show that there is no legally enforceable contract because, for example, there was no valid offer or acceptance to the contract, then the contract will be unenforceable. It may, however, be that the defendant will be estopped from making such a claim due to representations made, but this will depend upon the circumstances.[86]

85 See generally *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415.

86 See generally *Walton Stores (Interstate) v Maher* (1988) 164 CLR 387.

Unfairness

[1727] Specific performance may be refused where the contract is a result of unfair behaviour on the part of the plaintiff. In determining whether the plaintiff has acted unfairly, the court will consider a wide range of factors including, inter alia, whether the plaintiff was in a position of advantage; whether the plaintiff had greater information available to her or him, whether the plaintiff was aware that the defendant lacked requisite knowledge about the consequences of the contract; and whether the plaintiff took advantage of any special disability held by the defendant. In all of these situations, the common element is that the plaintiff, by reason of some particular advantage he or she holds, has obtained rights whereby it would be unjust to grant the plaintiff a decree of specific performance.[87]

Whether or not unfairness exists will depend upon an assessment of all the relevant circumstances. In order to establish unfairness, it is not necessary to prove that the plaintiff engaged in any unconscientious behaviour ... unfairness in this context is a more general assessment which may occur in a situation where an unconscionable dealing is established, but will certainly not be limited to these situations.[88] Where the facts do not clearly raise an equitable action, such as unconscionable dealing, undue influence or misrepresentation, it is still possible for the court, in its absolute discretion, to refuse an award of specific performance on the basis of unfairness. This can occur where a contract is particularly favourable to the plaintiff, or involves some sort of hardship to the defendant and was entered into in circumstances where the defendant did not have a complete understanding of the nature and consequences of the contract (or there is reasonable doubt of this); in such a situation, equity will be unlikely to award specific performance (*Vivers v Tuck* (1863) 1 Moo PC (NS) 516; 15 ER 794).

A lack of candour on the part of the plaintiff provides a good example of the sort of situation where unfairness may be raised as a discretionary defence to specific performance. For example, in *Summer v Cocks* (1927) 40 CLR 321, it was held that the conduct of the vendor during the sale of land and a hotel (in respect of which the vendor held a publican's licence) was sufficient to constitute unfairness and thereby preclude an award of specific performance. The vendor knew that the licence was in

87 See Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), pp 180-182.

88 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J at 467-468; *Weily v Williams* (1895) 16 LR (NSW) Eq 190.

some jeopardy prior to the sale, and, through his failure to keep the premises in proper repair, the licence was lost. The High Court considered that the lack of candour on the part of the vendor and the subsequent failure to take proper care of the hotel amounted to conduct such that the court, in the exercise of its discretion, should refuse to grant specific performance of the contract. This conduct would not necessarily constitute unconscionable dealing or undue influence in equity, however it was sufficient to raise discretionary considerations in the determination of the appropriate form of relief.

A mere error or misapprehension of judgment on the part of the plaintiff will not necessarily constitute unfairness barring the award of specific performance (*Slee v Warke* (1949) 86 CLR 271). Nevertheless, such an error, in combination with other factors such as a favourable contract to the plaintiff and hardship to the defendant, may be enough to establish unfairness. The strongest situation barring the award of specific performance will occur where the plaintiff has knowingly contributed to the particular error in question (*Summer v Cocks* (1927) 40 CLR 321). Where there is no actual knowledge of the error on the part of the plaintiff, specific performance will generally only be refused if it can be shown that the defendant would suffer a disproportionate hardship. In *Slee v Warke* (1949) 86 CLR 271, it was held that where the plaintiff has no knowledge of the mistake or error, specific performance should only be refused where it could cause "hardship amounting to injustice" (at 281-282).

It is reasonably settled that inadequacy or excess of consideration, per se, will not constitute a sufficient unfairness for a court to refuse specific performance (*Weily v Williams* (1895) 16 LR (NSW) Eq 190). It is generally felt that the amount of consideration given in a particular contract is a matter which the parties are prima facie supposed to be able to determine for themselves. This does not prevent the conclusion that inadequate or excessive consideration, in combination with other factors, may lead to a refusal of specific performance. This has been well summarised by Fullagar J in *Blomley v Ryan* (1956) 99 CLR 362, who stated (at 405):

> "[I]nadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways: first as supporting the inference that a position of disadvantage existed and secondly, as tending to show that an unfair use was made of the occasion."

In a situation where a plaintiff has acted unfairly, the court may refuse to award specific performance but may, in its absolute discretion, decide to award damages in substitution.[89] This practice provides further evidence of the distinctive remedial operation of unfairness; whilst a failure to prove unconscionable dealing or undue influence will preclude the award of any relief, because of the failure to raise an equitable action, proving that a plaintiff has acted so unfairly as to preclude an award of specific performance will not necessarily prohibit the application of different remedies.

Hardship

[1728] Specific performance may be refused on the ground that it would cause hardship either to the defendant or to third parties (*Longton Pty Ltd v Oberon Shire Council* (1996) 7 BPR 97,599). A refusal to award specific performance on the ground of hardship is very similar to the general ground of unfairness. Unfairness covers a wide range of considerations including adverse affects, if any, that the order may have upon the defendant. Strictly speaking, however, the distinction between unfairness and hardship considerations lies in the differing perspectives. Questions relating to unfairness are determined primarily by a reference to the behaviour of the plaintiff and questions of hardship are determined by reference to the consequences of the award upon the defendant or third parties.[90]

Where it is alleged that specific performance should be refused on the ground of hardship, the defendant must establish that the detriment which would be suffered will exceed that of the plaintiff if the award is refused (*ANZ Executors and Trustees Ltd v Humes Ltd* [1990] VR 615). This ultimately becomes a question of balance. Attention will be given to the terms of the contract, how excessive the consideration might be and any changes which have occurred since the contract was entered into.

It may be difficult to establish any material hardship at the time when the contract was entered into, as the difficulty may only become apparent following subsequent events. Generally, unless it is proven that the enforcement of the contract in such circumstances would be oppressive to the defendant, the mere fact that circumstances have changed, making the contract less attractive

89 *Dowsett v Reid* (1912) 15 CLR 695; *Jericho v Guglielmin* [1938] SASR 292; *Weily v Williams* (1895) 16 LR (NSW) Eq 190.

90 See generally Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001).

to the defendant, will, per se, be insufficient to preclude an award of specific performance (*Ready Construction Pty Ltd v Jenno* [1984] 2 Qd R 78).[91] This does not prevent changes in circumstances from being a relevant consideration; in determining whether hardship exists, a court should still take into consideration all of the circumstances known to exist at the time when the order is being made; this will include actual changes in circumstances as well as subsequent changes which are likely to occur (*Price v Strange* [1978] Ch 33). As Dr Spry[92] points out:

> "There is no reason in principle why a source of hardship should be ignored merely because it did not exist at the time when the material contract was entered into. Certainly the fact that it has occurred subsequently may be a matter affecting its weight; and if it appears that the parties contemplated that events might occur such as have in fact occurred the alleged causes of hardship may be of little importance. But this is not to say that they are irrelevant or that sometimes they may not be decisive so as to incline the balance of justice against the grant of relief."

Hardship may be established where the award of specific performance would cause financial hardship to the defendant (*Cominos v Rekes* (1979) 2 BPR 9619). Financial hardship will not be established just because the defendant is having trouble coming up with the purchase price (*Pasedina (Holdings) Pty Ltd v Khouri* (1977) 1 BPR 9460). If the defendant has voluntarily entered into the contract and accepted the purchase price, then enforcing the contract will not constitute an unfair hardship upon the defendant. In *Longtom Pty Ltd v Oberon Shire Council* (1996) 7 BPR 14,799 Young J in the Supreme Court of New South Wales noted that financial difficulties per se will not amount to hardship but if it is possible to establish financial difficulty because, on balance, it would cost a large sum of money for the defendant to comply with the contract and the plaintiff will gain little benefit, then a decree of specific performance may be issued in circumstances where it can be proven that damages would be inadequate.

Where the consideration is excessive, or the defendant, after making adequate attempts, is unable to obtain finance, the court may be prepared to hold that specific performance should be refused. Specific performance will not be refused where the financial hardship is a direct result of the conduct of the defendant. For example, where the defendant has delayed obtaining requisite finance and consequently has to accept

91 But see *Doust v Hubbard* [1964] Tas SR 260.

92 Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 192.

finance at a higher rate of interest, specific performance will not be refused (*Spencer v Daniljchenko* [1976] QWN (10 July)).

Hardship is not restricted to financial considerations. A court may also refuse to grant specific performance on the grounds of non-financial hardship caused to the defendant. For example, specific performance may be refused where the award would give rise to difficult family litigation,[93] where it would cause prejudice to beneficiaries under a trust,[94] or where it would be contrary to public policy to award specific performance.[95]

It is also possible for hardship suffered by a third party to preclude the award of specific performance. As noted above, specific performance may be refused if the defendant is a trustee and the remedy, if awarded, would cause hardship to the beneficiary (*Colyton Investments Pty Ltd v McSorley* (1962) 107 CLR 177). Where the third party suffering hardship has no actual interest in the property which is the subject matter of the contract, it is unclear whether specific performance will be refused.[96] There appears to be no clear justification as to why hardship caused to third parties should not be as relevant, although perhaps of less weight, than hardship caused to the actual contracting parties. Certainly, where the hardship is caused to the defendant's children, it will be a relevant consideration for the court, as this may also be interpreted as a hardship against the defendant directly (*Patel v Ali* [1984] Ch 283).

Uncertainty

[1729] Specific performance may be refused on the grounds of contractual uncertainty. A court of equity will not award specific performance of a contract which is uncertain (*Rampant v Jones* (1887) 9 ALT 50). Where it is difficult for a court to determine what must be done by the parties and what constitutes sufficient performance, a court will not award specific performance due to the burden it places upon the court and the hardship it may cause to the defendant.

Difficult and ambiguous language in the actual terms of the contract will not constitute a bar to specific performance if the

93 *Wroth v Tyler* [1974] Ch 30.

94 *Colyton Investments Pty Ltd v McSorley* (1962) 107 CLR 177.

95 *Hope v Walter* [1900] 1 Ch 257 (CA).

96 See *Gall v Mitchell* (1924) 35 CLR 222. But compare with *Hartlepool Gas & Water Co v West Hartlepool Harbour & Ry Co* (1865) 12 LT 366.

court can possibly construe and define the terms.[97] Where the exact meaning of a contract is open to doubt, however, the court will generally refuse to enforce the contract (*Schliemann v Thomsen* [1910] Q SR 232). A contract may be uncertain for a variety of reasons. The actual meaning of the terms may be unclear. For example, where an express term sets out a method for calculating a purchase price under the contract, it may be uncertain whether an alternative basis for calculating would be accepted if the primary method is impossible. In such a situation, it will ultimately be a matter of construction for the court to determine whether specific performance of a reasonable price should be awarded or whether specific performance should be refused outright (*Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600).

Where a term of the contract is conditional, it may be unclear in what circumstances the condition arises, thereby creating uncertainty (*Steward v Ferrari* (1879) 5 VLR (E) 200). It may also be uncertain whether a particular term is conditional or non-conditional in nature. Generally, the payment of price will be interpreted as conditional, but in particular circumstances this may be unclear. In some contracts, the parties may simply intend that the price or calculation of the price be of less significance than other material terms.[98]

Uncertainty may also arise where there is ambiguity surrounding the exact nature of the contract as a whole. This can particularly occur where the agreement is oral in nature. Where a plaintiff seeks to enforce an oral agreement, he or she must prove distinctly what its terms are (*Ogier v Booth* (1883) 9 VLR (E) 160). In a situation where uncertainty arises because there is some variation between an actual oral agreement and the terms set out in a written agreement, specific performance will not be awarded (*Stewart v Ferrari* (1879) 5 VLR (E) 200). Uncertainty may also occur where the contract is too wide to be defined accurately. For example, where a contract purports to give rights to all after-acquired property, the exact width and continuing effect of the contract may be unclear (*Gander v Murray* (1907) 5 CLR 575).

Whether or not there has been part performance of the contractual obligations by the parties will also be relevant in this context.[99] Part performance tends to delineate the contractual

97 *Tooth v Fleming* (1859) 2 Legge 1152; *Forbes v Clarton* (1878) 4 VLR (E) 22.

98 *Godecke v Kirwan* (1973) 129 CLR 629; *Meehan v Jones* (1982) 149 CLR 571; *Hall v Busst* (1960) 104 CLR 206.

99 See *Steadman v Steadman* [1976] AC 536; and *Australia and New Zealand Banking Group Ltd v Widin* (1990) 26 FCR 21 at 37.

terms in a clearer manner; it renders the terms more certain because the parties have actually recognised and acted upon those terms (*Parker v Taswell* (1858) 2 De & J 559; 44 ER 1106). Hence, where part performance can be proven, it is less likely that a court will refuse to award specific performance on the grounds of uncertainty alone.[100]

Other discretionary grounds

[1730] Specific performance may be refused on other general contractual and equitable grounds. Specific performance of a sale of land will generally not be granted where the vendor does not have title at the date of conveyance. In this situation, a purchaser will have a right to repudiate the contract and this repudiation will constitute a bar to specific performance (*Halkett v Earl of Dudley* [1907] 1 Ch 590). Specific performance may, however, be decreed where the vendor had no title at the date of the contract but is in a position to compel the title prior to settlement (*Meriton Apartments Pty Ltd v McLaurin & Tait (Developments) Pty Ltd* (1976) 133 CLR 671).

Specific performance of a part of a contract will generally not be granted. The justification for this is that, if a court cannot enforce all of the obligations owed by the defendant, it will not enforce them separately (*Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116). In a situation where the whole contract can be enforced but the plaintiff only seeks to enforce a part of the contract, specific performance may be awarded. Proceedings for the specific performance of a contract which is of such a kind that it can be specifically enforced can be commenced as soon as one party threatens to refuse to perform the contract or any part of the contract (*Turner v Bladin* (1951) 82 CLR 463).

[1731] Specific performance of a contract will sometimes be refused where it requires the constant supervision of the court.[101] The basic reason for this is that constant supervision is impractical and the court will discourage continual court applications for the

100 On the doctrine of part performance see above, para [1713].

101 See *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, where it was held that the court will not ordinarily enforce contracts, "the prosecution of which the court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the court to see that the work is carried out". This decision should be compared with that of *Posner v Scott-Lewis* [1987] Ch 25, where the court concluded that sometimes a contract may be enforced even where the court cannot ensure its constant supervision. For a more recent perspective see the decision of the House of Lords in: *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

determination of whether contractual compliance has occurred.[102]

However, the court is taking a more flexible approach to this question and today, if the contract sufficiently defines the obligations to be performed, it is less likely to refuse specific performance simply because supervision may be required.[103] For example, computer contracts where a supplier has undertaken to provide the customer with continuing support service may be specifically enforceable (*Gillespie v Whiteoak* [1989] 1 Qd R 284). Courts will sometimes enforce building agreements even if they do require continual supervision.[104] In these cases, it is generally felt that it would be unjust to leave the plaintiff with a remedy in damages that, considering the subject matter of the contract, would be inadequate. In order to gain specific performance of a building contract, the plaintiff will generally need to establish that the building work is properly defined by the contract, that the plaintiff has a substantial interest in having the contract performed which cannot be adequately relieved through an award of damages, and that the defendant has obtained possession of the land upon which the contracted work is to be done (*Wolverhampton Corp v Emmons* [1901] 1 KB 515 at 525-526).

In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 the House of Lords re-examined the question of constant supervision. On the facts of that case, the plaintiff owned a shopping centre and leased a part of it to the defendant who ran a supermarket. After experiencing financial difficulties, the defendant informed the plaintiff that he would have to close the supermarket in breach of the terms of the lease contract. The plaintiff offered the defendant a rental concession to keep the supermarket open, fearing that the closure of the supermarket would have an adverse effect on other tenants in the centre. However the defendant closed the supermarket and the plaintiff sought specific performance of the lease contract. The House of Lords denied specific performance on the grounds that it would cause significant financial hardship to the defendant if forced to run the business at a loss and that this would create hostility requiring the constant supervision of the court.[105] In examining

102 *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282; *Rampant v Jones* (1887) 9 ALT 50; *Fell v NSW Oil & Shale Co* (1889) 10 LR (NSW) Eq 225.

103 *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 724; *Posner v Scott-Lewis* [1987] Ch 25.

104 *Wolverhampton Corp v Emmons* [1901] 1 KB 515 (CA), especially Romer LJ at 525-526; *York House Pty Ltd v Federal Commissioner of Taxation* (1930) 43 CLR 427.

105 Compare this conclusion with that of the Victorian Supreme Court in *Diagnostic X-ray Services Pty Ltd v Jewel Food Stores Pty Ltd* [2001] VSC 9.

the significance of constant supervision, Lord Hoffman noted that the settled practice of refusing a decree of specific performance because it requires constant court supervision is based upon sound sense. His Honour noted that a hostile business arrangement creates wasteful and cumbersome burdens on the legal system and to force parties to continue business relations generally results in a breach leading to contempt of court which is often inappropriate in the circumstances. On the other hand, an award of damages brings the litigation to an end — the "forensic link" between the parties is severed.

This decision needs to be read in the light of the comments of the High Court in *Patrick Stevedores v The Maritime Union of Australia* (1998) 195 CLR 1. In this case, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ commented that while the rejection of the lessor's submissions in the *Argyll* case was inevitable,

> "What is significant is the acceptance by the House of Lords that the concept of 'constant supervision by the court' by itself is no longer an effective or useful criterion for refusing a decree of specific performance. Rather, Lord Hoffmann placed stress on other propositions. First, a person who is subject to a mandatory order attended by contempt sanction (which 'must realistically be seen as criminal in nature')[106] ought to know with precision what is required;[107] and, second, the possibility of 'repeated applications for rulings on compliance' with orders requiring a party 'to carry on an activity, such as running a business over a more or less extended period of time'[108] should be discouraged." ((1998) 195 CLR 1 at 46-47).

[1732] Specific performance may also be denied on general equitable grounds, such as delay.[109] Specific performance will only be available to those who are prompt to claim it. The degree of speed required will depend upon the circumstances and the nature of the case. It is generally necessary to prove that the delay has caused prejudice to the defendant or a third party or the delay is taken to constitute a waiver of the legal rights held by the plaintiff (*Lamshed v Lamshed* (1963) 109 CLR 440). Similarly, where the plaintiff lacks clean hands, specific performance will not generally be granted. This inquiry is akin to the unfairness analysis in that the court will consider the overall conduct of the plaintiff who is seeking to have the contract enforced before awarding specific performance.

106 Citing *Witham v Holloway* (1995) 183 CLR 525 at 534.

107 Citing *Argyll* [1998] AC 1 at 13-14.

108 Citing *Argyll* [1998] AC 1 at 13.

109 See below, Chapter 29: "Equitable Defences".

In *Liristic Holdings Pty Ltd v Q-Corp Marine Pty Ltd* [2001] NSWSC 418, Hamilton J in the New South Wales Supreme Court held that what was significant about the decision of the House of Lords was the acceptance that the concept of "constant supervision" by itself is no longer an effective or useful criterion for refusing a decree of specific performance. However, his Honour was careful to note that this determination should not be misunderstood. Courts are well accustomed to the exercise of supervisory jurisdiction and it is not an extraordinary expectation for many equitable orders.

SPECIFIC PERFORMANCE AND ALTERNATIVE OR INCIDENTAL FORMS OF EQUITABLE RELIEF

Specific performance and statutory damages

[1733] A plaintiff who has elected to sue for specific performance of a contract will not be precluded from later rescinding the contract and claiming damages (*Johnson v Agnew* [1980] AC 36). In this situation, however, leave of court will generally be required (*Facey v Rawsthorne* (1925) 35 CLR 566).

Even where the plaintiff has sought an award of specific performance under a current action, it is possible for the plaintiff to repudiate the contract and make an alternative claim for damages. This position has been well summarised by Gibbs, Mason and Jacobs JJ in *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 461:

> "If a party has by his conduct shown and continues to show an intention never to complete the contract, especially where his conduct by express act or by implication is not consistent with an intention to perform the contract pursuant to any judgment for specific performance, then it must be open to a vendor to rescind the contract even if there is a current action for specific performance."

A plaintiff may be entitled to damages where the court has made an order for the specific performance of a contract by the defendant, but circumstances later arise which are such as to make it inequitable that the order should be enforced (*McKenna v Richey* [1950] VLR 360). Damages in this situation will be awarded instead of the specific performance.

On the other hand, damages may be awarded in addition to or in substitution for an order of specific performance.[110] These damages are based upon the statutory provisions originally set out under the *Chancery Amendment Act* 1858 (Imp) (21 & 22 Vict c 27), s 2, otherwise known as *Lord Cairns' Act*, and its State equivalents.[111] In order for such damages to be awarded, it must first of all be established that the court has jurisdiction to make an award of specific performance.

It is also possible for equitable compensation, rather than statutory damages, to be awarded in addition to a suit for the specific performance of a contract.[112] Equitable compensation may cover any extra loss suffered by the plaintiff in the process of having the contract enforced. In *Willison v Van Ryswyk* [1961] WAR 87 at 91, it was held that a court in exercising its discretion to make an order for specific performance may issue a decree with equitable compensation for any deficiency not covered by the decree. A good example of the award of equitable compensation in the context of specific performance is provided in *City of Adelaide Land & Investment Co v Bent* (1889) 23 SALR 6, where a decree of specific performance of a contract for the sale of land was issued to the purchasers, although the vendors were unable to provide title to a particular piece of land which was a part of the contract. Obtaining this piece of land was not essential to the possession and enjoyment of the rest of the land in the contract, so the court made a deduction from the purchase money by way of compensation for the land to which the vendors could not provide title. It seems likely that a purchaser seeking equitable compensation for loss suffered as well as specific enforcement of the contract, at least in the context of a contract for the sale of land, may actually deduct the loss incurred from the purchase price tendered.[113]

Specific performance and injunctive relief

[1734] In some situations, injunctive relief may be available as an ancillary to an award of specific performance. For example, in a

110 See below, Chapter 22: "Equitable Compensation".

111 *Supreme Court Act* 1933 (ACT), ss 25-32; *Supreme Court Act* 1970 (NSW) s 68; *Judicature Act* 1876 (Qld), s 4(7); *Supreme Court Act* 1979 (NT), ss 61-70; *Supreme Court Act* 1935 (SA), s 30; *Supreme Court Civil Procedure Act* 1932 (Tas), s 11(13); *Supreme Court Act* 1986 (Vic), s 38; *Supreme Court Act* 1935 (WA), s 25(10).

112 See below, Chapter 22: "Equitable Compensation".

113 See *King v Poggioli* (1923) 32 CLR 222, Higgins J (dissenting) at 241-243. See also Harpum C, "Specific Performance with Compensation as a Purchaser's Remedy — A Study in Contract and Equity" [1981] *Cambridge Law Journal* 47 at n 5 and *Smith Kline & French Laboratories (Aust) Limited v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 83.

situation where an order for specific performance is sought, a plaintiff may claim injunctive relief to prevent a defendant from asserting legal rights before the specific performance claim is determined. Injunctive relief in these circumstances will generally only be granted where the plaintiff enters into an undertaking to observe the terms of the contract as its stands and to pay damages if the enforcement of the award is refused. In *Murphy v Wadick* (1878) 4 VLR (E) 224,[114] an injunction was granted to a plaintiff seeking specific performance of an oral agreement to renew a lease provided the plaintiff entered into an undertaking to observe the terms and covenants of the existing lease and to assign the leasehold interest if ordered by the court.

Specific performance and bankruptcy

[1735] A plaintiff cannot obtain a decree of specific performance against a person in bankruptcy if the decree requires acts which are contrary to the law of bankruptcy. If the defendant is, or has become, bankrupt prior to the plaintiff obtaining the decree of specific performance, the plaintiff will not be able to enforce the contract where to do so would interfere with bankruptcy proceedings.[115] For example, if a vendor has sold land to a purchaser and, prior to settlement, has become bankrupt, the purchaser will not be able to compel the vendor to complete the contract because it would be contrary to bankruptcy proceedings; furthermore, the actual title to the property may have vested with the trustee in bankruptcy making completion impossible anyway.

A trustee in bankruptcy may obtain specific performance for a contract entered into by the bankrupt if he or she is willing to assume the responsibility of the obligations originally undertaken in the contract by the bankrupt (*Knight v Burgess* (1864) 33 LJ Ch 727). Naturally, if the contractual obligations require the personal skill of the bankrupt, the trustee may be refused specific performance. On the other hand, a trustee in bankruptcy will not have this difficulty where specific performance is being sought of a contract entered into by the trustee during the course of realising the bankrupt's estate. In such a situation, the usual principles applicable to the award of specific performance will come into operation.

114 See also *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152.

115 *Willingham v Joyce* (1796) 3 Ves Jun 167; 30 ER 951; *Powell v Lloyd* (1828) 2 Y & J 372, 148 ER 962. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2052].

CHAPTER EIGHTEEN

INJUNCTIONS

David Maclean and Barbara McDonald

"The injunctive remedy is still the subject of development in courts of equity."[1]

DEFINITION

[1801] The equitable remedy of injunction is available to enforce legal or equitable rights by way of an order restraining the doing of a wrongful act, or an order requiring a particular act to be done. Injunctions are classified in various ways, depending upon whether they are positive or negative (mandatory, prohibitory) in nature; the stage of the proceeding at which the injunction is granted (interim, interlocutory, perpetual); whether the injunction is in aid of an equitable or legal right (in the exclusive, auxiliary, or concurrent jurisdictions); whether or not the injunction is on notice to the party sought to be enjoined (inter partes, ex parte); and, finally, whether it is sought before or after any commission of a wrongful act. An injunction obtained before the commission of any wrongful act is termed a quia timet[2] injunction. A quia timet injunction is also granted to order a defendant to rectify the effects of a wrongful act which, if it remains unrectified, will cause further damage.

In addition to these general forms of injunction, there are particular forms of court orders similar to injunctions, known as Anton Piller orders[3] and Mareva orders or asset preservation orders,[4] which have been developed to deal with particular problems. Anton Piller orders are granted initially in the absence of the defendant, and require the defendant to allow the plaintiff

1 Gleeson CJ, Gaudron and Gummow JJ in *Australian Securities and Investments Commission v Edensor* (2001) HCA 1 at [45]. See also *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 395.

2 Quia timet: because he or she fears.

3 Named from *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.

to enter the defendant's premises to search for, and if necessary to seize, documents or property which are to be the subject of proposed or pending proceedings.[5] A Mareva order or asset preservation order operates against the defendant personally, to restrain the defendant from dealing with assets under the defendant's control so as to remove them from the reach of the plaintiff and render any judgment fruitless and barren.[6]

The term "injunction" is used in numerous statutes to identify a particular species of order, the making of which the law in question provides as part of a new regulatory regime, for example s 80 of the *Trade Practices Act* 1974 (Cth)[7]. In these situations the term "injunction" takes its content from the provisions of the particular statute in question (*Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 395).

Broad statutory provisions such as s 23 of the *Federal Court of Australia Act* 1976, which empowers the Federal Court to make "orders of such kinds, including interlocutory orders … as the court thinks appropriate" have been construed conservatively. In *Cardile v LED Builders Pty Limited*, it was held that s 23 does not "provide authority for the granting of an injunction where, whether under the general law or by statute, otherwise there is no case for injunctive relief.[8]

In *Australian Securities and Investment Commission v Edensor Nominees Pty Limited* (2001) HCA 1 at [120], McHugh J stated "the term 'injunction' — is a wide term which should be given its ordinary meaning, a meaning wide enough to embrace any form of curial order which requires a person to refrain from doing or to do some act which infringes or assists in restoring another person's right, interest or property."

4 Formerly known as Mareva injunctions. Named from *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1980] 1 All ER 213n. In *Cardile v LED Builders* (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan JJ said at 393, that "the term 'injunction' is an inappropriate identification of that area of legal discourse within which the Mareva order is to be placed."

5 See below, Chapter 19: "Anton Piller Orders".

6 See below, Chapter 20: "Mareva Injunctions".

7 As to which see *ICI Operations Pty Limited v Trade Practices Commission* (1992) 38 FCR 248 at 266, in which Gummow J explained the differences between the general equitable principles and the effect of s 80. See also *South Sydney District Rugby League Football Club Ltd v News Ltd* [2001] FCA 862, Heerey J at [126] and Merkel J at [299] and [301].

8 (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan JJ at 396. See also *Patrick Stevedores Operations (No 2) Pty Limited v Maritime Union of Australia* Limited (1998) 195 CLR 1 at 29.

PERPETUAL INJUNCTIONS

[1802] A perpetual injunction is an order which is final as between the parties, by contrast with an interlocutory injunction, which is intended to preserve the status quo pending trial, and an interim injunction, which is specified to last only for a limited period of time. Perpetual injunctions may be subdivided into injunctions which are prohibitory in nature and those which are mandatory.

General Principles

The basis for an injunction

[1803] Most injunctions are prohibitory injunctions involving an order of a court exercising equitable jurisdiction which is directed at restraining the commission or continuance of a wrongful act. The wrongful act must generally be one in defiance of a recognised legal or equitable right.[9] It is essential for the plaintiff to establish that the defendant intends to infringe a right of the plaintiff.[10] Injunctions are available, for example, to restrain breaches of contract,[11] acts of waste,[12] acts constituting a nuisance,[13] trespass,[14] detinue,[15] defamation,[16] injurious falsehood,[17]breaches of duties of confidence,[18] passing off,[19] arbitrations[20] and conspiracy (*Patrick Stevedores v MUA* (1998) 159 CLR 1 at 31).

9 *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 395-396; *ABC v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1. In the case of public wrongs, see below [1812] and see Gaudron J in *ABC v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1 at 13.

10 *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457; *Grasso v Love* [1980] VR 163; *Copyright Agency Ltd v Haines* [1982] 1 NSWLR 182.

11 *Webster v Bread Carters' Union of New South Wales* (1930) 30 SR (NSW) 267.

12 *Weld-Blundell v Wolseley* [1903] 2 Ch 664.

13 *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391; *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393 (private nuisance); *Lyon v Fishmongers' Co* (1876) 1 App Cas 662; *Vanderpant v Mayfair Hotel Co Ltd* [1930] 1 Ch 138; *Boyce v Paddington Borough Council* [1903] 1 Ch 109 (public nuisance).

14 *Band of Hope & Albion Consols v St George & Band of Hope United Co* (1870) 1 VR 183.

15 *Collier-Garland (Properties) Pty Ltd v O'Hair* (1963) 63 SR (NSW) 500.

16 They are only granted in the clearest cases on an interlocutory basis: *Quartz Hill Consolidated Gold Mining Co Ltd v Beall* (1882) 20 Ch D 501 (CA); *Royal Automobile Club of Victoria v Paterson* [1968] VR 508; *Stocker v McElhinney (No 2)* [1961] NSWR 1043. See below [1823].

17 *ACP Publishing Pty Limited v Pacific Publications Pty Limited* [1999] NSW CA 46, 4 March 1999.

18 *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37; *Sullivan v Sclanders* [2000] 77 SASR 419. Cf *Maggbury Pty Limited v Hafele Pty Limited* [2001] HCA 70.

19 *Erven Warnink Bv v J Townend & Sons (Hull) Ltd* [1979] AC 731, Lord Diplock at 742; Lord Fraser at 755-756. See also *Riley Bishop (Vic) Pty Ltd v Appleton* (1983) 2 IPR 122.

20 *Kitts v Moore* [1895] 1 QB 253 (CA) (allegation that arbitration agreement void or voidable); *Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909.

Where no recognised legal or equitable right is affected, an injunction is not available (*Gouriet v Union of Post Office Workers* [1978] AC 435). For example, no injunction will lie to restrain a person from calling a house by the same name as someone else's house.[21] It is different if, for example, the plaintiff has rights (such as rights to light)[22] which would be affected by some building of the defendant. In other cases, it has been affirmed that the possibility of damage to the plaintiff's business and goodwill by acts of the defendant is not a sufficient basis for an injunction.[23] It has also been held that a husband is unable to obtain an injunction to prevent his wife from having an abortion, or an injunction to prevent a doctor from performing a legal abortion.[24] More recently, it was held by the High Court of Australia that a corporation could not restrain by injunction the broadcasting, by the defendant, of footage filmed by an unknown trespasser upon the plaintiff's property, where the plaintiff had no cause of action against the defendant itself (*ABC v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1). Nonetheless, an injunction may sometimes be obtained on the basis of the prevention of inconvenience, for example, where the injunction is to restrain a wrongful arbitration.[25] Similarly, injunctions or anti-suit orders, are obtainable to restrain the institution or prosecution of proceedings in foreign jurisdictions.[26] In *CSR Limited v Cigna Insurance Australia Limited* the High Court stated with reference to "anti-suit" injunctions: "If the bringing of legal proceedings involves unconscientious exercise of a legal right, an injunction may be granted by a court in the exercise of its equitable jurisdiction in restraint of those proceedings no matter where they are brought." The court has inherent power to protect the integrity of its process.[27]

21 *Day v Brownrigg* (1878) 10 Ch D 294, Jessel MR at 304 (CA). See also *Corp of Hall of Arts & Sciences v Hall* (1934) 50 TLR 518 (Ch).

22 *Newson v Pender* (1884) 27 Ch D 43 (Ch and CA).

23 *Associated Newspapers Group plc v Insert Media Ltd* [1988] 2 All ER 420; *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479; *ABC v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1.

24 *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276. See also *In Marriage of F* (1989) 96 FLR 118 (Fam Ct), where Lindenmayer J held, at 124-125, that the *Family Law Act* 1975 (Cth), s 114, gave the Family Court the jurisdiction and power to issue an injunction to prevent a wife from having an abortion. However, he declined to make such an order in the exercise of his discretion.

25 *Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909, Lord Diplock at 981.

26 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Settlement Corp v Hochschild* [1966] Ch 10. See also *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA); *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24.

27 *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345. See also Bell AS and Gleeson J, "The Anti-Suit Injunction" (1997) 71 *Australian Law Journal* 955.

Lord Goff, in *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24 at 44, stated that:

> "I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

In general, however, a plaintiff who claims an injunction to restrain the commission of acts which the plaintiff says may damage the plaintiff's property or goodwill must have some cause of action.[28]

[1804] An injunction will not be granted where it appears that the plaintiff has a sufficient remedy available at law. It could be said that there is no jurisdiction to award an injunction if damages are adequate, and no occasion to consider other matters. However, Sachs LJ, in *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349,[29] stated the modern approach:

> "The standard question in relation to the grant of an injunction, are damages an adequate remedy? might perhaps, in the light of the authorities of recent years, be rewritten, is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"[30]

In some cases, the question of the adequacy of damages can be simply answered by concluding that the plaintiff has no claim for damages at law.[31] The quantum of damage suffered by the

28 *Associated Newspapers Group plc v Insert Media Ltd* [1988] 2 All ER 420, Hoffmann J at 424-425. See also *Siskina (Cargo Owners) v Distos Compania Naviera SA (The Siskina)* [1979] AC 210; *ABC v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1 (no claim for invasion of privacy by a corporation). See also *Moorgate Tobacco Company Ltd v Philip Morris Limited* [No.2] (1984) 156 CLR 414 (no general tort of unfair competition). See also *Mercedes Benz AG v Leiduck* (PC) [1996] 1 AC 285 (no claim for substantive relief).

29 See also *Irving v Emu & Prospect Gravel & Road Metal Co Ltd* (1909) 26 WN (NSW) 137; *Stormer v Ingram* (1978) 21 SASR 93, Legoe J at 103; *Vincent v Peacock* [1973] 1 NSWLR 466 (CA); *Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd* [1983] 1 NSWLR 513, Yeldham J at 516; *Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning (Aust) Pty Ltd* [1984] VR 947, Kaye J at 955; *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149; *National Australia Bank Limited v Bond Brewing Holdings Limited* [1991] 1 VR 386 at 544-546.

30 Thus the issue of adequacy of damages is seen less as a jurisdictional limitation and more as one of the discretionary factors. See also Gummow W M C, "The injunction in aid of legal rights — an Australian perspective" (1993) 56 *Law and Contemporary Problems* 83 at 94.

31 *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, Lord Goff at 672-673 (plaintiffs had no claim for damages because their complaint was that UK legislation was incompatible with European law). See also *Bourgoin SA v Ministry of Agriculture, Fisheries & Food* [1986] QB 716. Note also that this question will not be applicable where the injunction is sought in aid of an equitable right.

plaintiff is relevant, but injunctive relief will not be denied merely because the damages that might be awarded would be small. The operation of this principle can be seen in the authorities which restrain trivial acts of trespass.[32]

Damages are an inadequate remedy where the plaintiff seeks an injunction in respect of a chattel which has a special value to the plaintiff (*Cook v Rodgers* (1946) 46 SR (NSW) 229). However, damages may be an adequate remedy where another such chattel is readily obtainable by the plaintiff (*Aristoc Industries Pty Ltd v RA Wenham (Builders) Pty Ltd* [1965] NSWR 581). A case of a different kind is where collateral matters, such as the need of the plaintiff to be able to continue a business, render damages an inadequate remedy (*Collier-Garland (Properties) Pty Ltd v O'Hair* (1963) 63 SR (NSW) 500). If the defendant is insolvent, or if solvency is doubtful, that may be another reason to regard it as inappropriate to confine the plaintiff to the pursuit of an award of damages (*Aristoc Industries Pty Ltd v RA Wenham (Builders) Pty Ltd* [1965] NSWR 581). In the case of a contract, it is important to realise that the parties have rights to its performance, not merely rights to compensation in the event of a breach.[33]

Legal damages are not the only common law remedy that may be taken into account. Relief by way of one of the prerogative writs can, for example, be a relevant alternative to an injunction,[34] but only rarely will injunctive relief be denied for that reason. The fact that criminal proceedings, for example, could also be brought with respect to the conduct of a defendant is no answer to a claim for an injunction (*Vincent v Peacock* [1973] 1 NSWLR 466 (CA)).

Where a person promises to do, or not do, some act, and agrees to pay a penalty in the event of non-performance of the promise, that person does not justify a breach of contract by electing to pay the penalty, and an injunction (or specific performance) may lie to compel the performance of the promise.[35] Conversely, if the parties to a contract have specified a sum as liquidated damages for breach, the plaintiff cannot in the event of breach

32 *Rochdale Canal Co v King* (1851) 2 Sim (NS) 78; 61 ER 270 (nominal damages, entitlement to injunction but for acquiescence); *Marriott v East Grinstead Gas & Water Co* [1909] 1 Ch 70.

33 *Lumley v Wagner* (1852) 1 De GM & G 604, Lord St Leonards LC at 619; 42 ER 687.

34 *Tynemouth Corp v Attorney-General* [1899] AC 293, Lord Morris at 305-306; *Ariansen v Bromfield* (1956) 57 SR (NSW) 24; *Buckoke v Greater London Council* [1970] 2 All ER 193; *Trethowan v Peden* (1930) 31 SR (NSW) 183 (CA).

35 *Hardy v Martin* (1783) 1 Cox 26; 29 ER 1046. See also *French v Macale* (1842) 2 Dr & War 269, Sir Edward Sugden LC at 274-275: "[I]f a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done."

recover the liquidated sum and, in addition, obtain an injunction.[36]

[1805] Where a plaintiff seeks an injunction, it is not always necessary to establish a proprietary right that is sought to be protected. Older authorities suggested that a proprietary right was always necessary.[37] However, it is now accepted that this is not a general requirement.[38] A proprietary right is not needed for injunctions to restrain breaches of confidence,[39] injunctions to restrain breaches of contract where no proprietary interest is involved,[40] injunctions to restrain breaches of statutory prohibitions,[41] or in aid of statutory rights (*Bradley v Commonwealth* (1973) 128 CLR 557).

In some cases, the legal or equitable right which a plaintiff will seek to protect is of a proprietary nature, so, in that sense, a proprietary interest is sometimes required. For example, an injunction to restrain a trespass or a nuisance is dependent upon the existence of a proprietary right. In the case of an injunction to protect the right of a person to be a member of a voluntary association, it was at one time thought to be essential to show that there was a proprietary interest at stake in order for an injunction to be obtainable.[42] It now appears that this is not necessarily so, and, in the case of wrongful expulsion from professional or trade societies, it has been regarded as sufficient that prejudice (such as a risk that a right to obtain employment may be affected) can be shown.[43] Nonetheless, there is a reluctance to interfere in the affairs of voluntary associations which do not confer upon members civil rights susceptible of private enjoyment.[44]

36 *Sainter v Ferguson* (1849) 1 Mac & G 286; 41 ER 1275 (relief in equity not available where judgment at law obtained).

37 See *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 (no injunction could issue to restrain the wrongful revocation of a licence).

38 *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan JJ at 395.

39 *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

40 Authorities applying *Lumley v Wagner* (1852) 1 De GM & G 604; 42 ER 687 are relevant here.

41 *Cooney v Council of the Municipality of Ku-ring-gai* (1963) 114 CLR 582.

42 *Rigby v Connol* (1880) 14 Ch D 482, Jessel MR at 487: "[T]he foundation of the jurisdiction is the right of property vested in the member of the society, and of expulsion." Where a property right is relied upon, it must not be merely relevant in an incidental and accidental way: *Cameron v Hogan* (1934) 51 CLR 358, Rich, Dixon, Evatt and McTiernan JJ at 378; *Scandrett v Dowling* (1992) 27 NSWLR 483 (CA).

43 *Thompson v British Medical Association (NSW)* [1924] AC 764, Lord Atkinson (for the Privy Council) at 778; *C S Makin v Gallagher* [1974] 2 NSWLR 559; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329; *Andrews v Mitchell* [1905] AC 78; *Osborne v Amalgamated Society of Railway Servants* [1911] 1 Ch 540 (CA); *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v Braithwaite* [1922] 2 AC 440; *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276.

44 *Cameron v Hogan* (1934) 51 CLR 358, Rich, Dixon, Evatt and McTiernan JJ at 378; *Heale v Phillips* [1959] Qd R 489 (right to exhibit dogs; voluntary association); *Pitcher v Lee Steere* (1935) 37 WALR 111.

Where a contractual right to enter a club is involved, that right may be too personal to be susceptible to protection by injunction.[45] It appears that the right to play a game,[46] or the maintenance of a position in society,[47] is similarly insufficient to attract injunctive relief.

[1806] An injunction may restrain the breach of an express[48] or implied[49] negative stipulation in a contract,[50] including a contract of personal service. Such an injunction may be granted notwithstanding that specific performance would not be ordered of the contract as a whole.[51] Courts are reluctant to make an order that a contract be specifically performed where personal relationships are involved.[52] This is because the court does not wish to be involved in ongoing supervision[53] of orders of that kind (for example, that an employee continues to work for an employer), and because it is generally undesirable to force individuals to maintain relationships where at least one of them does not wish to do so. Specific performance will not be refused in every case of a contract of personal service,[54] but this matter must be borne in mind in considering the operation of the doctrine in *Lumley v Wagner* (1852) 1 De GM & G 604; 42 ER 687. In that case, an opera singer agreed with an impresario to sing at his theatre for a stated period, and not to sing anywhere else during that period without his authority. While the court could not compel her to sing for him, nonetheless she was restrained by injunction from singing for anyone else during that period.[55]

Injunctions will not be granted to carry into effect a negative stipulation which prevents a person from entering into any other

45 *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, Denning LJ at 342; *Rigby v Connol* (1880) 14 Ch D 482, Jessel MR at 487-488.

46 *Rowe v Hewitt* (1906) 12 OLR 13 (amateur hockey association).

47 *Baird v Wells* (1890) 44 Ch D 661.

48 *Doherty v Allman* (1878) 3 App Cas 709, Lord Cairns LC at 720; *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552.

49 *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799.

50 In such cases, the usual discretionary considerations (below) remain important. *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 395.

51 *Lumley v Wagner* (1852) 1 De GM & G 604; 42 ER 687; *State Transport Authority v Apex Quarries Ltd* [1988] VR 187; *Beltech Corp Ltd v Wyborn* (1988) 92 FLR 283; *Ampol Petroleum Ltd v Mutton* (1952) 53 SR (NSW) 1. Cf *Wood v Corrigan* (1928) 28 SR (NSW) 492.

52 See above, Chapter 17: "Specific Performance".

53 On the issue of ongoing supervision generally, see *Patrick Stevedores v MUA* (1998) 195 CLR 1 at 46-47, citing *Cooperative Insurance Society Limited v Argyll Stores (Holdings) Limited* (1998) AC 1. See also *Cadbury Schweppes Inc v FBI Foods Limited* (1996) 138 DLR (4th) 682 at 707; *Cameron v Qantas Airways Limited* (1995) ATPR 41-417 at 60, 643-4.

54 *C H Giles & Co Ltd v Morris* [1972] 1 All ER 960; *Miotti v Belford* (1961) 79 WN (NSW) 98; *Price v Strange* [1978] Ch 337. See generally above, Chapter 17: "Specific Performance".

55 See also *Curro v Beyond Productions Pty Limited* (1993) 30 NSWLR 337.

form of employment at all for a particular period, as the effect of the injunction would be that the person must either carry out the contract, or be unemployed.[56] If, however, a contract contains a negative obligation not to do a particular kind of work which involves special skills or talents, then the question will be whether the grant of an injunction will effectively compel the party to perform the positive obligations under the contract. In *Warren v Mendy* [1989] 1 WLR 893, it was said that the following general principles were applicable to such cases:[57]

> "Compulsion is a question to be decided on the facts of each case, with a realistic regard for the probable reaction of an injunction on the psychological and material, and sometimes the physical, need of the servant to maintain the skill or talent. The longer the term for which an injunction is sought, the more readily will compulsion be inferred."

The term for which the injunction is sought is important. A shorter term will probably be less onerous upon the party sought to be enjoined than a longer term. Injunctions have, for example, been granted for terms of three months[58] and three years,[59] but refused for terms of two years[60] and five years (*Page One Records Ltd v Britton* [1967] 3 All ER 822). The other factors which can be taken into account cannot be exhaustively listed, but the following have been considered to be relevant:

- whether the defendant could enforce the plaintiff's obligations;[61]
- whether, where there are obligations of mutual trust and confidence, the employee's trust has been betrayed, or confidence in the employer is gone;[62]
- whether the real object of the injunction was to preserve the pride of a sporting club by refusing to permit one of its players to join a rival club;[63]

56 *Rely-a-Bell Burglar & Fire Alarm Co Ltd v Eisler* [1926] Ch 609; *Lamond v Calcraft* (1945) 53 SR (NSW) 103; *Miotti v Belford* (1961) 79 WN (NSW) 98.

57 See also *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209, Branson J at 217.

58 *Lumley v Wagner* (1852) 1 De GM & G 604; 42 ER 687.

59 *Hawthorn Football Club Ltd v Harding* [1988] VR 49 (injunction against football player not wishing to play for the plaintiff). See also *Buckenara v Hawthorn Football Club Ltd* [1988] VR 39 (injunction granted: two years).

60 *Warren v Mendy* [1989] 3 All ER 103.

61 *Page One Records Ltd v Britton* [1967] 3 All ER 822.

62 *Warren v Mendy* [1989] 1 WLR 893per Nourse LJ. It was decided in that case that the manager of a professional boxer was not entitled to enjoin another person from being the boxer's manager when the boxer had no wish to be managed by the plaintiff, to whom he was contractually bound. The boxer had expressly agreed to be managed exclusively by the plaintiff for the duration of the relevant contract.

63 *Radford v Campbell* (1890) 6 TLR 488 (CA).

- whether, if the injunction were granted, the defendant will or might be tempted to keep the bargain that the defendant has already made;[64] and
- whether the defendant has, realistically, other means of earning a living.[65]

Related questions have arisen where the relationship between the parties is not one of employer and employee, but is one of a commercial nature, such as a defendant who has agreed to sell goods only via the plaintiff as distributor, or some other commercial agreement of an exclusive nature.[66]

Discretionary considerations

[1807] An injunction is a discretionary remedy. The nature of this expression was explained by Lord Hoffman in *Bristol City Council v Lovell* [1998] 1 WLR 446 at 453 in a passage cited with approval by a majority of the High Court in *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 396:

> "The reason why an injunction is a discretionary remedy is because it formed part of the remedial jurisdiction of the Court of Chancery. If the Chancellor considered that the remedies available at law, such as damages, were inadequate, he could grant an injunction to give the plaintiff more effective relief. If he did not think that it was just or expedient to do so, he could leave the plaintiff to his rights at common law. The discretion is therefore as to the remedy which the court will provide for the invasion of the plaintiff's rights."

There are a number of factors which are relevant to the exercise of that discretion. The conduct of the plaintiff will be relevant. The expression used is that "whoever comes into equity must come with clean hands".[67] It involves an examination by the court of the plaintiff's conduct, in the sense that an injunction may be denied, if, for example:

64 *Hawthorn Football Club Ltd v Harding* [1988] VR 49.

65 *Warner Brothers Pictures Inc v Nelson* [1937] 1 KB 209. Note the criticism of that case made in *Warren v Mendy* [1989] 1 WLR 893 and see *Page One Records Ltd v Britton* [1967] 3 All ER 822 at 827-828.

66 See *Atlas Steels (Aust) Pty Ltd v Atlas Steels Ltd* (1948) 49 SR (NSW) 157; *Ampol Petroleum Ltd v Mutton* (1952) 53 SR (NSW) 1; *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175; *Dataforce Pty Ltd v Brambles Holdings Ltd* [1988] VR 771.

67 On the maxim that whoever comes into equity must come with clean hands, see generally below, Chapter 29: "Equitable Defences".

- the plaintiff has misled the defendant or the court;[68]
- the injunction is sought in furtherance of deceptive activities directed at individuals or the public at large;[69]
- the plaintiff has acted unlawfully in relation to the subject matter of the proceeding;[70]
- there have been breaches of contract by a plaintiff who seeks to restrain a breach by the other contracting party;[71] or
- the plaintiff has acted as though monetary compensation, and not injunctive relief, would be adequate (*Wood v Sutcliffe* (1851) 2 Sim NS 163; 61 ER 303).

What is generally required is that the unclean hands should have an immediate and necessary relation to the relief sought (*Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184, Eyre LCB at 319). Questions of degree and discretion arise, and a plaintiff may not be denied injunctive relief against breaches of contract where, for example, the plaintiff's own breaches were merely trifling.[72] The court can also take into account as part of its discretion any cessation of the conduct giving rise to unclean hands,[73] or a waiver on the part of the defendant.

The clean hands requirement is judged in relation to the relief that is sought.[74] For example, where a woman sought to restrain the publication of confidential marital matters by her former husband, it was claimed on the husband's behalf that the wife ought not to succeed because she had committed adultery during the marriage. Ungoed-Thomas J said that the wife's adultery, repugnant though it may be, should not "license the husband to broadcast unchecked the most intimate confidences of earlier and happier days".[75]

68 *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384. *Hewson v Sydney Stock Exchange Ltd* (1967) 87 WN (Pt 1) (NSW) 422; *Wolfe v Lang & Co* (1887) 13 VLR 75.

69 *Leather Cloth Co Ltd v American Leather Cloth Co Ltd* (1863) 4 De GJ & S 137; 46 ER 868.

70 *Littlewood v Caldwell* (1822) 11 Price 97; 147 ER 413 (injunction refused because the plaintiff partner had removed the partnership books). See also I'Anson Banks R C, *Lindley and Banks on Partnership* (17th ed, Sweet & Maxwell, London, 1995), pp 658-666 for injunctions in actions between partners generally.

71 *Measures Brothers Ltd v Measures* [1910] 2 Ch 248 (CA).

72 *Western v MacDermott* (1866) LR 2 Ch App 72; *Besant v Wood* (1879) 12 Ch D 605.

73 *Mrs Pomeroy Ltd v Scale* (1906) 23 TLR 170 (Ch); *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd* (1934) 35 SR (NSW) 108.

74 *Hubbard v Vosper* [1972] 2 QB 84 (scientology); *Attorney-General v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341 (CA) ("Spycatcher").

75 *Argyll v Argyll* [1967] Ch 302 at 333. See also *Marriage of Gibb* (1979) 5 Fam LR 694 (Fam Ct).

Relief may nonetheless be granted in the presence of unclean hands where the injunction is needed to prevent a multiplicity of actions for damages, which would be necessary with respect to continuing breaches if compensation could only be sought after the event.[76]

[1808] Hardship to the defendant may be a reason for refusing an injunction. Questions of hardship are of particular importance in the case of interlocutory injunctions which are granted before the final hearing of a matter.[77] Where the injunction sought is perpetual, hardship is also relevant, but its significance is reduced. Perpetual injunctions are granted at the final hearing, and, if it is established that the defendant has acted (or will act) in contravention of the rights of the plaintiff, then prima facie the plaintiff is entitled to an injunction. It is only in exceptional cases that relief will be denied.[78] Nonetheless, the court has a discretion, and hardship remains relevant. If a plaintiff has in some indirect way benefited from the defendant's breach of the plaintiff's rights, that can be taken into account as against the plaintiff.[79] Conversely, if the defendant has deliberately harmed the interests of the plaintiff, that will weigh against the defendant.[80]

Hardship to third parties can also be taken into account. The court "will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court".[81]

An example of the application of these principles is found in *Miller v Jackson* [1977] QB 966.[82] An injunction was sought by the owners of an adjoining property to prevent the playing of cricket on a local village ground, because cricket balls were occasionally

76 *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43, Isaacs ACJ at 67; *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSWR 224, Street J at 233; *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501, Wootten J at 509.

77 See below, paras [1821]-[1831].

78 *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146; *Beswicke v Almer* [1926] VLR 72, Cussen J (for the Full Court) at 76-77; *Kennaway v Thompson* [1981] QB 88.

79 *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 Ch D 757, Fry J at 769.

80 *Smith v Smith* (1875) LR 20 Eq 500, Jessel MR at 505; *Woollahra Municipal Council v Morris* [1966] 1 NSWR 136.

81 *The Hartlepool Gas & Water Co v The West Hartlepool Harbour & Railway Co* (1865) 12 LT 366, Kindersley V-C at 368 (CA), cited by Cumming — Bruce LJ in *Miller v Jackson* and adopted by the High Court of Australia in *Patrick Stevedores v MUA* [1998] 195 CLR 1 at 42-43.

82 *Miller v Jackson* has been approved and applied in a number of Australian cases. See *Patrick Stevedores v MUA* [1998] 195 CLR 1 at 42, footnote 97.

hit onto the plaintiffs' property. The English Court of Appeal took particular account of the hardship that would be visited upon the inhabitants of the village, and declined to award an injunction. Cumming-Bruce LJ stated the principle that:[83]

> "Regard must be had 'not only to the dry strict rights of the plaintiff and the defendant, but also the surrounding circumstances, to the rights or interests of other persons which may be more or less involved'. So it is that where the plaintiff has prima facie a right to specific relief, a court of equity will, if occasion should arise, weigh the disadvantage or hardship which he will suffer if relief were refused against any hardship or disadvantage which would be caused to third persons or the public generally if relief were granted."[84]

In *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380, a case involving a Mareva order or asset preservation order, restraining the disposal of assets by a third party to the original proceedings, the High Court pointed out that even where the third parties are not themselves bound by an order, "the contempt power extends to third parties who so conduct themselves as to obstruct the course of justice" (Gaudron, McHugh, Gummow and Callinan JJ at 395).

[1809] Delay and acquiescence may be grounds for refusing relief.[85] There are statements that the right to an injunction may be lost on the ground of delay alone.[86] However, the modern position is that delay of itself is not a defence, but that it may be relevant to a variety of particular defences. Thus it may be the basis of a defence of laches, or it may give rise to a defence based on a Statute of Limitation. It may also form part of material upon which it can be concluded that a relevant right of the plaintiff has been abandoned or released, or that there may be an acquiescence on the part of the plaintiff that defeats the claim to an injunction. Similarly, delay may form part of a defence based on estoppel.[87]

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83 *Miller v Jackson* [1977] QB 966, Cumming-Bruce LJ at 988, approving Spry I C F, *Equitable Remedies* (Law Book Co, Melbourne, 1971), p 365: see now (6th ed, Lawbook Co., Sydney, 2001), p 402.

84 In *NRMA v Stuart Geeson* (2001) NSW CA, 11 October, 2001, the New South Wales Court of Appeal took public interest (or the interest of NRMA members who made up a large part of the public) into account when refusing an injunction to restrain the publication of confidential information.

85 See generally below, Chapter 29: "Equitable Defences".

86 *Brooks v Muckleston* [1909] 2 Ch 519. But see *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58; 45 ER 800. Cf *Archbold v Scully* (1861) 9 HLC 360; 11 ER 769, Lord Wensleydale at 383.

87 See generally, below, Chapter 29: "Equitable Defences".

The defence of acquiescence arises where the plaintiff has expressly or impliedly assented to, or has not taken any action in relation to, the acts of the defendant complained of, and the defendant has altered her or his position in consequence.[88]

Delay is not essential to acquiescence, but its presence may be important. An example of acquiescence in the absence of extreme delay is *Sayers v Collyer* (1884) 28 Ch D 103 (CA). In that case, an injunction to restrain the use of premises as a shop for selling beer, where such use was in breach of a restrictive covenant, was refused. It was shown that the plaintiff had himself bought beer at the shop, and had known of the breach for three years before bringing action (Baggallay LJ at 106).

Acquiescence is an expression which is used in a number of different senses.[89] True acquiescence can be regarded either as an example of implied waiver or abandonment, or as meaning that the plaintiff is estopped from seeking equitable relief in relation to the conduct complained of (*Glasson v Fuller* [1922] SASR 148, Poole J at 161-162). Acquiescence or delay are dependent upon the plaintiff having knowledge of all the material facts.[90] However, the doctrine of laches operates differently where the plaintiff is the Attorney-General.[91]

[1810] Futility or impossibility of performance may also be reasons for refusing to grant an injunction. Equity does not act in vain. In the case of injunctive relief, it will make no order where it is impossible for the order sought to be complied with, or where compliance with the order sought would be futile, including where no useful purpose would be served by the order sought (*Hughes v WACA (Inc)* [1986] ATPR 48,134).

The ground of impossibility arises where it is not within the power or the ability of the defendant to comply with the order. Futility, however, describes the situation where an order will not be made because to do so would be idle, ineffectual or pointless.[92]

88 *Archbold v Scully* (1861) 9 HLC 360; 11 ER 769; *Scottish Australian Coal Mining Co v Redhead Coal Mining Co* (1892) 13 LR (NSW) Eq 32; *Greater Sydney Development Association v Rivett* (1929) 29 SR (NSW) 356; *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391; *White v Taylor* (1874) 8 SALR 1.

89 See below, Chapter 29: "Equitable Defences".

90 *Stafford v Stafford* (1857) 1 De G & J 193; 44 ER 697, Knight Bruce LJ at 202: "Generally, when the facts are known from which a right arises, the right is presumed to be known."

91 *Attorney-General v Proprietors of the Bradford Canal* (1866) LR 2 Eq 71; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 (PC).

92 *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146, Lord Hatherley LC at 154.

An injunction may also be refused where a defendant has other means available to achieve the result sought to be enjoined against. It is "contrary to the practice of the Equity Court to grant an injunction in cases where the party enjoined can, by his own volition and without committing any wrongful act, at once render the injunction nugatory and futile".[93]

If performance is not futile or impossible, the enjoined defendant must find a way, despite expense and difficulties, of complying with the order. The court has power to postpone the making of an order, or to suspend its operation, which can enable the severity of this rule to be lessened.[94]

[1811] There are also other reasons for refusing an injunction. An injunction ought not to be granted if the only means by which it can be complied with are illegal.[95] Furthermore, if, because of mental incapacity, the defendant is unable to understand the injunctive order sought, an injunction ought not to be granted (*Wookey v Wookey; Re S (a minor)* [1991] 3 All ER 365). In the case of a defendant minor, an injunction may be denied on the basis that it would not, in the circumstances of the particular case, be enforceable.[96]

Injunctions in aid of statutory rights and public interests

[1812] Injunctions are obtainable in aid of rights conferred, expressly or impliedly, by statute upon individuals.[97] The right need not be proprietary.[98] A court of equity has, however, no general jurisdiction to enforce statute law at the behest of an individual, as

93 *Death v Railway Commissioners (NSW)* (1927) 27 SR (NSW) 187, Long Innes J at 197.

94 *Attorney-General v Proprietors of the Bradford Canal* (1866) LR 2 Eq 71, Sir W Page Wood V-C at 83; *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149; *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146, Lord Hatherley LC at 154 ("very considerable inconvenience".)

95 *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149. See generally, below, Chapter 29: "Equitable Defences".

96 *Wookey v Wookey; Re S (a minor)* [1991] 3 All ER 365.

97 *Argyll v Argyll* [1967] Ch 302 (injunction to prevent breach of statutory provision concerning publication of evidence given in matrimonial proceeding). See also *John Fairfax & Sons Ltd v Australian Telecommunications Commission* [1977] 2 NSWLR 400; See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 125-126, 139.

98 *Argyll v Argyll* [1967] Ch 302. cf *Colortone Holdings Ltd v Calsil Ltd* [1965] VR 129. See now *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd,* (1998) 194 CLR 247 at [27].

such enforcement is the business of the government.[99] Public rights arising out of statute may be enforced by the relevant Attorney-General, who is generally the only proper plaintiff,[100] although a relator action is permitted where an individual (who need have no personal interest in the action)[101] brings the action with the consent and in the name of the Attorney-General.[102] An injunction to restrain criminal activity is exceptional.[103] Where a statutory penalty is provided for, injunctions are available only where the statutory penalty is inadequate or where it is a case of emergency.[104] A statute may exclude a remedy of injunction expressly or by necessary implication.[105]

Where an individual seeks to enforce a statutory provision in the nature of a general prohibition, the position is that special circumstances must be shown in order to permit an individual to obtain injunctive relief. This is to be contrasted with the position where a statute confers a right on any person to sue for contravention.[106]An individual must show an infringement of a private right or some special damage. It has been held in the High Court that a plaintiff may have a special interest in the subject matter of the proceeding sufficient to seek equitable relief.[107] Damages

99 *Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd* (1935) 54 CLR 230, Latham CJ at 239. See also *Californian Theatres Pty Ltd v Hoyts Country Theatres Ltd* (1959) 59 SR (NSW) 188; *Attorney-General v City of Brighton* [1964] VR 59; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247 at 277.

100 *Truth about Motorways Pty Limited v Macquarie Infrastructure Investments Management Limited* (1999) 200 CLR 591, discussing this general rule laid down in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481.

101 *Attorney-General v Crayford Urban District Council* [1962] Ch 575, Lord Evershed MR at 585.

102 For example, *Attorney-General v Sharp* [1931] 1 Ch 121 (CA) (bus proprietor operated business without a licence). For laches and acquiescence where the Attorney-General is the plaintiff, see *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 48 ALJR 464.

103 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J at 49-50; *Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd* (1935) 54 CLR 230, Starke J at 246-250; *Attorney-General v Sheffield Gas Consumers Co* (1853) 3 De GM & G 304; 43 ER 119, Turner LJ at 320; *Attorney-General (Qld) (ex rel Kerr) v T* (1983) 57 ALJR 285.

104 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J at 49-50. See also *Peek v NSW Egg Corporation* (1986) 6 NSWLR at 5-6.

105 *Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd* (1935) 54 CLR 230, Latham CJ at 240-241 (who construed the statutory provisions as a code). But, see *Stevens v Chown* [1901] 1 Ch 894 (where a statute provides a particular remedy, the jurisdiction to order an injunction is not excluded, unless the statute expressly provides).

106 See *Truth about Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (1999) 200 CLR 591. See also *ICI Australia Operations Pty Limited v Trade Practices Commission* (1992) FCR 248, Lockhart J at 255, described s 80 of the *Trade Practices Act* as "essentially a public interest provision … because any persons can be affected …".

107 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672. See now *Batemans Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247; *Shop Distributors and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558. See also *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27 and *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493.

under *Lord Cairns' Act* cannot be ordered in lieu of an injunction to enforce a public right.[108]

Injunctions in the exclusive jurisdiction of equity

[1813] Where an injunction is sought in the exclusive jurisdiction of equity, as in the case of breaches of trust or fiduciary duty or indeed any infringement of a purely equitable right, it is granted almost as of right where the plaintiff's case is established. Equitable defences such as laches, acquiescence or estoppel are relevant, but legal damages are unavailable and so an injunction is not to be denied on the basis that some satisfactory claim for damages at law may be obtained.[109] For example, injunctions are appropriate to protect the right of a beneficiary to due administration of a trust[110] or to enable one trustee to prevent another from committing a breach of trust,[111] or to prevent third parties from dealing with trust property (*Ackerly v Palmer* [1910] VLR 339).

Injunctions and damages

[1814] A court exercising equitable jurisdiction has a discretion to award equitable damages in addition to, or in substitution for, an injunction.[112] Equitable damages have been given in cases involving legal[113] or purely equitable[114] rights. They are only available where an occasion for considering the grant of an injunction exists. For example, they would not be available if there were no proof of any threat to continue a wrongful act,[115]

108 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672. On *Lord Cairns Act (Chancery Amendment Act* 1858 (21 & 22 Vict c 27)), see below, Chapter 22: "Equitable Compensation", and McDermott P, *Equitable Damages* (Butterworths, Sydney, 1994).

109 See above, para [1804].

110 *Park v Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1965] NSWR 298.

111 *Baynard v Woolley* (1855) 20 Beav 583; 52 ER 729.

112 See below, Chapter 22: "Equitable Compensation". The relevant statutes are *Supreme Court Act* 1970 (NSW), s 68; *Supreme Court Act* 1935 (SA), s 30; *Supreme Court Civil Procedure Act* 1932 (Tas), s 11(13); *Supreme Court Act* 1986 (Vic), s 38; *Supreme Court Act* 1935 (WA), s 25(10). For a discussion of the more complex situations in the Australian Capital Territory, the Northern Territory and Queensland, see Grieg D G and Davis J L R, *The Law of Contract* (Law Book Co, Sydney, 1987), paras [1499-1500]. See also Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), para [3225].

113 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851.

114 *Gas & Fuel Corp of Victoria v Barba* [1976] VR 755; *Talbot v General Television Corp Pty Ltd* [1980] VR 224 (SC and FC); *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, Gibbs CJ, Mason, Murphy and Brennan JJ at 676; *Re Leeds & Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809, Vaughan Williams LJ at 825; Stirling LJ at 833; *Wroth v Tyler* [1974] Ch 30; *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. But see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2321].

115 *Proctor v Bayley* (1889) 42 Ch D 390 (CA).

or if legal damages would be an appropriate remedy.[116] Equitable damages are available, however, where an injunction would be denied for a purely discretionary reason, such as laches[117] or mistake (*Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674). For an award of equitable damages to be available, it is sufficient that an injunction might have been granted at the time of the commencement of the proceeding, rather than the time when the award of damages is considered (*Cory v Thames Ironworks & Shipbuilding Co Ltd* (1863) 8 LT 237). However, they can also be granted where an injunction would not have been granted at the commencement of the proceeding, but would have been granted at the final hearing.[118]

Form of relief and enforcement

[1815] Where an injunction has been granted, any party enjoined is entitled to know what is required to be done (or not done), and, in general, the order ought to define precisely what is required.[119] A prohibitory injunction involving no more than a declaration of right cast in injunction form is usually undesirable.[120] Where it is sought to enjoin the servants or agents of the defendant as well as the defendant, an appropriate form of order is to restrain the defendant "by their servants workmen agents or otherwise" (*Marengo v Daily Sketch & Sunday Graphic Ltd* [1948] 1 All ER 406, Lord Uthwatt at 407). An order in that form is directed to the defendant as an individual, and to the other persons referred to only in their capacity as servant or agent, or otherwise as the case may be. Ordinarily, an order should not be directed against a person individually who is not a party to the proceeding concerned. In exceptional cases, injunctions have been granted against persons who are not parties,[121] but, in general, they ought not to be granted against third parties such as assignees, transferees, or successors of the defendant.[122] Precision in the form of an order is of particular importance in the case of a mandatory injunction, since the defendant is entitled to know exactly what the court requires to be done, but orders are

116 *McKenna v Richey* [1950] VLR 360; *Shaw v Applegate* [1978] 1 All ER 123.

117 *Wroth v Tyler* [1974] Ch 30.

118 *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197. See further below, Chapter 22: "Equitable Compensation".

119 *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33; *Epitome Pty Ltd v Australasian Meat Industry Employees Union (No 2)* (1984) 3 FCR 55.

120 *South Sydney District Rugby League Football Club Ltd v News Ltd* [2001] FCA 862, Heerey J at [124].

121 *Hubbard v Woodfield* (1913) 57 SJ 729 (Ch). See now *Cardile v LED Builders* (1999) 198 CLR 380 and note that in any event third parties can be liable for contempt of court if they obstruct the course of justice, Cardile at 395. See below, Chapter 20: "Mareva Injunctions".

122 *Fire Nymph Products Ltd v Jalco Products (WA) Pty Ltd* (1983) 47 ALR 355, Toohey J at 392.

sometimes permitted in a form more general than precise (*Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33).

[1816] An injunction may be enforced by committal, the imposition of a fine, or sequestration. An intentional breach of an injunction renders the person concerned liable to be committed, whether it is the defendant or any person who has knowingly abetted the breach of the injunction.[123] The purpose is to compel obedience to the order of the court. An injunction is also enforceable by way of sequestration of the property of disobedient parties. Where a company is concerned, the property of directors and officers who are parties to the disobedience is liable to sequestration along with the property of the company.[124] A fine may be imposed by the court.[125]

In the case of a mandatory injunction, if a defendant has not complied with the injunction, it is permissible to obtain an order that the plaintiff (or someone else appointed by the court) carry out the acts required[126] at the expense of the defendant.[127]

[1817] An injunction need not be granted immediately or so as to take effect forthwith. It may be granted with its operation to be suspended, or its grant may be delayed altogether. Suspension is permissible, for example, "where a good deal of time must necessarily elapse to enable the parties to comply with an injunction without being put to grievous annoyance and expense."[128] For example, the grant of an injunction was delayed for a period of 12 months in one case where the plaintiff had to be content with a favourable declaration in the meantime, with liberty to apply for an injunction after that period.[129] In another case, the plaintiffs (who were yet to suffer any pecuniary damage) obtained declarations and, the defendants having been

123 Casual or accidental breaches ought not to give rise to committal: see *Heatons Transport (St Helens) Ltd v Transport & General Workers' Union* [1973] AC 15. An injunction not to work a mine is not breached by doing works to stabilise the mine: *Mulcahy v Walhalla Gold Mining Co* (1868) 5 WW & A'B (E) 103.

124 *Inland Revenue Commissioners v Hoogstraten* [1985] QB 1077 (Mareva order).

125 *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] Ch 195; *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 (fines and breaches of injunctions); *Witham v Holloway* (1995) 69 ALJR 847.

126 Such as the appointment of a nominated person to execute documents on behalf of the defendant: see *Supreme Court Act* 1981 (Vic), s 39 and *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1983] 2 AC 787.

127 See *Folley v Marafioti (No 2)* (1972) 9 SASR 9; *Re LL Syndicate (Ltd)* (1901) 17 TLR 711 (Ch); *Parker v Camden London Borough Council* [1986] Ch 162; *Savage v Norton* (1908) 1 Ch 290.

128 *Attorney-General v Proprietors of the Bradford Canal* (1866) LR 2 Eq 71, Page Wood V-C at 84. *Ku-ring-gai Municipal Council v Arthur H Gillott Pty Ltd* (1968) 15 LGRA 116.

129 *Vestry of the Parish of St Mary, Islington v Hornsey Urban District Council* [1900] 1 Ch 695 (CA).

put upon suitable terms to protect the plaintiffs, were at liberty to apply for an injunction after a period of two years (*Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485 (PC)).

In considering whether to make an order of a suspended nature, it ought to be borne in mind that the court will not "allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict".[130] The operation of an interlocutory injunction was suspended for a period of 12 months in a case where the injury to the plaintiff was temporary and the defendant offered compensation (*Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483 (Ch)). The defendant had trespassed on to the plaintiff's air space with a crane for building purposes. That decision has been criticised because there should not be forced "on a reluctant plaintiff something very like a settlement involving operations by the defendant company on the plaintiff's land" (*Charrington v Simons & Co Ltd* [1971] 2 All ER 588, Russell LJ (for the court) at 592).

Mandatory injunctions

[1818] Mandatory injunctions may be granted as a matter of discretion, and the same principles are applicable as in the case of prohibitory injunctions. A mandatory injunction requires some act or acts to be done. The order of the court should define precisely what the defendant is required to do.[131] If the particular act or acts can be specified precisely, then they should be so specified, but in some cases, for example nuisance,[132] orders have been made in more general terms. For instance, in one case, a defendant was ordered, by way of mandatory injunction, to "execute such works as may be necessary" to put a drain in working order.[133] The plaintiff had previously obtained an injunction to have drains kept open, and one of them had ceased to work.

Mandatory injunctions may be classified in two ways. First, a mandatory injunction may be restorative in nature. A mandatory injunction of that kind is aimed at requiring a defendant to undo a wrongful act or to prevent the occurrence of further damage[134]

130 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley LJ at 315-316 (CA).

131 *Redland Bricks Ltd v Morris* [1970] AC 652, Lord Upjohn at 266; *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33.

132 *Thompson-Schwab v Costaki* [1956] 1 All ER 652, Lord Evershed MR at 655.

133 *Kennard v Cory Bros & Co Ltd* [1922] 2 Ch 1, Warrington LJ at 17 (CA).

134 *Patrick Stevedores v MUA* [1998] 195 CLR 1 at 31.

in a situation where earlier, a prohibitory injunction may have been obtainable to prevent the commission of the wrongful act in question.[135] A failure to obtain a prohibitory injunction in time does not mean, however, that a mandatory injunction cannot subsequently be granted.[136]

Secondly, a mandatory injunction may be given to compel the carrying out of some positive obligation by the defendant. Problems of supervision arise here particularly,[137] and render it less likely that a mandatory injunction of this kind will be granted. For example, plaintiffs have failed to obtain orders to keep a ferry[138] or an airport[139] running. However, "it cannot be regarded as an absolute and inflexible rule that the court will never grant an injunction requiring a person to do a series of acts requiring the continuous employment of people over a number of years."[140]

The jurisdiction to order a mandatory injunction is exercised cautiously;[141] it is always a matter of discretion. The plaintiff should demonstrate a very strong probability of grave damage (*Durell v Pritchard* (1865) 1 Ch App 244).

Where the making of an order would subject the defendant to substantial costs of works, a defendant who has acted wilfully as against the plaintiff may nonetheless be ordered to do the works. This is so even if the cost of the works is disproportionate to the advantage which will accrue to the plaintiff. If, however, the defendant has acted reasonably, the hardship involved in the possible costs may mean that the plaintiff must be content with a claim for damages (*Redland Bricks Ltd v Morris* [1970] AC 652, Lord Upjohn at 666).

135 *Redland Bricks Ltd v Morris* [1970] AC 652, Lord Upjohn at 665; *Charrington v Simons & Co Ltd* [1971] 2 All ER 588; *Hornsby Shire Council v Danglade* (1928) 29 SR (NSW) 118; *Economy Shipping Pty Ltd v ABC Building Pty Ltd* [1969] 2 NSWR 97.

136 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, Brightman J at 337. See also Chapter 17: Specific Performance.

137 See above [1806].

138 *Attorney-General v Colchester Corp* [1955] 2 QB 207.

139 *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 2 All ER 277.

140 *Gravesham Borough Council v British Railways Board* [1978] Ch 379, Slade LJ at 405; *Karaggianis v Malltown Pty Ltd* (1979) 21 SASR 381.

141 See generally *Redland Bricks Ltd v Morris* [1970] AC 652.

Quia timet injunctions

[1819] A quia timet injunction is granted to prevent a threatened infringement of the rights of the plaintiff, where the infringement is yet to occur. The injunction may be interim, interlocutory or perpetual, and prohibitory or mandatory.

Quia timet injunctions fall into two broad categories.[142] The first is where the plaintiff has not yet been injured by the defendant, but the defendant threatens and intends to act in a way that will cause irreparable harm to the plaintiff or the plaintiff's property. In the second category, the plaintiff, having been fully compensated for the damage caused by the defendant, alleges that the earlier actions of the defendant may lead to a future cause of action.

[1820] The principles applicable to a mandatory quia timet injunction are as follows. First, a mandatory injunction can only be granted where the plaintiff shows a very strong probability[143] upon the facts that grave damage will accrue in the future. Secondly, damages must not be a sufficient or adequate remedy if the damage does happen.[144] Thirdly, the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be taken into account. In *Redland Bricks Ltd v Morris* [1970] AC 652,[145] Lord Upjohn said (at 666):

> "(a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff."

However (at 666):

> "(b) … where the defendant has acted reasonably, though in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because

142 *Redland Bricks Ltd v Morris* [1970] AC 652, Lord Upjohn at 665.

143 The test has been expressed in other ways: "A strong case of probability": *Attorney-General v Corp of Manchester* [1893] 2 Ch 87, Chitty J at 92; "imminent danger of very substantial damage": *Fletcher v Bealey* (1885) 28 Ch D 688, Pearson J at 698.

144 On adequacy of damages, see above, para [1804].

145 Citing *Woodhouse v Newry Navigation Co* [1898] IR 161 as an illustration.

> no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at law and all his consequential remedies in equity."

Fourthly, where the court grants a mandatory injunction, it must be careful to see that the defendant knows exactly what has to be done. This knowledge is not knowledge as a matter of law but as a matter of fact, so that contractors can be given the proper instructions.[146]

Overall, the court must inquire what will do "justice between the parties, having regard to all the relevant circumstances" (*Hooper v Rogers* [1975] Ch 43, Russell LJ at 50). Where the defendant has acted wrongly but reasonably, it may be that heavy expenditure ought not to be ordered. In such a case, it may be appropriate to order works which do not remedy the wrong, but merely lessen the chances of future injury.[147]

It is not sufficient for the plaintiff merely to express a fear of threatened harm,[148] but there can be no absolute standard of degree of probability of future injury (*Hooper v Rogers* [1975] Ch 43, Russell LJ at 50).

INTERLOCUTORY AND INTERIM INJUNCTIONS

Interlocutory injunctions

General

[1821] An interlocutory injunction is obtained before the final determination of the rights of the parties, and framed so as to endure until the hearing and determination of the proceeding concerned. The usual purpose of such an injunction is to

146 See also *Attorney-General v Staffordshire County Council* [1905] 1 Ch 336, Joyce J at 342.

147 *Redland Bricks Ltd v Morris* [1970] AC 652, Lord Upjohn at 666; See also *Kennard v Cory Bros & Co Ltd* [1922] 1 Ch 265, Sargant J at 274 (the "Moving Mountain" case).

148 *Attorney-General (Canada) v Ritchie Contracting & Supply Co Ltd* [1919] AC 999, Lord Dunedin (for the Privy Council) at 1005.

maintain the status quo between the parties pending the trial[149] or on appeal.[150] Status quo sometimes means the state of affairs in existence immediately prior to the issue of the relevant originating process, which is usually a writ seeking a perpetual injunction.[151] Here questions of discretion arise, and it may be that some earlier position should be restored, such as existed before the allegedly wrongful acts of the defendant occurred.[152] Alternatively, if there has been delay in the making of the application, it may be appropriate to preserve the status quo in existence prior to that application rather than the status quo of some earlier time (*Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, Lord Diplock at 140).

Discretionary considerations

[1822] The considerations which are relevant to the exercise of discretion by the court in the grant of a perpetual injunction[153] are also relevant to the grant of an interlocutory injunction, but the nature of an interlocutory injunction is such that distinct principles have developed. This is because the court will not usually be able to make an immediate decision on the final merits of the plaintiff's case. Therefore, the court will have to decide whether to make an interlocutory order to govern the position of the parties pending the final determination of their rights. In coming to its decision, three matters in particular are important.[154] First, the strength of the plaintiff's case as a matter of fact and law;[155] secondly, whether damages at law provide an adequate remedy — where damages (or any other alternative remedy) are an adequate remedy for the plaintiff, no injunction can be granted;[156] thirdly, the balance of convenience.[157]

149 *ABC v Lenah Game Meats Pty Limited* [2001] 76 ALJR 1 at 4, 14.

150 *Shari-Lee Hitchcock v TCN Channel 9 Pty Limited* (No 1) [2000] NSWCA 76, Spigelman, J at [3].

151 *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, Lord Diplock at 140.

152 *Thompson v Park* [1944] KB 408 (mandatory injunction). In *Patrick Stevedores Operations No 2 Pty Limited v MUA* (1998) 195 CLR 1, the High Court upheld an injunction awarded to employees to maintain the status quo immediately before the proported allegedly wrongful termination of a labour supply contract, holding that the orders provided a "commercial framework" for the operation of the employer companies until trial. Industrial disputes call for particular caution in the exercise of the court's discretion and a careful balancing process: see *National Workforce Pty Limited v Australian Manufacturing Workers Union* [1998] 3 VR 265 and *Australian Paper Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union* (1998) 81 IR 15, North J at 24.

153 See above [1807].

154 *Castlemaine Tooheys Limited v South Australia* (1986) 161 CLR 148 Mason ACJ at 153.

155 See below, para [1823].

156 For a description of the general position, see *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, Evershed MR at 181. See below, para [1825].

157 See below, para [1825].

Included in the question of the balance of convenience are issues such as:

- whether irreparable harm to the plaintiff would be suffered if an injunction is not granted;[158]
- relative hardships that would be visited upon the parties;[159]
- undertakings by the defendant as to damages;[160]
- unclean hands;[161] and
- impossibility or futility of performance.[162]

Interlocutory relief which is equivalent in effect to a final judgment can be granted.[163] In such a case, the strength of the plaintiff's case assumes a particular importance, and should be considered.[164]

[1823] The plaintiff must show that there is a serious question of fact or law that ought to be tried.[165] There was for some considerable time vigorous debate on the question as to whether a plaintiff, in applying for an interlocutory injunction, must establish a prima facie case in the sense that it is probable that the plaintiff would succeed upon the final determination of the plaintiff's case (*Beecham Group Limited v Bristol Laboratories Pty Limited* [1968] 118 CLR 618). However, it is now settled that what the plaintiff must establish is "that there is a serious question to be tried".[166] The serious question may be one of fact or of law.

158 See below, para [1826].

159 See below, para [1827].

160 See below, para [1831].

161 See above, para [1807].

162 See above, para [1810].

163 *Woodford v Smith* [1970] 1 WLR 806 (Ch); *Heywood v BDC Properties Ltd* [1963] 2 All ER 1063; *NWL Ltd v Woods* [1979] 3 All ER 614; *Cayne v Global Natural Resources plc* [1984] 1 All ER 225; *Lawrence David Ltd v Ashton* [1989] ICR 123 (CA).

164 *Cambridge Nutrition Ltd v British Broadcasting Corp* [1990] 3 All ER 523 (CA) (television broadcast).

165 *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board* (1982) 57 ALJR 425 (HC); *A v Hayden (No 1)* (1984) 59 ALJR 1 (HC); *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; *Polyukhovich v Commonwealth* (1991) 172 CLR 501. Sometimes the term "substantial question" is used: *Shari-Lee Hitchcock v TCN Channel 9 Pty Limited (No 1)* [2000] NSWCA 76 at [2].

166 The serious question test is derived from Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, who said at 407: "The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried." The serious question test has been accepted by the High Court: *Patrick Stevedores v MUA* [1998] 195 CLR 1 at 24; *Fejo v Northern Territory* [1998] 195 CLR 96 at 122 and 141.

The serious question test is an essential, but not a sufficient, element in the exercise of the court's discretion. An injunction ought not to be granted in the absence of a serious question to be tried, but relief will not be granted merely *because* there is a serious question to be tried. Furthermore, there is a relationship between the strength of the plaintiff's case and the nature of the relief sought by the plaintiff. A strong case on the part of the plaintiff may yield more substantial relief than may a weaker case. If, however, the denial of relief would lead to substantial hardship for the plaintiff, it may be that the plaintiff's case need not be as strong as it might in a case where the denial of relief would lead to less substantial hardship.[167]

There are circumstances in which the plaintiff must have what is in substance a stronger case than usual. Those instances include a quia timet application,[168] an interlocutory injunction to restrain a defamation,[169] interlocutory mandatory injunctions,[170] and interlocutory injunctions in cases involving questions of constitutional law (*Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148). These examples are only general, and recourse must be had to the relevant authorities in each jurisdiction in order to ascertain the current practice of the courts. Discretion has an overriding role.

The "serious question" test is subject to special matters arising in individual cases. Where a final hearing of a dispute is unlikely to occur because the grant or refusal of an injunction would virtually bring the dispute to an end, it has been said that the court should apply broad principles so as to avoid injustice. The defendant should not be precluded from going to trial because of the grant of an interlocutory injunction.[171] There is no fixed rule

167 As happened in *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603. See in particular the analysis of Lord Goff at 869-873.

168 *Grasso v Love* [1980] VR 163; *Byrne v Castrique* [1965] VR 171; *Attorney-General (Canada) v Ritchie Contracting & Supply Co Ltd* [1919] AC 999, Lord Dunedin at 1005 (PC); *Earl of Ripon v Hobart* (1834) 3 My & K 169; 40 ER 65; *Hooper v Rogers* [1975] Ch 43.

169 *Stocker v McElhinney (No 2)* [1961] NSWR 1043; *Bonnard v Perryman* [1891] 2 Ch 269; Lord Coleridge CJ, Lord Esher MR, Lindley, Bowen and Lopes LJJ at 284; *Herbage v Pressdram Ltd* [1984] 2 All ER 769; *Animal Liberation (Inc) v Gasser* [1991] 1 VR 51 (FC). For a general discussion of the authorities see *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153. See also *National Mutual Life Association of Australasia Limited v GTV Corporation Pty Limited* [1989] VR 747 at 764; *Jakudo Pty Limited v South Australian Telecasters Limited* (1997) 69 SASR 440; *Australian Broadcasting Corporation v Hanson* (unreported judgment of Queensland Court of Appeal, 28 September 1998); *Holley v Smyth* [1998] 1 All ER 853; *Summertime Holdings Pty Limited v Environmental Defenders Office Limited* (1998) 45 NSWLR 291.

170 *Dataforce Pty Ltd v Brambles Holdings Ltd* [1988] VR 771; *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901.

171 *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 (CA). Note that there may have been a different result if the plaintiff had had an overwhelming case: see Eveleigh LJ at 233; Kerr LJ at 235.

that a plaintiff can never obtain by an interlocutory injunction essentially the whole of the relief that would be sought at the trial, but the plaintiff's prospects of success must be considered.[172]

[1824] Generally, questions of law and conflicts in the affidavit evidence will not be resolved on an application for an interlocutory injunction. It was said by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 407[173] that, in the context of an application for an interlocutory injunction:

> "[i]t is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

Nonetheless, there will be occasions where questions of law can be decided upon the hearing of such an application.[174]

[1825] Where an application is made for an interlocutory injunction, it should not be granted where there is an adequate remedy in damages at law available.[175] If an available claim for damages would be adequate relief for the plaintiff, then the need for equitable relief does not arise, but if the plaintiff has no available claim for damages at law then the court must consider the balance of convenience[176] as to whether an injunction ought to be granted. Where damages are available as a remedy, but they are not an adequate remedy, then, in the exercise of its discretion whether to grant an injunction, the court must consider, among other things, "the extent to which any damage to the plaintiff can be cured by payment of damages rather than by the granting of an injunction".[177] Hence a claim for damages may be relevant in either of two ways: as a threshold denial of the need for an injunction, or as one of the discretionary factors to be taken into account in the determination of the balance of convenience.

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172 *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418; *NWL Ltd v Woods* [1979] 3 All ER 614; *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 (CA); *Lawrence David Ltd v Ashton* [1989] ICR 123 (CA); *Woodford v Smith* [1970] 1 WLR 806 (Ch); *Heywood v BDC Properties Ltd* [1963] 2 All ER 1063. But see *Dodd v Amalgamated Marine Workers' Union* [1924] 1 Ch 116 (CA).

173 *Chappell v Broughton* (1890) 11 LR (NSW) Eq 65; *Kurt Keller Pty Ltd v BMW Australia Ltd* [1984] 1 NSWLR 353; *Dage v Baptist Union of Australia Ltd* [1985] VR 270.

174 *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, Lord Jauncey at 677.

175 See above [1804]

176 As happened in *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603. See in particular the analysis of Lord Goff at 869-873.

177 *Donmar Productions Ltd v Bart* [1967] 2 All ER 338, Ungoed-Thomas J at 339.

In considering the balance of convenience, the modern attitude of the court is to consider whether it is just, in all the circumstances, that the plaintiff should be confined to a remedy in damages (*State Transport Authority Ltd v Apex Quarries Ltd* [1988] VR 187). A claim for damages at law is not the only alternative remedy that may lead to the conclusion that equitable intervention by way of injunction is not required. It may be sufficient, for example, to require the defendant to keep an account of profits,[178] although not if it would be difficult to keep an accurate account,[179] nor if the profits might not sufficiently protect the plaintiff if no injunction were granted.[180]

Similar questions arise where a defendant is prepared to offer an undertaking to the court not to do the acts complained of by the plaintiff. Injunctive relief will not be denied merely because an undertaking is offered, but it may in the circumstances render it unnecessary to make an order. If an undertaking is given in lieu of the making of an order, the plaintiff should ordinarily be given liberty to apply to the court should an injunction turn out to be needed (*Smith v Baxter* [1900] 2 Ch 138). Undertakings made to the court are generally enforceable in the same fashion as an injunction. Thus, a breach of such an undertaking may give rise to a contempt of court (*Biba Ltd v Stratford Investments Ltd* [1973] Ch 281).

[1826] Whether irreparable injury will occur if an injunction is not granted is a relevant factor. It is commonly said that, in order to obtain an interlocutory injunction, a plaintiff must show a threat of irreparable injury as a prerequisite, in the sense that there is a threat of injury "which, if not prevented by injunction, cannot afterwards be compensated by any decree which the Court can pronounce in the result of the cause".[181] The question is whether the plaintiff ought to wait until trial for relief or be granted relief in the meantime by way of an interlocutory injunction. In some of the early authorities, there was a tendency to consider irreparable damage as being, for example, "a very grievous injury indeed".[182] However, the modern approach is to examine the nature of the damage and take it into account together with the other relevant circumstances of the case. In one case, the

178 See below, Chapter 26: "Taking Accounts".

179 *Barclay v Neeld* (1894) 11 WN (NSW) 9.

180 *Harman Pictures NV v Osborne* [1967] 2 All ER 324, Ungoed-Thomas J at 336.

181 *Attorney-General v Hallett* (1847) 16 M & W 569; 153 ER 1316; *Richardson v Forestry Commission* (1987) 164 CLR 261. See *Donnelly v Amalgamated TV Services* (1998) 45 NSWLR 570. Hodgson CJ in Eq held that "an injunction would, as a practical matter, be the only satisfactory remedy".

182 *Pinchin v London & Blackwall Railway Co* (1854) 5 De GM & G 851, Lord Cranworth LC at 860; 43 ER 1101.

erection of a substantial building was restrained, notwithstanding that at the trial an order to pull it down could have been made,[183] while, in another, it was held that the erection of a fence did not give rise to an irreparable injury, as it could easily be destroyed (*Attorney-General v Hallett* (1847) 16 M & W 569; 153 ER 1316). Actual loss at the time of the application need not be shown, but there needs to be a sufficient probability of actual damage resulting from the actions of the defendant,[184] although it does not have to be established precisely (*Francesco Cinzano & Cia (Australia) Pty Ltd v Ruggiero (No 1)* (1979) 25 SASR 321).

[1827] In the exercise of its discretion to grant an injunction, the court makes a determination as to the balance of convenience. That is, the court balances the inconvenience to the defendant of the grant of the injunction, if at the ultimate determination of the proceeding the defendant is successful, with the inconvenience of a denial of the grant of an injunction to the plaintiff, should the plaintiff prove to be successful.[185]

Hardships that would be visited upon the parties by the grant or denial of an interlocutory injunction, as the case may be, are relevant. These are discretionary considerations in respect of which no general rules are laid down.[186] For example, in one case, the owner of some houses was concerned that the owner of a mine had no right to work certain mines, and that the houses would be destroyed or irreparably damaged by the working of the mines. The owner sought an injunction to restrain the mining. The court decided, however, that any injury which might be caused to the house owner would be minor and capable of reparation, while injury caused to the mine owner could not be compensated (*Hilton v Earl of Granville* (1841) Cr & Ph 283, Lord Lyndhurst LC at 297-298; 41 ER 498).

In another example, the plaintiffs succeeded in their complaint that United Kingdom legislation and regulations which prevented them from registering their 95 vessels as British fishing vessels were invalid because of contraventions of the laws of the European Community.[187] As far as the balance of convenience was concerned, it was apparent that there would be disastrous effects upon the plaintiffs should the application not be granted:

183 *Newson v Pender* (1884) 27 Ch D 43 (CA).

184 *Swimsure (Laboratories) Pty Ltd v McDonald* (1979) 2 NSWLR 796.

185 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. See generally *Castlemaine Tooheys Limited v South Australia* (1986) 161 CLR 148; *Fejo v Northern Territory* (1998) 195 CLR 96 at 141.

186 *Saunders v Smith* (1838) 3 My & Cr 711, Lord Cottenham LC at 728; 40 ER 1100.

187 *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 (United Kingdom companies controlled by Spanish nationals).

greatly reduced access to fishing areas, losses in time spent fishing, forced sales of vessels, and substantial commercial losses. Further, were the injunction not to be granted, competitors would obtain an advantage by reason of the absence of the plaintiffs' vessels. It was concluded that the balance of convenience lay in favour of the plaintiffs.

The issue in deciding whether to grant an interlocutory injunction has been stated by Hoffman J in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, at 678:[188]

> "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

Hardship to third parties is taken into account,[189] as is benefit to third parties, or to the public (*Attorney-General v Guardian Newspapers Ltd* [1987] 3 All ER 316 (Ch)).

[1828] An interlocutory injunction may be discharged if it transpires (before trial) that it was granted upon an erroneous legal basis, that is, when subsequent decisions alter the law as it stood at the time the injunction was given. A plaintiff "has no built-in right to the continuance of the injunction which it has obtained after it has become apparent that it was founded on a decision which was wrong in law."[190] Interlocutory injunctions can be varied or discharged before trial, and third parties adversely affected have standing to apply.[191]

188 This statement was approved in *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, Lord Jauncey at 683.

189 *Hartlepool Gas & Water Co v West Hartlepool Harbour & Railway Co* (1865) 12 LT 366, Kindersley V-C at 368 (perpetual injunction); *Attorney-General v Guardian Newspapers Ltd* [1987] 3 All ER 316 (Ch). See also *Patrick Stevedores v MUA* [1998] 195 CLR 1 at 41-43.

190 *Regent Oil Co Ltd v J T Leavesley (Lichfield) Ltd* [1966] 2 All ER 454, Stamp J at 458.

191 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1980) 44 FLR 88, Northrop J at 99 (FC Fed Ct); *R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, Kerr J at 157; *Z Ltd v A-Z and AA-LL and AA-LL* [1982] QB 558 at 588.

Interlocutory mandatory injunctions

[1829] Jurisdiction exists to grant an interlocutory mandatory injunction,[192] but the court will be reluctant to do so.[193] In some instances, it is appropriate to restore the parties to the position which prevailed before the defendant took some wrongful act. In a case involving an infringement of a right of light, a defendant was ordered to pull down a building which had been hurriedly constructed to obtain an advantage after service of the writ.[194]

It has been said that the plaintiff's case must be very strong when applying for an interlocutory mandatory injunction, and the court will need a high degree of assurance that it will later appear that the order was correctly granted.[195] However such statements have more recently been described as mere guidelines or useful generalisations rather than independent principle.[196] The weight of authority now favours a more consistent approach to both prohibitory and mandatory interlocutory injunctions alike.[197] It has been said that an interlocutory mandatory injunction would be more likely to issue where the defendant was compelled, not to embark upon a fresh course of conduct, but as here, to revert to a course of conduct pursued before the occurrence of the acts or omissions which provoked the litigation.[198] In *Parker v Camden London Borough Council* [1986] Ch 162, an interlocutory mandatory injunction was granted to compel a local authority to remedy a breach of a covenant to repair. It appeared that there was a risk to the health of the tenants of the authority if the order were not made: boilers had broken down, depriving the tenants of heating and hot water.

192 *Bonner v Great Western Railway Co* (1883) 24 Ch D 1, Fry LJ at 10 (CA).

193 *Blakemore v Glamorganshire Canal Navigation* (1832) 1 My & K 154; 39 ER 639; *Ryder v Bentham* (1750) 1 Ves Sen 543; 27 ER 1194; *Parker v Camden London Borough Council* [1986] Ch 162.

194 *Daniel v Ferguson* [1891] 2 Ch 27 (CA). So too where service of the writ has been evaded by the defendant: *Von Joel v Hornsey* [1895] 2 Ch 774 (CA).

195 *Queensland v Australian Telecommunications Commission* (1985) 59 ALJR 562, Gibbs CJ at 563 (HC), relying on Megarry J in *Shepherd Homes Limited v Sandham* [1971] Ch 340 at 351.

196 Hoffman J in *Films Rover International Limited v Cannon Films Sales Limited* [1987] 1 WLR 670, cited with approval by Gummow J in *Businessworld Computers Pty Limited v Australian Telecommunications Commission* (1988) 82 ALR 499, who eschewed the requirement of a "high degree of assurance" or a higher standard than normal.

197 *AV Jennings Limited v First Provincial Building Society Limited* (1996) ATPR 41-494, Lehane J at 42,188. See also *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120 Heerey J at [35].

198 Gummow J in *Businessworld Computers Pty Limited v Australian Telecommunications Commission* (1988) 82 ALR 499 at 503.

Injunctions pending appeal

[1830] Where an application for an interlocutory injunction has failed, the judge at first instance nonetheless has a discretion to grant a limited injunction pending the hearing of the appeal. Where a limited injunction of that kind is sought, the question is whether the judgment is such that the successful party ought to be at liberty to act despite the pending appeal. In *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261,[199] an application for an interlocutory injunction was dismissed, whereupon the plaintiffs successfully applied ex parte for an injunction in the same terms pending an appeal by the plaintiffs. It was observed that:[200]

> "A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal."

In *Attorney-General v Jonathan Cape Ltd* [1976] 1 QB 752, an undertaking was given to the court by a successful defendant not to publish allegedly confidential material for a short period pending a decision by an unsuccessful plaintiff whether to appeal.

Appellate courts are reluctant to interfere with interlocutory orders awarding or refusing interlocutory injunctions, since they involve exercises of discretion and matters of practice and procedure.[201]

Undertakings as to damages

[1831] A plaintiff who is successful in obtaining an interlocutory injunction is ordinarily required to give an undertaking as to damages, in order to protect the defendant. The long form of the undertaking is that the plaintiff "abide by any order which this Court may make as to damages, in case this Court shall be of the opinion that the defendant shall have sustained any, by reason

199 See also *Polini v Gray* (1879) 12 Ch D 438 (CA); *Silver Peak Mines Ltd v Williams* (1916) 33 WN (NSW) 31; *Jesasu Pty Ltd v Minister for Mineral Resources* (1987) 11 NSWLR 110; *Orion Property Trust Ltd v Du Cane Court Ltd* [1962] 3 All ER 466.

200 *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261, Megarry J at 268. See also *Chartered Bank v Daklouche* [1980] 1 All ER 205 (extension of injunction pending appeal).

201 *Superstar Australia Pty Ltd v Coonan & Denlay Pty Ltd* (1981) 57 FLR 110; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; *Epitoma Pty Ltd v AMIE Union* (1984) 3 FCR 55.

of this order, which the plaintiff ought to pay".[202] Sometimes all that appears in the order of the court is that "the usual undertaking as to damages was given". The point of the undertaking is to protect the defendant should the defendant suffer damage as the result of an injunction which should not have been granted. The defendant's damages must flow from the injunction itself.[203] Such an undertaking does not necessarily mean that the defendant will obtain damages if the plaintiff is ultimately unsuccessful. For example, the ultimate failure of the plaintiff may be due to matters that arose after the grant of the interlocutory injunction (see *Ushers Brewery Ltd v P S King & Co (Finance) Ltd* [1972] Ch 148). Nonetheless, a lack of ultimate success will often mean that the injunction should not have been granted, and that the defendant should obtain damages[204] by the enforcement of the undertaking. Conversely, a defendant can obtain damages by way of the undertaking in some cases where the plaintiff is ultimately successful, for example if the plaintiff suppressed material facts when the injunction was obtained.[205]

The undertaking can be in favour of the defendant, and even third parties not joined in the proceeding (*Z Ltd v A-Z and AA-LL* [1982] QB 558). The undertaking can be required to be secured,[206] and can possibly be accepted from a third party.[207] The undertaking is usually that of the plaintiff personally. Where a plaintiff is outside the jurisdiction, the undertaking is often accepted from the plaintiff's solicitor (*Anglo-Danubian Co Ltd v Rogerson* (1867) LR 4 Eq 3). The nature of the undertaking is that it is given to the court, and is not a contract between the plaintiff and defendant. Hence the party which has given the undertaking can apply to be released from it. In exceptional cases, an injunction may be granted without an undertaking [208] or where an undertaking is of little or no value. Arguably, in such

202 Ingpen A R, Bloxam F T and Garrett H G, *Seton's Judgments and Orders* (7th ed, London, Stevens & Sons, 1912), p 507.

203 *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249, Aickin J at 281-283.

204 *Victorian Onion & Potato Growers' Association v Finnigan (No 2)* [1922] VLR 819 (interim injunction); *Re Wood; Ex parte Hall* (1883) 23 Ch D 644 (CA).

205 The plaintiff is under an obligation not to mislead the court. See also *Smith v Day* (1882) 21 Ch D 421, Jessel MR at 425 (CA).

206 *Harman Pictures NV v Osborne* [1967] 2 All ER 324; *Lister v Cowdery* (1900) 21 LR (NSW) Eq 4.

207 *East Molesey Local Board v Lambeth Waterworks Co* [1892] 3 Ch 289, Kekewich J at 300 (CA).

208 *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502. See also *Attorney-General v Albany Hotel Co* [1896] 2 Ch 696, North J at 700. An undertaking was required from the Crown in right of the Commonwealth in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (interlocutory injunction to restrain breach of copyright).

cases, the plaintiff's case should be strong.[209] Where no undertaking has been provided, damages are not available for loss caused by an interlocutory order that ought not to have been made (*Bond Brewing Holdings Ltd v National Australia Bank Ltd (No 2)* (1990) 8 ACLC 403).

Interim injunctions

[1832] An interim injunction is one that is usually expressed to last until a future date. It is to be contrasted with an interlocutory injunction which is expressed to last until the final hearing and determination of the dispute in question. The distinction between them is not one of substance, and the considerations that govern interlocutory injunctions also govern interim injunctions. However, some matters are particularly relevant to interim injunctions.

First, an interim injunction is often sought ex parte, as a matter of urgency, where some imminent damage to the rights of the plaintiff is anticipated. In those circumstances, it is usually appropriate to give the plaintiff interim protection only, in the sense that interlocutory relief ought not to be granted before both sides have been heard, or have been given an opportunity to be heard.

Secondly, if an ex parte application is made, the plaintiff is under an obligation to make a full and fair disclosure of all the material facts.[210] Materiality is to be determined by the judge hearing the application, and not by the plaintiff or the plaintiff's legal advisers (*Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188 at 192). The applicant must make proper inquiries before making the application, and hence the duty of disclosure includes material facts known to the plaintiff and material facts that would have been known had proper inquiries been made.[211] What constitutes proper inquiries depends upon the circumstances, including the nature of the applicant's case, the orders sought, the probable effect of the orders upon the defendant, the degree of legitimate urgency and the time

209 *Donnelly v Amalgamated TV Services* [1998] 45 NSWLR 570 at 575-6, where Hodgson CJ in Eq described an injunction as the only satisfactory remedy to prevent the probable knowing participation by the defendant media company in a serious abuse by the police of their powers under a search warrant.

210 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, Isaacs J at 681. The same rule applies to an application to discharge or dissolve an ex parte interim injunction: *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* [1988] ATPR 49,783.

211 *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188 at 192.

available for the making of inquiries (at 192). Where the plaintiff has not complied with the duty of full and frank disclosure, the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty" (*Bank Mellat v Nikpour* [1985] FSR 87, Donaldson J at 91 (CA)). The court has a discretion regarding the order to be made where there is a lack of full and frank disclosure. It may be appropriate to discharge the order obtained immediately. In that respect, it is important but not decisive for the plaintiff to show that the non-disclosure was innocent, "in the sense that the fact was not known to the applicant or that its relevance was not perceived" (*Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188 at 193). Alternatively, the court may continue the order or make a new order on terms, including an order as to costs, which may well happen if, in the case of an innocent non-disclosure, an injunction could properly have been granted if all the material facts had been disclosed.[212]

Ordinarily, an injunction obtained ex parte will be dissolved or set aside upon proof that the plaintiff was guilty of a substantial non-disclosure.[213] Where an ex parte injunction has been dissolved, the plaintiff is at liberty to make a fresh application.[214] There may be a duty cast upon a plaintiff who has obtained an ex parte injunction, at least in the case of a Mareva order,[215] to bring to the attention of the court material matters which arise after the injunction has been granted.[216]

Equitable defences

[1833] Where an interlocutory or an interim injunction is sought, equitable defences such as unclean hands, delay, waiver, acquiescence, release and estoppel are relevant. The general equitable doctrines regarding these defences are considered in detail in Chapter 29: "Equitable Defences". Where delay is

212 *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc* [1988] 3 All ER 178 at 181-183 (Mareva order).

213 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, Isaacs J at 682; *Ali & Fahd Shobokshi Group Ltd v Moneim* [1989] 2 All ER 404, Mervyn Davies J at 414; *Behbehani v Salem* [1989] 2 All ER 143. So too if there has been a positive misrepresentation: *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384; *Bentley v Nelson* [1963] WAR 89 (FC). See also Spry I C F, *Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), pp 511-514. But see *Dormeuil Freres SA v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197, especially Browne-Wilkinson V-C at 201.

214 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, Isaacs J at 683; *Hilton v Lord Granville* (1841) 4 Beav 130; 49 ER 288; *Barneys Blue-Crete Pty Ltd v Australian Workers' Union* (1979) 43 FLR 463.

215 On Mareva orders, see above, Chapter 20: "Mareva Injunctions".

216 *Commercial Bank of the Near East plc v A B C and D* [1989] 2 Lloyd's Rep 319, Saville J at 323.

accompanied by a prejudice to the defendant or third parties, there is a basis for denying interlocutory relief.[217] It is not clear whether mere delay is itself sufficient to deny relief. In a case in which there was a delay of 12 weeks in applying for an interlocutory injunction to prevent the closing of a school, the delay was regarded as substantial, but not fatal.[218] The issue was stated to be whether the delay had made it unjust to grant the injunction claimed. Delay may suggest that the plaintiff's complaints are not as serious as the plaintiff claims,[219] but it may be explicable, for example, because of the time needed to prepare for a complicated application,[220] or because of a lapse of time during which the plaintiff had to find evidence,[221] or because of an initial misapprehension of the plaintiff caused by the defendant.[222] It may also be explicable because of time spent awaiting legal advice (*Baulkham Hills Shire Council v A V Walsh Pty Ltd* [1968] 3 NSWR 138). Nonetheless, it has been said that considerable delay alone can be enough to lead to the denial of injunctive relief,[223] particularly interim relief (*Wilmot Breeden Ltd v Woodcock Ltd* [1981] FSR 15 (Ch)).

COMPLIANCE WITH INJUNCTIONS

[1834] Injunctions must be complied with strictly. Where a person is bound by an injunction, that person is under an obligation to do all within her or his power to comply with the injunction notwithstanding expense or inconvenience, and a failure to do so constitutes a breach of the injunction.[224] The spirit of the

217 *Wood v Sutcliffe* (1851) 2 Sim NS 163; 61 ER 303; *Magna Alloys & Research Pty Ltd v Ten-Haaf* [1978] Tas SR 136; *Borough of Moracombe & Heysham v Mecca Ltd* [1962] RPC 145 (Ch).

218 *Legg v Inner London Education Authority* [1972] 3 All ER 177, Megarry J at 191. See also *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513, Ungoed-Thomas J at 527 (delay of six weeks considered damaging to plaintiff); *South Sydney Municipal Council v Hadzinickitas* (1977) 35 LGRA 159.

219 *Ware v Regent's Canal Co* (1858) 3 De G & J 212, Lord Chelmsford LC at 230; 44 ER 1250.

220 As in *Legg v Inner London Education Authority* [1972] 3 All ER 177.

221 *Coles v Sims* (1854) 5 De GM & G 1, Knight Bruce LJ at 8; 43 ER 768.

222 *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 528; 70 ER 220.

223 *Spencer v Silva* [1942] SASR 213; *White v Taylor* (1874) 8 SALR 1. It has also been said that relief should be sought promptly: *Sherwell v Combined Incandescent Mantles Syndicate Ltd* [1907] WN 211 (CA); *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49.

224 *Plumbers & Gasfitters Employees Union of Australia v John Holland Constructions Pty Ltd* [1988] ATPR 49,136; *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146 at 153-154; *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149; *CS Lewis v Pontypridd* (1895) 11 TLR 203; *Harding v Tingey* (1864) 10 LT 323. Cf *ANZ Banking Group Ltd v Bank of Melbourne Ltd* (unreported, SC Vic, Ashley J, 26 June 1995).

injunction must be complied with as well as the letter,[225] and it is a contempt of court to do or fail to do any act which may result in a breach of an injunction.[226] It is also a breach of an injunction for any person to be party to an arrangement designed to confound the purpose of the injunction.[227]

225 *Ellam v H F Martin & Co* (1898) 68 LJ Ch 120 at 125 ("The Court will not for a moment tolerate a breach of an injunction, but it will always enforce observance of its orders, and will not allow itself to be tricked or trifled with"); *Grand Junction Railway Co v Dimes* (1849) 17 Sim 38; 60 ER 1041; *Attorney-General v Great Northern Railway Coy* (1950) De G & Sm 75 at 92; 64 ER 741.

226 *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 99. The standard of proof for civil or criminal contempt is that of beyond reasonable doubt: *Witham v Holloway* (1995) 69 ALJR 847, where there is a discussion of the differences between the two kinds of contempt.

227 *Cities Service Oil v Menard* (1960) 24 DLR (2d) 495. Third parties who are privy to the breach and the arrangement are also in contempt. See further on the nature of the liability of third parties *Seaward v Paterson* [1897] 1 Ch 545; *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; *Witham v Holloway* (1995) 69 ALJR 847; *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 395.

CHAPTER NINETEEN

ANTON PILLER ORDERS

Robertson Wright

INTRODUCTION

[1901] An Anton Piller order is an order which may be made for the preservation of property[1] which is the subject of proposed or pending proceedings,[2] or documents and other property which relate to any issues arising in those proceedings.[3] The order derives its name from the decision of the English Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55. To achieve its purpose, an Anton Piller order requires the respondent to whom, or to which, it is directed, to permit the persons specified in the order to enter upon his, or its, premises, and to inspect, take copies of, and to remove, specified material, or classes of material, indicating where appropriate, documents, articles, or other forms of property.[4] In addition, an Anton Piller order may require the respondent to disclose to the applicant the whereabouts of the documents or property and the identity of the persons from whom such documents or property were acquired and to whom they were supplied.[5] An Anton Piller

1 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 76.

2 An Anton Piller order may even be made after judgment for the purpose of eliciting documents which are essential for execution and which would otherwise be unjustly denied to the judgment creditor: *Distributori Automatici Italia SpA v Holford General Trading Co Ltd* [1985] 3 All ER 750.

3 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 71; *Yousif v Salama* [1980] 1 WLR 1540 at 1542. In *EMI (Australia) Ltd v Bay Imports Pty Ltd* [1980] FSR 328 at 332, it was held that the relief should be limited to property in relation to which the final relief was sought or which might assist the applicant's claim for final relief.

4 *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545, Powell JA at 547. See also *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 60 and *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 71.

5 While a provision requiring a respondent to disclose such information may not be required for the preservation of the subject matter of, or evidence in, the proceedings, the inclusion of such a provision is based on the principle in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133: *Golf Lynx v Golf Scene Pty Ltd* (1984) 59 ALR 343 at 349-352; *Sony Corp v Anand* [1981] FSR 398 at 402. See also *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 71; *Stewart v Miller* [1979] 2 NSWLR 128.

order is an extraordinary remedy[6], designed to obtain, and to preserve, vital evidence pending the final determination of the applicant's claim in the proceedings, in a case in which it can be shown that there is a high risk that, if forewarned, the respondent would destroy or hide the evidence, or cause it to be removed from the jurisdiction of the court.[7] For that reason, the application is made ex parte, in the absence of the respondent,[8] and, if necessary, the court may be closed while the application is heard.[9] Anton Piller orders have been made in a wide variety of cases (*Chappell v United Kingdom* [1989] FSR 617 at 622).[10] The majority, however, have been granted in proceedings involving infringement of patents, trade marks or copyright, misleading or deceptive conduct, breach of confidentiality or passing off. Anton Piller orders are often made at the same time as, and in support of, a Mareva injunction (*Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38 at 71).

JURISDICTION AND NATURE

[1902] Superior courts of record have power to make Anton Piller orders in their inherent jurisdiction (*Simsek v Macphee* (1982) 148 CLR 636 at 640-641).[11] However, in relation to the Federal Court and

6 Courts have repeatedly emphasised the extraordinary and draconian nature of the remedy. For example, in *Bank Mellat v Nikpour* [1985] FSR 87 (CA) at 92, Donaldson LJ described Anton Piller orders as one of the law's "nuclear weapons." See also *Microsoft Corporation v Goodview Electronics Pty Ltd* (1999) 46 IPR 159, in which Branson J said that the order will only be made in "exceptional circumstances".

7 *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545, Powell JA at 547. *Rank Film Distributors Ltd v Video Information Centre* [1981] 2 WLR 668 at 672, 677; *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 61.

8 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 61; *Gianitsios v Karagiannis* (1986) AIPC 90-321 at 36,975; *Chappell v United Kingdom* [1989] FSR 617 at 621. In *Chrysalis Records Ltd v Vere* (1982) 43 ALR 440, Shepherdson J made Anton Piller type orders but noted at 447: "[T]his application is not of a true *Anton Piller* type, in that the matter is on short notice and was raised in argument before me."

9 *Golf Lynx v Golf Scene Pty Ltd* (1984) 59 ALR 343 at 353; *Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38 at 71.

10 Examples of non-intellectual property cases where Anton Piller orders have been made include: *Emanuel v Emanuel* [1982] 1 WLR 669; *BPA Industries Ltd v Black* (1987) 11 NSWLR 609; and *Talbot v Talbot* (1995) FLC 92-586.

11 Anton Piller orders have been made in Australia in various cases including the following reported decisions: *EMI (Australia) Ltd v Bay Imports Pty Ltd* [1980] FSR 328; *Golf Lynx v Golf Scene Pty Ltd* (1984) 59 ALR 343; *Cope Allman (Marrickville) v Farrow* (1984) 3 IPR 567; *Polygram Records Pty Ltd v Monash Records (Australia) Pty Ltd* (1985) 10 FCR 332; *Gianitsios v Karagiannis* (1986) AIPC 90-321; *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 11 FCR 478; *BPA Industries Ltd v Black* (1987) 11 NSWLR 609; *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34; *Mazur v Mazur* (1992) FLC 92-305; *Talbot v Talbot* (1995) FLC 92-586. See also *VN International Video Pty Ltd v West End HK TVB Video* (1995) AIPC 91-214; *Interest Research Bureau Pty Ltd v Interest Recount Pty Ltd* (1997) 38 IPR 468; *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545.

courts of limited statutory jurisdiction, it may be more correct to speak of the power to make such orders as being within the court's implied jurisdiction.[12] This power is in addition to express powers to grant injunctive relief conferred by statute and the powers conferred by the Rules of Court of the various Commonwealth and State courts for the making of orders for the preservation and inspection of property (*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623ff).

An Anton Piller order is to be distinguished from a search warrant, despite the superficial similarities between the two. A search warrant issued under statute authorises, for the purposes of criminal investigations, an invasion of premises and the search for and seizure of documents and other property without the consent of the persons entitled to possession of the premises, documents and property (*George v Rockett* (1990) 170 CLR 104 at 110). Except in the case of a warrant issued for the purpose of searching a place for stolen goods, the common law refuses to countenance the issue of search warrants at all and refuses to permit a constable or government official to enter private property without the permission of the occupier (at 110). An Anton Piller order does not authorise the applicant or her or his representative or any other person to enter or search premises against the respondent's will, nor does it permit the applicant or any other person to use force to enter (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 60). An Anton Piller order operates by ordering the respondent to permit the applicant or its representatives to enter, search and sometimes take property into custody,[13] and, provided the order is not a nullity, the respondent will be guilty of contempt if he or she refuses to comply by withholding permission.[14]

[1903] As an Anton Piller order is an in personam order,[15] it ought not be made against a person over whom the court has no jurisdiction (*Altertext Inc v Advanced Data Communications Ltd* [1986] FSR 21 at 26). Where the power to make an Anton Piller order against a foreign respondent is founded upon the granting of leave to serve out of the jurisdiction, the order ought not be executed until the foreign respondent has been given the opportunity to apply to set aside the leave to serve (at 26-27).

12 See the discussion of the Federal Court's power to grant Mareva injunctions in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623ff. As to the power of the Family Court of Australia see *Talbot v Talbot* (1995) FLC 92-586 at 81,804-5.

13 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 60.

14 *Wardle Fabrics Ltd v G Myristis Ltd* [1984] FSR 263 at 271-275; *Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150 at 153.

15 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 62.

Nonetheless, a court has power to order a person over whom it has jurisdiction to permit the search of premises and the seizure of documents or other property located outside the territorial jurisdiction of the court (*Cook Industries Inc v Galliher* [1979] Ch 439).[16] An Anton Piller order has been made against a respondent in a representative action, so as to bind all the respondents so represented until the order is modified or discharged.[17]

REQUIREMENTS

[1904] An Anton Piller order should only be made when there is a paramount need to prevent a denial of justice to the applicant, as the making of such an intrusive ex parte order even against a guilty respondent is contrary to normal principles of justice (*Lock International plc v Beswick* [1989] 3 All ER 373 at 384). Before an Anton Piller order will be made, the applicant is required to satisfy the court that:[18]

- the applicant has an extremely strong prima facie case;
- the damage, potential or actual, must be very serious for the applicant; and
- there is clear evidence that the respondent has in her or his possession documents or other property relevant to the proceedings, and that there is a real possibility[19] that, if the respondent is forewarned, he or she may destroy such material.

The granting of an Anton Piller order involves the exercise of a discretion by the courts (*Interest Research Bureau Pty Ltd v Interest Recount Pty Ltd* (1997) 38 IPR 468 at 473). An Anton Piller order should not be made where an order for delivery up or preservation of the documents or other property is likely to be

16 An example where a court in its discretion refused to exercise such a power is *Protector Alarms Ltd v Maxim Alarms Ltd* [1978] FSR 442.

17 *EMI Records Ltd v Kudhail* [1985] FSR 36 at 37; *Tony Blain Pty Ltd v Jamison* (1993) 41 FCR 414 at 416 (although the order in that case was not technically an Anton Piller order, the situation is analogous).

18 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 62; *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 38. See also *Cope Allman (Marrickville) Ltd v Farrow* (1984) 3 IPR 567 at 574.

19 This will ordinarily require clear evidence of fraud, dishonesty or contumacy, or that the respondent's business is of a transitory nature: *Busby v Thorn EMI Video Programmes Ltd* (1984) 1 NZLR 461 at 466, 477; *Gianitsios v Karagiannis* (1986) AIPC 90-321 at 36,976. The risk of disobedience may be inferred from clear evidence of dishonest conduct in other respects: *Yousif v Salama* [1980] 1 WLR 1540; *Dunlop Holdings Ltd v Staravia Ltd* [1982] Com LR 3; *Lock International plc v Beswick* [1989] 3 All ER 373.

sufficient (*Lock International plc v Beswick* [1989] 3 All ER 373 at 384). An applicant will not be permitted to use an Anton Piller order as a means of finding out whether he or she has any, and, if so, what, case against the respondent (*Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] FSR 63 at 70).

An applicant for an Anton Piller order is required to make full disclosure of all material facts when applying for the order. Failure to comply, even innocently, with this obligation will, unless the court in its discretion otherwise decides, lead to a refusal or discharge of the order, even though there may be facts justifying its grant.[20] The nature of Anton Piller orders requires that the affidavits in support of applications for them ought to err on the side of excessive disclosure. In the case of material falling into the grey area of possible relevance, the judge, not the applicant's solicitors, should be the judge of relevance (*Columbia Pictures Inc v Robinson* [1987] Ch 38 at 77). In particular, any applicant seeking an Anton Piller order must place before the court all the information which he or she has relating to the circumstances of the respondent which it could be suggested points to the probability that, in the absence of the order, material which should have been available will disappear (*Jeffrey Rogers Knitwear Productions Ltd v Vinola (Knitwear) Manufacturing Co* [1985] FSR 184 at 189).

[1905] The position of the absent respondent will also be protected by the undertakings which the court almost invariably requires to be given by the applicant or her or his representatives before granting an Anton Piller order.[21] While the court will determine in each case what specific undertakings it requires, the following matters, which the Federal Court is required to take into account when Anton Piller orders are being considered,[22] provide a useful guide to some of the matters which should be covered by undertakings given by the applicant or conditions imposed by the court:

20 *Chappell v United Kingdom* [1989] FSR 617 at 622; *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682; *Dormeuil Freres SA v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197 at 199; *Bank Mellat v Nikpour* [1985] FSR 87. There is also a useful analysis of the authorities by Wilcox J, concerning whether there is a duty on an applicant for an Anton Piller order to make inquiries before making an ex parte application, in *Lego Australia Pty Ltd v Paraggio* (1993) 44 FCR 151 at 169-170.

21 *Booker McConnell plc v Plascow* [1985] RPC 425 at 442; *Chappell v United Kingdom* [1989] FSR 617 at 623.

22 *Federal Court Practice Note No 10* (1994) 45 FCR 8. This practice note appears to have been inspired by the comments of the Vice-Chancellor in *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 859-861.

a] in general, such orders should be permitted to be executed during business hours only;

b] the order and all relevant court documents should be served, and execution of the order supervised, by a solicitor other than a member of the firm of solicitors acting for the applicant in the proceedings;[23]

c] Alternatively, the applicant may be required to give an undertaking that independent legal advice will be made available to the occupier of the premises to which the order relates before the order is executed;

d] the solicitor supervising should prepare a written report on what occurred when the order was executed and a copy of such report should be served on each respondent and presented in court as soon as possible;

e] if the order directs an occupant of residential premises to permit a search of the premises and the applicant is aware that at the time of execution of the order the occupier is likely to be a woman, the solicitor supervising is to be a woman or accompanied by a woman;

f] the person to whom the order is directed should be advised of the right to obtain legal advice before the order is executed, provided the advice can be obtained promptly;

g] safeguards should be included to prevent the applicant in person from searching for and examining a trade rival's documents;

h] an inventory of items seized should be prepared, and the occupant given an opportunity to check the inventory and given a signed copy of the inventory before the items are removed;[24]

i] the period during which a person may be restrained from informing any other person (other than a solicitor) of the existence of the order should be as short as possible;

j] in some cases, it may be appropriate for the court to require that the material seized be delivered to an independent person to be held without disclosure to the applicant pending an inter partes hearing where the respondent may present argument that the material should not be disclosed to the applicant; and

k] if an independent custodian is to hold the seized material, the custodian may be required to give a written undertaking to retain the material without disclosure until further order.

23 In *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 the solicitor gave an undertaking that he would "remain at all times in charge of the exercise of the rights conferred" which included the right to "seize and retain property." As a result it was held that the supervising solicitor's duty in that case extended to ensuring that property seized remained in his control. The solicitor was held to have breached that undertaking by abandoning control when he allowed the property to pass into the hands of another person who was not even a party to the proceedings.

24 An "inventory" is a detailed, descriptive list of articles. Failure to prepare an adequate inventory when an undertaking to do so has been given will amount to contempt: *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 at 568.

It would also seem to be appropriate to ensure that the independent solicitor supervising should be a practitioner familiar with the workings of Anton Piller orders and the relevant decisions (*Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 861).

Typical examples of undertakings concerning additional matters which may be appropriate are as follows:[25]

a] the usual undertaking as to damages required in cases of interlocutory relief;

b] an undertaking by the applicant that all relevant documents, such as the affidavits and other documents relied upon by the court, the initiating process and the notice of the next hearing, will be served by the applicant's solicitors on the respondent at the time when the order is served by those solicitors on the respondent;

c] an undertaking by the applicant's solicitors:

- to offer to explain to the person served, fairly and in everyday language, the meaning and effect of the order, and to inform that person that he or she has the right to obtain legal advice before complying with the order or any part of it, provided such advice is obtained forthwith;
- to retain in their custody any items taken by or delivered to them under the order;
- to answer any question from the respondent as to whether an item is within the scope of the order;
- to prepare, before their removal from the respondent's premises, a list of the items taken;
- to ensure that the exercise of the rights under the order remains at all times under the control of a solicitor;
- not to use the documents and information obtained except for the purposes of civil proceedings in connection with the subject matter of the present dispute, without the consent of the owner of the documents or the leave of the court.[26]

25 *Chappell v United Kingdom* [1989] FSR 617 at 623; *Tony Blain Pty Ltd v Jamison* (1993) 41 FCR 414 at 416 (although the order in that case was not technically an Anton Piller order, the situation is analogous).

26 It might be argued that there is no necessity for such an undertaking because of the implied undertaking to the same effect which arises when a party obtains access to another's documents under compulsory process of the court: see *United States Surgical Corp v Hospital Products International Pty Ltd* (1982) *Ritchie's Supreme Court Procedure NSW*, Vol 2, Practice Decisions, para [13,037]; and *BPA Industries Ltd v Black* (1987) 11 NSWLR 609 at 610. However, in various cases, such express undertakings have been given as it is thought that they remove some of the problems with making orders which might otherwise require the respondent to incriminate herself or himself: see, for example, *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 11 FCR 478 at 490; *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 39 (where such an undertaking was offered); *Sony Corp v Anand* [1981] FSR 398 at 401. However, the inadequacy of such an undertaking to protect a respondent from self-incrimination was noted in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443. The form of the order may be inconsistent with the applicant having an entitlement merely upon the granting of the Anton Piller order to have access for the purposes of the litigation to the material seized: see *Bucyrus (Australia) Pty Ltd v ANI Mining Services Ltd* (1999) 45 IPR 643, Dowsett J at 644 [1].

In certain circumstances, the court may require an undertaking designed to ensure that independent legal advice will be available, on the spot, to persons named in the order, especially where the order requires those persons to deliver up what may be their own property (*Tony Blain Pty Ltd v Jamison* (1993) 41 FCR 414 at 416). In some cases, an order has provided that the independent solicitor supervising should also be available to give independent legal advice to the respondent when served with the order. While this may help to reduce the cost of executing Anton Piller orders for the applicant, it creates problems for the solicitor supervising, especially when it comes to reporting to the court. If the solicitor supervising is given any information while performing the role of independent legal adviser, that information will be privileged. However, in making the solicitor's report to the court, a conflict between the solicitor's duty to the court to make a full and proper report and the solicitor's duty to uphold the respondent's privilege and to keep any information conveyed confidential may well arise. Combining the roles of solicitor supervising and independent legal adviser to the respondent places intolerable burdens on the solicitor in question, especially where that solicitor's fees are being paid by the applicant. It appears that, as a general principle, such a course should not be adopted.

Depending on the circumstances, the applicant may also be required to provide security in support of her or his undertaking as to damages.[27]

FORM AND SCOPE OF THE ORDER

[1906] The order must be so drawn as to extend no further than the minimum extent necessary to achieve the preservation of the documents or other property which might otherwise be destroyed or concealed (*Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38 at 76). The appropriateness of any particular type of provision in an order will depend on the circumstances of each case.[28] For example, a provision requiring the respondent to deliver into the custody of the applicant's solicitors various specified documents or specified classes of documents as are in

27 *Golf Lynx v Golf Scene Pty Ltd* (1984) 59 ALR 343 at 353; *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 40; *Myring v Beale* (1899) 20 LR (NSW) Eq 6.

28 For examples of orders made see: *EMI (Australia) Ltd v Bay Imports Pty Ltd* [1980] FSR 328 at 328-329, as limited at 332; *Golf Lynx v Golf Scene Pty Ltd* (1984) 59 ALR 343 at 354; *Chappell v United Kingdom* [1989] FSR 617 at 625-626; *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 at 724-725; *EMI Ltd v Pandit* [1976] RPC 333 at 342-343; *Pall Europe Ltd v Microfiltrex Ltd* [1976] RPC 326.

the power, possession, custody or control of the respondent may be appropriate in situations where the documents or other property belong to the applicant, but may not be appropriate in other circumstances. In *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545, Powell JA at 548 it was held that the primary order should, as a minimum, specify, or deal with, the following:

1] the particular person or persons — whether by name or description — and the maximum number of such persons, to be permitted to enter;

2] the premises to which entry is permitted;

3] the times at which entry is to be permitted;

4] the particular purposes, as for example:

a] to search for, inspect and copy material alleged to infringe copyright or to constitute or to contain confidential information;

b] to remove identified material.[29]

The order should provide for the respondent to have an opportunity to consider and to take legal advice in respect of it, before being obliged to comply with it, and there should be reserved to the respondent liberty to apply in very short notice to discharge the order. Further the originating process should, in any event, be made returnable on short notice consistent with the respondent having an adequate opportunity to obtain legal advice and to prepare to apply to discharge, or to oppose the continuation of, the order and any associated relief.

A form of order providing that the applicant's representatives "be entitled to enter" instead of ordering the respondent to permit entry is defective (*Manor Electronics Ltd v Dickson* [1988] RPC 618 at 622). The order must not suggest that the applicant has any right to enter except with the respondent's permission (at 622). If the applicant's solicitor is to be accompanied by a person who has a particular role to play in searching for and identifying documents or other property, for example an expert witness, it is desirable that the person should be named in the order and that the order should provide for the person to be identified to the respondent by the solicitor who effects service (*Vapormatic Co Ltd*

29 As a general rule, removal should be permitted only where, under copyright law, or under general law, the material in question is the property of the applicant, or the order provides for the preparation of a detailed list of the items being removed and for the return of documents the subject of the list once copies have been made. The respondent should be given an adequate opportunity to check the list. When there is any dispute as to the title of the items removed, the order should provide for the safe custody of the items not to be returned, pending the return of any originating process: *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545, Powell JA at 548.

v Sparex Ltd [1976] 1 WLR 939). An Anton Piller order relating to specified computer programs or information recorded on a computer may include an order that the respondent print out material in readable form[30] or allow the information to be recorded on disk, the disks to be removed and the information to be copied.

The privilege against self-incrimination, where available, also constitutes a limitation on the nature and extent of the terms of an Anton Piller order. Where it is apparent from the applicant's evidence that an ex parte order effectively compelling production of documents or the provision of information will put the respondent in danger of self-incrimination, the court should not make such an order[31] and, if an order has been made in such circumstances, the court may set it aside and order that any documents and other things seized be returned (*Exagym Pty Ltd v Professional Gymnasium Equipment Co Pty Ltd* [1994] 2 Qd R 129).

EXECUTION OF THE ORDER

[1907] In enforcing an Anton Piller order the applicant must act with due circumspection and not act oppressively nor abuse her or his power, because of the draconian nature of the remedy (*Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55).[32] On the service and execution[33] of the order, the respondent should be informed of her or his rights and given an opportunity of considering the order together with the supporting documentation and of consulting a solicitor and, if the respondent wishes to apply to discharge the order, he or she must also be given an opportunity to do this.[34] If permission to enter is refused, no force should be used and the applicant's only remedy is to institute proceedings for contempt against the respondent (*Anton Piller KG Manufacturing Processes Ltd* [1976] Ch 55 at 61).

30 *Gates v Swift* [1982] RPC 339.

31 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380; *BPA Industries Ltd v Black* (1987) 11 NSWLR 609; *Tate Access Floors Inc v Boswell* [1991] Ch 512. The position in England has been altered by s 72 of the *Supreme Court Act* 1981 (UK), which withdraws the privilege against self-incrimination in certain proceedings, including proceedings for infringement of intellectual property rights and for passing off. There is no equivalent legislation in any jurisdiction in Australia. The problem has been addressed in a different way in England: see *IBM United Kingdom Ltd v Prima Data International Ltd* [1994] 1 WLR 719.

32 For a discussion of what does and does not amount to proper conduct in executing an Anton Piller order, see *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 82-84.

33 No warning is required prior to the execution of an Anton Piller order. A warning would defeat its very purpose: *Vietnam International Video D & D Inc v Tho Vinh Huynh* (1997) 40 IPR 163, Tamberlin J at 168.

34 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 61; *A B v C D E* [1982] RPC 509.

At the time of execution, the applicant should be accompanied by her or his solicitor (at 61).[35] The significance of the intervention of the solicitor in the execution of the order and in the undertakings given by the solicitor is that solicitors are officers of the court and, as such, are subject to the disciplinary powers of the court. A failure by a solicitor to comply fully with an undertaking given by her or him personally to the court will render the solicitor liable for contempt and may constitute professional misconduct (*Chappell v United Kingdom* [1989] FSR 617 at 623). Accordingly, if a solicitor is involved in the execution, the court can make an Anton Piller order with some confidence that the order will not be abusively enforced by the applicant.[36] There has been some doubt expressed as to the practical effectiveness of this regime (*Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 859-861). Such criticism has been acted upon by the Federal Court, which now requires that, generally, Anton Piller orders should be accompanied by undertakings or conditions taking into account the matters referred to in *Federal Court Practice Note No 10* (1994) 45 FCR 8.

It has been suggested that, in England, it is common practice for a police officer to be present, outside the premises, when an Anton Piller order is being executed, with a view to forestalling a breach of the peace.[37] This procedure would appear to be appropriate only in very rare cases where a breach of the peace might reasonably be anticipated, as the presence of the police is likely to give the impression to the respondent that the Anton Piller order is in effect a search warrant. In any event, if it is proposed to have a member of the police service present, this fact together with the evidence which would justify the police presence should presumably be disclosed to the court at the time of making the application (*Chappell v United Kingdom* [1989] FSR 617 at 626-628, 631).

In seeking and executing an Anton Piller order, the applicant should bear in mind the following guidelines suggested by Scott J in *Columbia Picture Industries Inc v Robinson* [1986] Ch 38 at 76-77:[38]

35 It is undesirable that the solicitor involved with the execution of the order should be personally connected with the applicant: *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 622. See also *Fila Canada Inc v Jane Doe and John Doe* (1996) 35 IPR 104, Reed J at 107-108 (Fed Ct Canada).

36 The unsatisfactory aspects of the position in which solicitors are put in this context are commented upon by Scott J in *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 75.

37 *Chappell v United Kingdom* [1989] FSR 617 at 624; *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 59.

38 The comments of Sir Donald Nicholls V-C in *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 859-861 on the execution of Anton Piller orders should also be borne in mind.

- Once the applicant's solicitors have satisfied themselves what material exists and have had the opportunity to take copies, the material ought to be returned to the owner. The material should not be retained for more than a relatively short while for that purpose.
- A detailed record should be made by the solicitors who execute the order of any material taken, before the material is removed.
- No material should be taken unless it is clearly covered by the terms of the order.[39]
- It is inappropriate that seized material, the ownership of which is in dispute, should be retained by the applicant's solicitors pending trial. If the material is to be kept from the respondent, it should be held by the respondent's solicitors subject to an appropriate undertaking being given by those solicitors.

If an Anton Piller order is executed in breach of its terms (for example, if it is not executed within the business hours specified in the order), interlocutory orders granted at the same time as the Anton Piller order and the Anton Piller order itself (if it is still capable of operating) may not be continued (*VN International Video Pty Ltd v West End HK TVB Video* (1995) AIPC 91-214 at 39,174). If there are any doubts about the terms of an Anton Piller order, it is not appropriate for the solicitors for the applicant to place an interpretation on the order which, incidentally, favours their client. The doubts or uncertainties should be resolved by approaching the court for clarification prior to execution (at 39,174).

USE OF INFORMATION OBTAINED

[1908] The general rule is that a party (or a representative of a party) who is permitted to inspect or copy a document of another person produced under compulsory process of the court in relation to pending proceedings is subject to an obligation not to use or permit to be used any such copy or any knowledge acquired from any such inspection otherwise than for the purposes of the proceedings, without the consent of the owner of the documents or the leave of the court.[40] The applicant for

39 It is wrong to remove material not covered by an Anton Piller order unless there is free and informed consent: see *JC Techforce Pty Ltd v Pearce* (1996) 138 ALR 522, Branson J at 526-7; and *Flocast Australia Pty Ltd v Purcell (No 3)* (2000) 176 ALR 354, Heerey J at 365 [41].

40 *United States Surgical Corp v Hospital Products International Pty Ltd* (1982) *Ritchie's Supreme Court Procedure NSW*, Vol 2, Practice Decisions, para [13,037]; *Kimberley Mineral Holdings Ltd (In Liq) v McEwan* [1980] 1 NSWLR 210; *Registrar of the Supreme Court v McPherson* [1980] 1 NSWLR 688; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Sony Corp v Anand* [1981] FSR 398.

an Anton Piller order gains access to, and copies of, documents in the respondent's possession or control under compulsory process of the court. Thus, as a matter of principle, the use which can be made of such documents or information derived from such an order should be restricted in the same way.

Indeed, the restricted use of documents obtained pursuant to an Anton Piller order has been compared to the restricted use of documents obtained pursuant to discovery. In *Crest Homes plc v Marks* [1987] AC 829 Lord Oliver said that an Anton Piller order is, inter alia, an order for discovery in advance of pleadings. It is clearly established that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents belonging to her or his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of her or his client. The material must not be used for any "collateral or ulterior purpose" (*Crest Homes plc v Marks* [1987] AC 829 at 853).[41] His Lordship also said that the implied undertaking could be released or modified if the party seeking the release demonstrated "appropriate" circumstances[42] and the court was satisfied that the release would not occasion injustice to the party from whom the documents had been obtained.

However, the position may be different where the information required to be provided is the names and addresses of the persons to whom the respondent has supplied and from whom the respondent has acquired the documents or other property the subject of the Anton Piller order. It has been held in England that, in the absence of an express undertaking limiting the use that can be made of documents or information obtained as a result of the execution of an Anton Piller order,[43] certain information obtained under an Anton Piller order can be used for the purposes of pursuing claims against third parties implicated in

41 This obligation, however, does not prevent the publication of evidence or the name of a party or witness that has been heard in an open court. That would require a specific order of the court: *Computer Interchange Pty Ltd v Microsoft Corporation* (1999) 88 FCR 438, Madgwick J at 442-443 [14] [18].

42 *Crest Homes plc v Marks* [1987] AC 829 at 854. For a discussion of appropriate or special circumstances see *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576 and *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 110 ALR 685, Wilcox J at 693. See also *Dart Industries Inc v Bryar & Associates* (1997) 38 IPR 389 for an application of these principles in the context of an Anton Piller order.

43 Such an undertaking is often given in an attempt to avoid some of the problems of self-incrimination raised in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380: *Sony Corp v Anand* [1981] FSR 398 at 401. However, it is not a complete solution to those problems: *Rank Film Distributors Ltd v Video Information Centre* at 443.

the same wrongdoing (*Sony Corp v Anand* [1981] FSR 398 at 402). In addition, it was suggested that there was probably no limitation which prevented information obtained under an Anton Piller order being used for the purposes of instituting or supporting criminal proceedings against third parties (at 403).[44]

Such a conclusion was limited to information that persons implicated, even innocently, in a tortious wrongdoing are bound to give concerning others involved in the wrongdoing,[45] and was justified on the basis that, where an Anton Piller order required a respondent to provide such information, the purpose of the order would be defeated if the general rule applied to restrict the use that could be made of documents or information derived from the execution of the order (*Sony Corp v Anand* [1981] FSR 398).

As a matter of practice, it would seem appropriate that if part or all of the Anton Piller order were to be based on the principle in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, that fact and the intended use to be made of the documents or information should be disclosed to the court. The court could then determine whether it required the applicant to give any undertaking to limit the use which could be made of any documents or information derived as a result of the execution of the order. Otherwise, the general obligation not to use the documents or information for any collateral purpose should apply.

In a situation analogous to that which arises under an Anton Piller order, the Federal Court has held that it has power to grant leave to permit information contained in an affidavit sworn and filed in compliance with an order of the court to identify sources of supply to be used in relation to inquiries outside Australia and in relation to possible breaches of proprietary rights which may exist under the laws of other countries. That power will only be exercised in special circumstances and where the release of the information will not occasion injustice to the party swearing the affidavit (*Levi Strauss & Co v Coulton* (1992) 25 IPR 312).

44 The extremely brief report of Warner J's decision in *General Nutrition Ltd v Pattni* [1984] FSR 403 gives no indication why he reached a conclusion contrary to that in *Sony Corp v Anand*.

45 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

REMEDIES OF THE RESPONDENT

[1909] A respondent, served with an Anton Piller order (especially if it contains an express reservation of liberty to apply),[46] can refuse to comply immediately and, instead, make an urgent application to have the order set aside.[47] However, a respondent who chooses this course does so at her or his peril (*Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 71). If the respondent is successful, no problems as a practical matter arise, although there may be a technical contempt (*Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150 at 153). If he or she fails, however, the respondent will be rendered liable to penalties for contempt of court (at 152). If the respondent fails and there is any reason to believe that, in the period between the time when the order was served and the time when the order was eventually complied with, the respondent has taken steps which would breach the order, the consequences to the respondent will be of the utmost gravity (*WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 at 726).

A respondent to an Anton Piller order, who wishes to seek to have the order set aside and does not wish to comply with the order prior to the hearing of her or his application, may attempt to protect her or his position by making an ex parte application to the court. Such an application would seek a variation of the order so as to allow the respondent to put all the documents and other property the subject of the order into the custody of the respondent's solicitors, subject to appropriate undertakings by those solicitors, pending the hearing of the application to set aside the Anton Piller order itself. In this way, the risk of contempt could be avoided. Even if no ex parte application were made, the respondent may put the documents and other property into the custody of her or his solicitors with the agreement of the applicant pending the hearing of an application to discharge the order. However, this agreement would not eliminate any contempt. If there were no agreement by the applicant, the degree of any possible contempt may be reduced in any event if the respondent took steps to preserve the documents or other property pending the hearing of her or his application to discharge.

46 It would seem reasonable to assume that a court would hold that there was an implied reservation of liberty to apply if this was not expressly provided for in the order.

47 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 at 725; *Coca-Cola Co v Gilbey* [1995] 4 All ER 711.

Alternatively, the respondent can comply with the order as best he or she can and subsequently seek to have the order discharged. This may not be entirely futile as the order may not have been fully executed, or the applicant may be ordered to return documents, copies or any other property seized, if the order has been executed. In any event, the discharge of the order may be a preliminary to enforcing the applicant's undertaking as to damages.[48]

Whenever the application is made, the court will be very unlikely to discharge an Anton Piller order on an ex parte application by the respondent,[49] and the court is most likely to require that any application to discharge be supported by sworn evidence (*Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150).

In addition to the liberty to apply, the Anton Piller order will also usually contain a provision limiting the duration of the relief to a short period, such as a week, as the order will have been granted ex parte and is only provisional in nature.[50] On the expiry of that period, there will be an inter partes hearing at which the court will review the order and consider whether the relief should be continued. At that time, the respondent may also apply for the order to be varied or discharged (*Chappell v United Kingdom* [1989] FSR 617 at 624).

[1910] If the order is set aside, the respondent will be relieved from complying further with any injunctions contained in the order, and documents or other property seized under the order will be returned to the respondent.[51] Partial relief of a similar nature may also be granted by the court even if the application for discharge is not wholly successful (*Chappell v United Kingdom* [1989] FSR 617 at 624). Whilst the court may set aside the order even after its execution,[52] it will not do so unless discharge was applied for reasonably soon after execution and will serve some practical purpose.[53]

48 *Booker McConnell plc v Plascow* [1985] RPC 425 at 434; although discharge of the order is not a necessary precondition to obtaining damages: *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 87.

49 *Hallmark Cards Inc v Image Arts Ltd* [1977] FSR 150.

50 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 at 727; *Chappell v United Kingdom* [1989] FSR 617 at 624.

51 *Chappell v United Kingdom* [1989] FSR 617 at 624; *Exagym Pty Ltd v Professional Gymnasium Equipment Company Pty Ltd* [1994] 2 Qd R 129. Of course, where the property seized is the applicant's property that property will not usually be returned after the discharge of the order: *Interest Research Bureau Pty Ltd v Interest Recount Pty Ltd* (1997) 38 IPR 468.

52 *Booker McConnell plc v Plascow* [1985] RPC 425 at 434.

53 *Chappell v United Kingdom* [1989] FSR 617 at 624; *Booker McConnell plc v Plascow* [1985] RPC 425; *Columbia Picture Industries Inc v Robinson* [1987] Ch 38.

An Anton Piller order may be set aside on various grounds, including (*Chappell v United Kingdom* [1989] FSR 617 at 624):[54]

- There were no, or no sufficient, grounds for making the order.
- The applicant failed to disclose material facts when applying for the order (*Milcap Publishing Group AB v Coranto Corporation Pty Ltd* (1995) 32 IPR 34, Davies J at 35). [55]
- The order was improperly or oppressively executed.

In the absence of any statute removing or modifying the privilege against self-incrimination,[56] the respondent can also move to set aside the part of the order which requires the respondent to file and serve affidavits setting out from whom the respondent obtained and to whom the respondent supplied the documents or other property in question, if providing such information would tend to incriminate her or him.[57]

In lieu of or in addition to seeking to set aside the order, the respondent may seek damages pursuant to the applicant's undertaking as to damages, on the grounds that the order was improperly obtained or executed.[58] The order does not have to be set aside before the respondent can be awarded damages, and whether or not the order is set aside does not affect the level of damages to be awarded.[59] Whilst they may be determined earlier, claims by the respondent for damages are usually stood over until the substantive hearing.[60] The damages which may be awarded by the court in favour of the respondent, based on the undertaking as to damages given by the applicant, are primarily compensatory (*Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38 at 87). In England, it has been held that aggravated damages may also be awarded in cases where the excessive and oppressive manner in which the order was executed amounted to

54 For an example of circumstances where the court refused to set aside an Anton Piller order see: *Hotline Communications v Hinkley* (1999) 44 IPR 445, Warren J at 457-459.

55 There may be other consequences for failing to make full and frank disclosure: see for example *Pulse Microsystems Ltd v Safesoft Systems Inc* (1996) 36 IPR 331 (Court of Appeal of Manitoba) where the aggrieved respondents were awarded solicitor-and-client costs.

56 For example, the *Evidence Act* 1995 (Cth), s 187 (corporations). See also *Supreme Court Act* 1981 (UK), s 72.

57 *BPA Industries Ltd v Black* (1987) 11 NSWLR 609; *Cobra Golf Ltd v Rata* [1997] 2 All ER 150, Rimer J at 166.

58 *Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38; *Chappell v United Kingdom* [1989] FSR 617 at 624.

59 *Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38; *Chappell v United Kingdom* [1989] FSR 617 at 624.

60 *Dormeuil Freres SA v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197; *Chappell v United Kingdom* [1989] FSR 617.

contumely and affront (at 87). In Australia, there is no reason why both aggravated and exemplary damages should not be awarded in appropriate circumstances,[61] unless the undertaking as to damages is expressly limited to compensatory damages.[62]

The respondent can also claim damages for trespass if, for example, entry to the respondent's premises was gained by a trick or without real consent or if documents or other property were seized without justification under the order (*Chappell v United Kingdom* [1989] FSR 617 at 625). In addition, if the applicant or the applicant's solicitors are in breach of their undertakings or any implied obligation to the court, the respondent can proceed against them for contempt of court (at 625).

61 *Lamb v Cotogno* (1987) 164 CLR 1; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

62 For example, compensatory damages are all that are contemplated in the "usual undertaking as to damages" in the Federal Court: *Federal Court Practice Note No 3* dated 7 May 1990; and in the Supreme Court of New South Wales: *Supreme Court Rules*, Pt 28, r 7(2).

CHAPTER TWENTY

MAREVA ORDERS

François Kunc and Samantha Hepburn

INTRODUCTION

The nature of the order

[2001] A Mareva order is an interlocutory order issued under the inherent and statutory jurisdiction of the court for the primary purpose of ensuring that assets are preserved and the integrity of the court process is upheld (*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380). Generally, unsecured creditors are in no position to give any direction to debtors concerning the use or management of their assets. The Mareva order represents a special exception for creditors in that it entitles the applicant to restrain the defendant from dealing with assets under the defendant's control so as to remove them from the reach of the plaintiff. Given the significant impact that the Mareva order can have upon a defendant, courts should be very careful and act with a high level of caution in granting the remedy. The decision of the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 defined more precisely the source of the jurisdiction to award Mareva orders, namely, the prevention of abuse in the court process and the stultification of the administration of justice by the removal of assets from the plaintiff's reach. Kirby J also noted (at 428) that the Mareva order (his Honour actually preferred the description "asset preservation order") is often sought on an urgent basis and that in order to protected the process of the court from being frustrated, "a very large measure of latitude be allowed to judges as to when they consider it appropriate to provide such relief."[1]

The Mareva order is available against a wide range of different forms of property, including real and personal property, as well as

1 See also: Devonshire P "Mareva Injunctions and Third Parties: Exposing the Subtext" (1999) 62 (4) *Modern Law Review* 561.

tangibles and intangibles (*CBS United Kingdom Ltd v Lambert* [1983] 1 Ch 37 (CA)). Most Mareva orders will be issued ex parte, in the absence of the defendant, because it is the applicant who seeks to preserve the assets pending the final outcome of litigation. Given the fact that the purpose of the Mareva order is to uphold the integrity of the court process, the order may be issued by a court at any point ranging from prior to the commencement of litigation up until the date when judgment is handed down, provided the applicant can satisfy the requirements for granting this form of relief and the court is satisfied that it is an appropriate remedy in light of all the circumstances.

The Mareva order may be issued against non-parties as well as parties to the proceedings. Where the order is issued against parties to the proceedings, the purpose of the order is to prevent the frustration of an eventual court order. This was made very clear by the judgment of Wilson and Dawson J in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 617-618 where their Honours held that the Mareva order "represents a limited exception to the general rule that a plaintiff must obtain his judgment and then enforce it … . Its use must be necessary to prevent the abuse of the process of the court." Alternatively, where the order is issued against persons who are not parties to the proceedings, the aim of the order is to ensure the proper administration of justice.

[2002] The Mareva order is a derivation of the Mareva injunction, first awarded by Lord Denning MR in *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 — the name stemming from the subsequent decision of Lord Denning MR in *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1980] 1 All ER 213. The Mareva order stems from the equity jurisdiction and is akin to, but broader than, injunctive relief. The High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 concluded that to avoid confusion as to the true nature of such orders, it was best that henceforth, references to "Mareva orders" be substituted for "Mareva injunctions".

The Mareva order is an adjunct to litigation and where it is granted to a plaintiff, the plaintiff is obliged to proceed promptly with the action or apply to have the order discharged (*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 38).

The Mareva order is a very significant benefit to modern litigation, particularly in light of technological developments allowing movement of assets, in particular money, with seamless ease from one international jurisdiction to another. The Mareva

order may be granted by a court in circumstances where there is a real danger of assets, relevant to proceedings, being removed out of the jurisdiction or disposed of within the jurisdiction.[2] The Mareva order is continually utilised by modern courts to meet new situations and its aim, particularly within commercial matters, is to meet the individual needs of the case in order to further the purposes of justice (*Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 331 per Rogers AJA).

Source of jurisdiction

[2003] The power to grant a Mareva order in Australia is both statutory and a function of the inherent power of the court concerned. Although this dual basis has not been expressly recognised in all States (for example, Queensland and Western Australia), authorities propounding it have been followed without adverse comment. The weight of Australian authority is clearly to the effect that the basic source of power is the court's inherent jurisdiction to prevent abuse of its own process. The source of jurisdiction for the Mareva order has been a cause of controversy in Australia, and doubts about the power to grant it initially hampered its recognition.[3] The identification of both a statutory basis and a source of power in the inherent jurisdiction marks a difference between Australian law and the position in England. Furthermore, as the recent discussion by the Privy Council in *Mercedes Benz AG v Leiduck* [1995] 3 WLR 718[4] makes clear, it must be acknowledged that the precise juridical nature of the Mareva order remains a difficult question.

The English cases which established the court's power to grant the order based it upon the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 45(1),[5] which provided that the "High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do". This provision was substantially re-enacted as the *Supreme Court Act* 1981 (UK), s 37, with the important addition of s 37(3):

2 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Deane J at 623 (Mason CJ, Wilson and Dawson JJ agreeing), citing the comments of Lord Denning MR in *Prince Abdul Rahman Bin Turki Al Sudairy v Abu-Taha* [1980] 3 All ER 409 at 412. See also *Ballabil Holdings Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155, Street CJ at 160.

3 See, for example, *Pivovaroff v Chernabaeff* (1978) 16 SASR 329 (SC and FC); later overturned by *Devlin v Collins* (1984) 37 SASR 98 (FC).

4 See also Aitken L, "The Juridical Basis of the Mareva Injunction" (1996) 70 *Australian Law Journal* 109.

5 *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282 (CA); *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1980] 1 All ER 213n (CA).

> "The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."

This section confirmed the judge-made development of the Mareva order, and jurisdiction to grant the injunction has not since been doubted. However, where, for example, a detailed and comprehensive statutory scheme governs the entitlement to and recovery of moneys such as maintenance payments, the jurisdiction to grant a Mareva order may be expressly or impliedly excluded by the statute (*Department of Social Security v Butler* [1995] 1 WLR 1528 (CA)). In Australia, the initial doubts regarding jurisdiction to grant Mareva orders have now been overcome and the jurisdiction is now found as follows.

The Federal Court's power to grant a Mareva order derives from the express grant by the *Federal Court of Australia Act* 1976, s 23, "to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate".[6] Even in the absence of s 23, the Federal Court has power to make such orders in relation to matters properly before it, as an incident of the general grant of jurisdiction to it as a superior court of law and equity, to deal with such matters.[7]

In the Australian Capital Territory, jurisdiction is found in the *Supreme Court Act* 1933, s 34.[8]

In New South Wales, jurisdiction derives from the *Supreme Court Act* 1970, s 23, which gives the court all jurisdiction necessary for the administration of justice in New South Wales, or from the court's inherent powers.[9] The District Court of New South Wales

6 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, discussed in Eassie K, "The Mareva Injunction in the Federal Court" (1987) 3 *Commercial Law Quarterly* 19.

7 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612. See also *Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873 at 883-884. Strictly speaking, because the Federal Court is a creature of statute, it has incidental rather than inherent powers. See also *Hiero Pty Ltd v Somers* (1983) 68 FLR 171 (Fed Ct) and *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 39.

8 The *Supreme Court Act* 1933 (ACT), s 34, is the equivalent of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 45(1): see *Barisic v Topic* (1981) 58 FLR 262 (SC ACT), following *Balfour Williamson (Aust) Pty Ltd v Douterluingne* [1979] 2 NSWLR 884.

9 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264, the Court of Appeal at 270. See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Wilson and Dawson JJ at 617; Hodgekiss W, "Jurisdictional Basis of the Mareva Injunction in New South Wales" (1982) 56 *Australian Law Journal* 310.

has jurisdiction under s 46 of the *District Court Act* 1973, which gives that court jurisdiction in any action to grant any order which the Supreme Court might have granted if the action were proceeding in the Supreme Court.[10] The Industrial Commission of New South Wales has inherent jurisdiction to issue a Mareva order by virtue of its status as a superior court of record, notwithstanding the absence of any express statutory authorisation to issue such injunctions (*Wheeler v Selbon Pty Ltd* [1984] 1 NSWLR 555 (Industrial Commission)).

In the Northern Territory, jurisdiction is found in the *Supreme Court Act* 1979, s 69.

In Queensland, the jurisdiction has been confirmed as residing in the *Judicature Act* 1876, s 5(8), which is the equivalent of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 45.[11]

In South Australia, the jurisdiction to grant a Mareva order was initially denied (*Pivovaroff v Chernabaeff* (1978) 16 SASR 329 (SC and FC)). However, in *Devlin v Collins* (1984) 37 SASR 98, the court adopted the reasoning used in New South Wales[12] and primarily found jurisdiction in the inherent power of the court (*Devlin v Collins* (1984) 37 SASR 98, White J at 114 (FC)). Jurisdiction was also derived from the *Supreme Court Act* 1935, s 29(1).[13]

The Tasmanian equivalent is to be found in the *Supreme Court Civil Procedure Act* 1932, s 11(12).

In Victoria, jurisdiction was originally found only to be derived from the *Supreme Court Act* 1958, s 62(2), which empowered the court to grant an interlocutory injunction "in all cases in which it appears to the Court to be just or convenient that such order should be made".[14] Subsequently, it was held that the jurisdiction could also be "easily justified" from the court's inherent jurisdiction to control its own processes.[15] Any debate was ended by

10 *M & H J Webb Pty Ltd v Doherty* (unreported, Supreme Court New South Wales, Young J, 29 April 1994). See also *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435.

11 *Bank of New Zealand v Jones* [1982] Qd R 466 (FC). A Mareva order had previously been granted in Queensland in an unreported case which subsequently went to the High Court: *Hunt v B P Exploration Co (Libya) Ltd* (1979) 144 CLR 565.

12 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (CA).

13 *Devlin v Collins* (1984) 37 SASR 98, King CJ at 100 (Jacobs, Cox and White JJ agreeing); Zelling J at 104. This provision is the equivalent of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 45(1).

14 *Praznovsky v Sablyack* [1977] VR 114, Harris J at 115. See also *J D Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185, Lush J at 188.

15 *Pearce v Waterhouse* [1986] VR 603, Vincent J at 604 (no differences based on different sources of jurisdiction regarding extent of remedy or circumstances in which granted).

the introduction of the *Supreme Court Act* 1986, s 37(3), which gave a statutory basis to the grant of a Mareva order.[16] This provision is not, however, an exhaustive code of the circumstances in which a Mareva order would be granted. Rather, it has been regarded as an enabling provision (*National Australia Bank Ltd v Dessau* [1988] VR 521, Brooking J at 524).

In Western Australia, jurisdiction to grant Mareva orders arises from the *Supreme Court Act* 1935, s 25(9).[17]

AVAILABILITY

When available

[2004] A Mareva order may be sought at any time, subject to proof of the necessary elements.[18] Although it is most commonly sought as the first step in proceedings, the flexibility of the remedy and its underlying purpose have meant that a Mareva order may be available at all conceivable stages of litigation. Certain particular situations have been dealt with in the authorities.

A Mareva order may be available before a cause of action arises. Whether a plaintiff requires a vested cause of action before it will be granted is not entirely free from doubt.[19] However, an order will be made in at least two circumstances before the plaintiff can be said to have a complete cause of action. First, where an arbitration is pending, the court has power to grant a Mareva order where there is no primary proceeding before it, and the plaintiff does not propound a cause of action but is claiming money to which he or she may be entitled by reason of a favourable award in the pending arbitration (*Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274). Secondly, where the Commissioner of Taxation issues an assessment to additional tax, a Mareva order may be granted in favour of the Commissioner before the additional tax is payable.[20]

16 *Brereton v Milstein* [1988] VR 508, Murphy J at 514. This is the equivalent of the *Supreme Court Act* 1981 (UK), s 37(3).

17 *Sanko Steamship Co Ltd v D C Commodities (A/asia) Pty Ltd* [1980] WAR 51. This provision is the equivalent of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 45(1).

18 See below, paras [2009]-[2015].

19 See below, para [2010].

20 *Deputy Commissioner of Taxation v Sharp* (1988) 82 ACTR 1; following *Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274. See Hines M C, "Mareva Injunction: A New Weapon of the Commissioner" (1986) 15 *Australian Tax Review* 80.

A Mareva order may also be available during a stay of judgment. In *Commissioner of Taxation (Cth) v Goldspink* (1985) 82 FLR 21, the Supreme Court of New South Wales granted the Commissioner a Mareva order against a taxpayer who had obtained a stay of judgment, signed against the taxpayer by the Commissioner, for unpaid tax.

The Mareva order may in limited circumstances be available post-judgment, to aid the execution of a judgment. In *Cardile v LED Builders* [1999] 198 CLR 380, the majority joint judgment specifically noted that Mareva orders are not primarily interlocutory, as they may operate after the recovery of final judgment. However, they are impermanent in the sense that they exist purely to preserve assets and assist in the protection of methods of execution.[21] Nonetheless, care must be taken to ensure that such an order is within the jurisdiction of the relevant court. In *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, the majority of the High Court concluded that the District Court had no power under s 46 of the *District Court Act* 1973 (NSW) to grant a post-judgment Mareva order as the specific statutory powers which were conferred were limited to injunctions within "an action".[22]

A Mareva order will also lie in support of an order for costs. An order may be granted or continued in support of an order for costs or of any judgment or order of the court for the payment of money, whether or not the exact sum payable has been quantified at the date when the order is made and the order is sought.[23]

Against whom available

[2005] A Mareva order is available against any person susceptible to the court's jurisdiction who is in control of assets which the

21 See also (1999) 198 CLR 435 and *Weal v Bathurst City Council and Anor* [2000] NSWLEC 51 (15 March 2000).

22 See the minority judgments in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 of Kirby and McHugh JJ who noted that courts throughout the common law world accepted jurisdiction to make Mareva order which could extend to the protection or preservation of assets after judgment in an action. See also the decision in *Weal v Bathurst City Council and Anor* [2000] NSWLEC 51 (15 March 2000) which concluded that a court that has jurisdiction to hear proceedings has jurisdiction to grant a Mareva order.

23 *Jet West Ltd v Haddican* [1992] 2 All ER 545 (CA); following *Stewart Chartering Ltd v C & O Managements SA (The Venus Destiny)* [1980] 1 All ER 718 (QB). In *Brott v Drew* (1993) FLC 92-358, Kay J in the Family Court of Australia accepted that a solicitor, faced with a threat that a former client would leave the jurisdiction immediately on obtaining her property settlement, could seek a Mareva order against that former client in respect of his costs which were then being taxed. However, the order ultimately made by his Honour was to restrain the former client from leaving the jurisdiction without making adequate provision for security for the sum claimed by the solicitor. Whatever the basis for the order made by Kay J may be, it is respectfully submitted that it cannot be characterised as an exercise of the Mareva jurisdiction.

defendant could require to be applied in discharge of the judgment debt. While it is clear that an order may be granted against both local and foreign defendants, the question arises as to whether third parties, who are unconcerned in the proceedings between the plaintiff and defendant, can be restrained from dealing with assets under their control (*Ballabil Holdings Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155, Street CJ at 160 (CA)).

Where a Mareva order is granted against a party to proceedings, the purpose will be to prevent the abuse of a court's process. This rationale cannot be extended to third parties as they are not parties to the action and are, therefore, not in a direct position to frustrate or abuse the court process. Where a Mareva order is granted against a third party, the aim of the court is more generalised: with a third party order, the purpose of the court is to protect the integrity of the court processes once those processes have been set in motion, thereby ensuring the proper administration of justice by maintaining the status quo.[24]

A court will exercise care and caution when considering whether to grant any Mareva order, but will be particularly careful when deciding whether to grant such an order against a third party and it should not generally be granted without the applicant giving an undertaking as to damages (*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380). In *Frigo v Culhaci* [1998] NSWSC 393 the NSW Court of Appeal set aside a Mareva injunction on the grounds that no undertaking as to damages had been given. The court noted that the absence of an undertaking as to damages is a severe detriment to a defendant who, if proceedings fail, will be left without a remedy against the plaintiff with respect to any loss flowing from obedience to the injunction. In *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 the High Court approved of the comments made by the court in *Frigo v Culhaci* and concluded that care must be taken when considering whether to grant a Mareva order because where an undertaking as to damages is given for a Mareva order, and it turns out that the Mareva order should not have been granted, there can often be difficulties in quantifying and recovering damages under the undertaking.[25]

The general principles which a court should take into account in considering whether to grant a Mareva order against a third party

24 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 354; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380. For more recent decisions on this see: *Pacific Car and Truck Rentals Holdings Pty Ltd v Damianos* [2001] VSC 504; *Damianos & Multispan Constructions No 1 Pty Ltd v Portland (No 3)* [2001] NSWSC 1049.

25 See *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249, Aickin J at 260; affm by the Full Court of the High Court (1981) 146 CLR 306.

were set out by the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380. In that case the court set out two fundamental situations where a Mareva order may be issued:

- The third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including "claims and expectancies" of the judgment debtor or potential judgment debtor or,
- Some process, ultimately enforceable by the courts, is or may be available to the judgment creditor because of a judgment against that actual or potential judgment debtor whereby the third party may be obliged to disgorge property or otherwise contribute to the funds of the property of the judgment debtor, whether by the appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, in order to satisfy the judgment against the judgment debtor.[26]

In *Tomlinson v Cut Price Deli Pty Ltd* (unreported Federal Court 23 June 1995), Kiefel J held that an asset preservation order might be made against a non-party where it had become mixed up in the transaction and the non-party had actively participated in the deliberate removal of assets; for example, where the non-party is a company which the defendant controls (*LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65 at 78). In *Cardile v LED* the majority in the High Court approved of the decision in *Tomlinson* although the majority rejected the view that an independent cause of action against the non-party was required or that the defendant needed to have a proprietary interest in the assets of the non-party (Gaudron, McHugh, Gummow, and Callinan JJ at 57). For example, in *Clout v Anscor* [2001] FCA 709 Drummond J directed Mareva orders against all of the non-parties as he was satisfied not that there was a "cause of action, but rather," that there was an "arguable case" that the monies and assets held by these parties were subject to a constructive trust. Similarly, in *Yukong Line v Rendsburg Investments Corporation* [2001] 2 Lloyd's Rep 113 at 121 the Court of Appeal held that an interlocutory Mareva order is available against a "co-defendant against whom no direct cause of action lies, provided that the claim for the injuction is ancillary and incidental to the plaintiff's cause of action against that co-defendant." It is, however, important to exercise caution in this area and any order made against a non-party be issued on condition that proceedings be commenced against the non-party.[27] Nevertheless, it is important to exercise caution in this area and the High Court in *Cardile* noted that a Mareva order could be made on condition that proceedings be commenced against the

26 This test was applied by the Full Court of the Supreme Court in *Caboche v Southern Equities Corp Ltd* [2001] SASC 55.

27 This possibility was expressly alluded to by the Court in the *Cardile* decision.

non-party. In *Cardile v LED* the majority in the High Court approved the decision in *Tomlinson* although the majority rejected the view that an independent cause of action against the non-party was required or that the defendant needed to have a proprietary interest in the assets of the non-party (Gaudron, McHigh, Gummow and Callinan JJ at 57).[28]

[2006] Discretionary considerations are extremely relevant in determining whether to issue a third party Mareva order. It is particularly important for a court to consider whether proceedings may be available against the third party and if they are, why they have not been taken and whether the undertaking to commence such proceedings should be a pre-condition of the issuing of a Mareva order (*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380). In *Westpac Banking Corporation v Hilliard & Information Age Travel Pty Ltd* [2001] VR 187, the court made it clear that the reality of granting any Mareva order, but especially third party orders, is that they have a very significant effect upon the party involved; in a practical sense, the Mareva order operates as a very tight "negative pledge" species of security over property to which the contempt sanction is attached. The Mareva order requires a high degree of caution on the part of the court and, rightly or wrongly granted, may have the capacity to impair or restrict, just as much as an order appropriately granted may facilitate and ensure its due conduct. Indeed, the Mareva order is a drastic remedy which should not be granted lightly.[29]

Examples of Mareva orders against third parties include: where the third party holds assets on resulting trust for the defendant,[30] or where money "in commercial reality ... is family money [which the defendant] has at least as great an interest in" as the third party.[31] In *Vereker v Choi* (1985) 4 NSWLR 277, Clarke J held

28 See also *Cabouche v Southern Equities Corp Ltd* [2001] SASC 55 where non-parties were similarly enjoined.

29 These comments were made by the New South Wales Court of Appeal in *Frigo v Culhaci* [1998] NSWC 393 and were approved by the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

30 *Commissioner of Taxation (Cth) v Goldspink* (1985) 82 FLR 21 (SC NSW). See also *Deputy Commissioner of Taxation v Winter* (1988) 92 FLR 327 (SC NSW) (Mareva injunctions granted against third parties; arguable case that third parties held assets which in truth belonged to the defendant).

31 *Vereker v Choi* (1985) 4 NSWLR 277, Clarke J at 284; applied in *Gibb Australia Pty Ltd v Cremor Pty Ltd* (1992) 106 FLR 453 (SC ACT). See also the decision of the English Court of Appeal in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366. The latter decision is important for at least two reasons. First, it approved the reasoning of Mummery J in *T S B Private Bank International SA v Chabra* [1992] 2 All ER 245 (Ch). Secondly, it took up the House of Lords' analysis of *Siskina (Cargo Owners) v Distos Compania Naviera SA (The Siskina)* [1979] AC 210 in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 34 (see below, para [2010]), to propound the basis of a Mareva injunction against a third party as being an injunction incidental to and in aid of the enforcement of the plaintiff's substantive rights against the defendant, which rights usually, although not invariably, take the shape of a cause of action.

that the application of a Mareva order against third parties is an exception to the general rule, that it was a necessary pre-condition for an applicant seeking a Mareva order to establish a substantive cause of action.[32] *Vereker*'s case was relied upon by Mummery J in *T S B Private Bank International SA v Chabra* [1992] 2 All ER 245, where a Mareva injunction was granted to restrain the defendant from disposing of the proceeds of a sale of assets belonging to a company in which the defendant was the majority shareholder. The court, of its own motion, ordered the company joined as a second defendant and extended the Mareva injunction against it. While conceding that under English law this was an "exceptional" course, the court took this action on the basis that, while there was no cause of action against the company, the claim for the injunction was ancillary and incidental to the plaintiff's cause of action against the first defendant. Since the injunction against the first defendant alone was inadequate to protect the plaintiff, it was appropriate to grant the injunction in support of the existing legal right claimed against the first defendant. By virtue of the first defendant's control as majority shareholder over the defendant company, the decision is consistent with the principles in *Winter v Marac Australia*. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, Lord Mustill noted that the right to an interlocutory injunction which is incidental to, and dependant on, the enforcement of a substantive right usually although not invariably takes the shape of a cause of action. This approach was used by Hoffman LJ in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 to hold a wife of a judgement debtor liable to a Mareva injunction although no action had been brought against her specifically. The High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 concluded that the comments of Lord Mustill indicated that a Mareva order may be available against a third party but that the third party must ultimately be amenable in some way to the coercive process of the court — requiring property to be disgorged or to contribute in the satisfaction of a judgment against a debtor.

The most obvious example of an otherwise unrelated third party is a bank where the defendant has an account. Mareva injunctions can be granted against banks, which are sometimes joined as defendants only for that purpose. In cases of fraud, a bank can be joined (whether or not an injunction is sought against it in respect of the defendant's account) to obtain special discovery orders to enable the plaintiff to trace the flow of funds through the account.[33] If not joined as a party, the bank is given

32 See below, para [2010].

33 *Bankers Trust Co v Shapira* [1980] 3 All ER 353 (CA): see below, para [2019].

notice of the order made against the defendant. In accordance with the principles stated by the Court of Appeal in *Winter v Marac Australia*, a bank holding the defendant's accounts may properly be joined as a party or simply given notice of the injunction.[34]

In *Bank of Queensland Ltd v Grant* [1984] 1 NSWLR 409 at 414,[35] Clarke J drew a distinction in relation to the position of banks, namely that:

> "the third party [bank] subjected to the order held assets of the defendant. It goes without saying that it is a very different thing to enjoin a person from dealing with his own assets. Accordingly, even if the injunctions against banks were properly founded, I do not regard these cases as authoritative support for the making of the order."

The leading English authority is the Court of Appeal decision in *Z Ltd v A-Z and AA-LL* [1982] QB 558, which proposes that any persons with knowledge of the injunction must do what they reasonably can to preserve the assets, and are guilty of contempt of court as an act of interference with the course of justice if they assist in the disposal of the assets. This obligation arises even if the defendant does not know of, and has not yet been served with, the injunction. In the case of a bank, the injunction requires the bank to freeze the defendant's account (or any other of the defendant's assets held by it), and revokes the defendant's instructions in relation to it.

The degree of specificity required in relation to bank accounts in the order itself and the bank's rights of set-off and indemnity is discussed below.[36]

The leading judgment in *Z Ltd v A-Z and AA-LL* was delivered by Lord Denning MR (at 573), and at the core of his concern about the effect of Mareva injunctions on third parties was his Lordship's assertion that it operated against property rather than

34 Third parties, such as banks, may arguably be necessary to the resolution of the dispute, and able to be joined (or served out of the jurisdiction) on that basis. See, for example, *Supreme Court Rules* (NSW), Pt 8 r 7, Pt 10 r 1(1)(i). A third party affected by a Mareva injunction (whether by joinder or notice) will be allowed to seek a variation of the order and its costs: *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465, Parker J at 466 (QB). See also, *Sharp v Australian Builders Labourers' Federated Union of Workers (WA Branch)* [1989] WAR 138, Seaman J at 141-143.

35 See below at [2010] for a discussion of whether an accrued and vested cause of action is required.

36 See below, para [2020].

against persons. This is arguably inconsistent with basic equitable principles, and subsequent English authorities have gradually moved away from Lord Denning's approach. In *Babanaft International Co SA v Bassatne*,[37] Kerr LJ said that, although the passage in Lord Denning MR's judgment "headed 'Operation in rem' may well go too far in a number of respects, there cannot be any doubt that Mareva injunctions have a direct effect on third parties who are notified of them and who hold assets comprised in the order". Certainly it is very clear that a Mareva order does not deprive the party subject to its restraint either of title to or possession of the assets to which the order extends (*Re Ling; Ex parte Enrobook Pty Ltd* (1996) 142 ALR 8 at 92). This passage was itself to some extent criticised by Lord Donaldson MR (with whom Neill and Butler-Sloss LJJ agreed) in *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65. Referring to Kerr LJ's statement, Lord Donaldson MR said (at 83, original emphasis):

> "I know what was meant, but I am not sure that it is possible to have an 'in rem effect' upon persons whether natural or juridical and a Mareva injunction does not have any in rem effect on the assets themselves or the defendant's title to them. Nor does such an injunction have a *direct* effect on third parties. The injunction (a) restrains those to whom it is directed from exercising what would otherwise be their rights and (b) indirectly affects the rights of some, but not all, third parties to give effect to instructions from those directly bound by the order to do or concur in the doing of acts which are prohibited by the order. Whether any particular third party is indirectly affected, depends upon whether that person is subject to the jurisdiction of the English courts."

While his Lordship was speaking in the context of non-resident third parties, his comments are of general application. The comments by Lord Donaldson MR are directly consistent with the tenor of the High Court's analysis in *Cardile v LED Builders Pty Ltd* which made it clear that a Mareva order is an in personam order which severely restricts the ability of a defendant to deal with his or her assets but does not, in itself, deprive the defendant of any title or possession to those assets.[38]

37 [1990] Ch 13 at 25 (CA) (referring to *Z Ltd v A-Z and AA-LL* [1982] QB 558, Lord Denning at 573 (CA)).

38 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan JJ at 404. See generally: Tyree A, "Mareva Injunctions: The Third Party Problem" (1982) 10 *Australian Business Law Review* 375; Willoughby T and Connal S, "The Mareva Injunction: A Cruel Tyranny?" (1997) 19(8) *European Intellectual Property Review* 479.

[2007] The court is not bound to accept an assertion by a defendant or third party that the assets in question belong to the third party. The courts try to minimise the effect of Mareva orders on parties not involved in the principal dispute between plaintiff and defendant, particularly when an order is specifically sought against a third party. In *Bank of Queensland Ltd v Grant* [1984] 1 NSWLR 409 at 411, Clarke J observed that, "[i]n particular there has been a greater recognition of the invasion of the freedom and rights of innocent third parties resulting, in some cases, from the grant of Mareva injunctions." In *Bank of New Zealand v Jones* [1982] Qd R 466, the Full Court of the Supreme Court of Queensland expressed concern about making an order against the defendant husband that would affect the joint bank account he maintained with his third party wife. The court adverted to the probable answer that the order operated against the defendant personally and not against his property. The issue did not ultimately have to be determined because, during the hearing, the defendant's wife was joined as a defendant herself in respect of a substantive cause of action against her.

The court need not simply accept an assertion that an asset under the control of a third party, sought to be enjoined, is the property of that third party and unconnected with the defendant. The approach which has been adopted in Australia[39] is that given by the English Court of Appeal in *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747. The Court of Appeal held that, in those circumstances, a court would order a trial on the preliminary issue of ownership of the assets concerned. Lloyd LJ summarised the position as follows:

- Where a plaintiff invites the court to include within the scope of a Mareva order assets which appear on their face to belong to a third party, for example, a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant.
- Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene.
- In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party.

39 *Commissioner of Taxation (Cth) v Goldspink* (1985) 82 FLR 21, Lusher J at 29 (SC NSW); *McIntyre v Pettit* (1988) 90 FLR 196 (SC NSW).

- Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient (*SCF Finance Co Ltd v Masri* [1985] 2 All ER 747, Lloyd LJ at 753 (CA)).

In *TSB Private Bank International SA v Chabra* [1992] 2 All ER 24, Mummery J (at 253) referred to the *SCF Finance* case, noting that "that procedure, which is obviously applicable in the majority of cases, does not necessarily preclude a court in an appropriate case from joining the third party as a party to the proceedings and then making such orders as the court thinks fit in relation to that party".

Location of assets

[2008] A Mareva order may be granted to restrain a defendant from dealing with assets wherever located, and irrespective of whether those assets were ever within the jurisdiction, although an order affecting assets outside the jurisdiction will rarely be made. While the purpose of the order as a means of dealing with the free and rapid international movement of assets urges, that in appropriate cases, an order should be granted, preventing the disposition of assets outside the jurisdiction raises several difficult matters. Relevant issues are the traditional circumspection of Australian courts in asserting exorbitant jurisdiction, control of the court's process, the enforcement of its orders and the jurisdictional basis itself.

In *Hospital Products Ltd v Ballabil Holdings Pty Ltd* [1984] 2 NSWLR 662, Rogers J decided (at 668) that the court has power to grant an order affecting overseas assets, but that "the discretion needs to be exercised with great prudence and with a predisposition against the making of an order". On appeal, the court limited its finding in the *Hospital Products* case to the conclusion that there was jurisdiction to grant the injunction where the assets were within the jurisdiction at the time when the proceedings were commenced. The court did not address the wider question of assets that had never been in New South Wales.[40] Subsequent

40 *Ballabil Holdings Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155, Street CJ at 162; Glass JA at 164 (CA). The wider question of assets that had never been within the jurisdiction was not considered. Priestley JA at 165 expressed a more general view that "when exercising [the Mareva] jurisdiction against a company incorporated within the jurisdiction, the location of the company's assets can have no bearing on the extent of the court's jurisdiction, although it may, as already indicated, affect the court's discretionary exercise of those powers".

Queensland[41] and South Australian[42] decisions have applied the reasoning in the *Hospital Products* case and granted injunctions where assets were not and never had been in the jurisdiction. In *Brereton v Milstein* [1988] VR 508, Murphy J distinguished the *Hospital Products* case and relied on the apparent limitation contained in the *Supreme Court Act* 1986 (Vic), s 37(3) to assets located within Victoria. However, Brooking J in *National Australia Bank Ltd v Dessau* [1988] VR 521 declined to follow Murphy J's decision. His Honour found (at 527) that s 37(3) was only an enabling provision, and that the court had inherent power to grant a Mareva order in respect of foreign assets, regardless of where they may previously have been located.[43]

After the decision of the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, a more accurate formulation of the jurisdictional basis of Mareva orders against foreign assets can be ascertained. It is clear, that provided it can be established that the order is needed to prevent the abuse of judicial process and to enhance the overall administration of justice, the order may be made against any assets — even foreign assets — whether or not those assets were within the jurisdiction when proceedings commenced. The approach outlined in the *Cardile* decision is directly consistent with the observation of the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391 where the court noted that the "counterpart of a court's power to prevent its processes being abused is its power to protect the integrity of those processes once set in motion".[44]

A worldwide pre-judgment Mareva order and concomitant disclosure order will only be made in an exceptional case.[45] In *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65, the English Court of Appeal expressed the view that the existence of sufficient assets within the jurisdiction was an excellent reason for confining the order to local assets, but, other considerations apart, the fewer the assets within the jurisdiction, the greater the necessity for taking protective measures in relation to those

41 *Planet International Ltd (in liq) v Garcia* [1989] 2 Qd R 427.

42 *Coombs & Barei Constructions Pty Ltd v Dynasty Pty Ltd & Coombs* (1986) 42 SASR 413, Millhouse J at 419-420.

43 The court may exercise its discretion with greater caution where defendants have been brought within the court's jurisdiction not by local service but by service out under the rules of court: *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139, Staughton LJ at 1154 (CA).

44 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan J at 393.

45 *Derby & Co Ltd v Weldon* [1990] Ch 48 (CA). See also Collins L, "The Territorial Reach of Mareva Injunctions" (1989) 105 *Law Quarterly Review* 262. More generally, see Crawford R, "The Extra-Territorial Effect of Mareva Injunctions: The Sleeping Giant of Fairyland" (1990) 18 *Australian Business Law Review* 218.

outside it. The view that a worldwide Mareva order would be granted very rarely was also expressed in *Republic of Haiti v Duvalier* [1990] 1 QB 202 (Staughton LJ at 215). The latter case was distinguished in *Rosseel NV v Oriental Commercial Shipping (UK) Ltd* [1990] 3 All ER 545, in which the English Court of Appeal said that, where it was sought to enforce a judgment or arbitration award in support of a foreign jurisdiction, the court should, save in exceptional circumstances, refrain from making orders which extend beyond its own territorial jurisdiction. Where, however, the rights of the parties have been determined in English proceedings, whether by litigation or arbitration, the court will, in appropriate circumstances, enforce such rights by the exercise of extra-territorial jurisdiction. Furthermore, the English Court of Appeal has disallowed an unqualified worldwide Mareva order, relying in part on the Australian authorities to conclude that there was jurisdiction to grant an injunction extending to foreign assets (*Babanaft International Co SA v Bassatne* [1990] Ch 13 (CA)). The court held that it would be improper to grant an unqualified worldwide injunction because it would amount to an exorbitant exertion of extra-territorial jurisdiction over third parties, and indicated that the order should be limited so as to make it clear that the rights of third parties were unaffected.[46] Although concerned with an injunction after judgment, the principles are equally applicable to injunctions sought at any time during proceedings.[47]

ELEMENTS

[2009] In order to obtain a Mareva order, a plaintiff must satisfy the court of the following.[48] Subject to certain exceptions, the court must be satisfied that the plaintiff has a vested and accrued cause of action against the defendant,[49] and that the cause of action is sufficiently arguable to justify the granting of interlocutory relief. The court must also be satisfied that a danger exists by way of the defendant absconding, or of assets being removed from the jurisdiction, or being disposed of within the jurisdiction, or otherwise dealt with in some fashion, whereby the plaintiff, if successful, will not be able to have judgment satisfied. The balance of convenience must favour the granting of relief, and

46 See below, para [2020].

47 It has been suggested that any discretion in favour of a Mareva order against foreign assets will be exercised more readily after judgment has been obtained: *Babanaft International Co SA v Bassatne* [1990] Ch 13, Neill LJ at 40 (CA).

48 See *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (CA); *Patterson v B T R Engineering (Aust) Ltd* (1989) 18 NSWLR 319 (CA); *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49.

49 See Aitken L, "The End of Anticipatory Mareva?" (1993) 66 *Australian Law Journal* 542.

any other matters relevant to the circumstances of the particular case must be taken in to account in the exercise of the court's discretion.

Following the decision of the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, the general principle founding the exercise of the power to grant interlocutory relief is that the court may make such orders against either parties to the proceedings or relevant third parties, where they are necessary to ensure the proper and effective exercise of the jurisdiction.

Generally, because the Mareva order is an interlocutory order against property held by parties or relevant non-parties to proceedings, they should be supported by an undertaking as to damages.[50] An application for a Mareva order is generally made ex parte and where this occurs, the plaintiff is bound to disclose all facts material to the granting of relief, both favourable and unfavourable. If a full and proper disclosure is not given by the plaintiff, the court may discharge the order — retaining a discretion to allow the plaintiff to re-apply for a similar order in the same terms.[51] A plaintiff should immediately inform the court in an ex parte application for a Mareva order of any information which it discovers to be incorrect or incomplete and to reveal any material change of circumstances — for as long as the proceedings remain on an ex parte basis.[52] A Mareva order will generally only be issued on the basis of sworn evidence, and will not be issued on the basis of pleadings alone (*Whitton v Murray* (unrep, 1/11/1993, CA NSW, 40442 of 1993)).

Given the myriad circumstances in which relief in the form of a Mareva order is sought and the discretionary nature of the remedy, each of these elements is not equally significant in any given application, but the principles can be identified in general terms. The key is the nature and purpose of the remedy: that is, to prevent the frustration of the processes of the court by a defendant dissipating assets, other than in the ordinary course, so as to deprive the successful plaintiff of the fruits of judgment. However, as the question of dissipation of assets will not

50 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan J at 401, confirming the principle enunciated by Brennan J at 621 in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

51 This occurred in *Sharp v Australian Builders Labourers' Federated Union of Workers (WA Branch)* [1989] WAR 189.

52 *Commercial Bank of the Near East plc v A,* The Times, 17 March 1989, noted in Starke JG, "Material changes subsequent to Mareva order — duty of plaintiff" (1989) 63 *Australian Law Journal* 364.

normally be in issue at the final hearing, and having regard to the possible consequences of a Mareva order, the judge must approach the task with caution but not timidity. That caution will be all the greater where assets which may be subject to the order are out of the jurisdiction, or where the interests of third parties may otherwise be affected. Therefore, the court will decline to grant a Mareva order which will have the effect of substantially interfering with the business rights of a third party in order to secure the recovery of debts or damages from the defendant with which the third party has no connection, such as cargo belonging to the defendant on the vessel of a third party, who would thereby be deprived of the use of its one trading asset. The offer of an indemnity by the plaintiff is insufficient, since the order would involve an unwarrantable interference with the trading activity of the third party shipowner (*Galaxia Maritime SA v Mineralimportexport (The Eleftherios)* [1982] 1 All ER 796 (CA)). As a type of interlocutory order, the court will also consider the strength of the plaintiff's case, the balance of convenience and, ultimately, general discretionary considerations. In *Soinco Saci v Novokuznetsk Aluminium Plant* [1998] QB 406, Colman J noted that it is particularly important with Mareva injunctions to ensure that rigid principles are avoided and that the law is extended incrementally to meet new factual situations when the interests of justice requires it. These three aspects are inter-related and overlap to a greater or lesser extent … particularly the first and the second."[53] In *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, Young CJ said (at 54-55):

> "As the strength of the arguable case diminishes so the balance of convenience moves in favour of the defendants and vice versa."[54]

As part of the general matrix going to the exercise of the court's discretion, the overlap will also extend to the question of the risk of the defendant dissipating his or her assets. As Burt CJ noted in *Perth Mint v Mickelberg (No 2)* [1985] WAR 117 at 119 (FC):

> "[T]he sufficiency of the strength of the plaintiff's case will always fall to be judged in the context of the risk that the defendant will dissipate his assets with the intention of placing them beyond the reach of the plaintiff. As has been said, those two considerations must be judged in combination."

53 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264, Street CJ, Hope JA and Rogers AJA at 276 (CA).

54 See also *Brereton v Milstein* [1988] VR 508, Murphy J at 518.

[2010] A vested and accrued cause of action, for which substantive final relief can be immediately granted, is accepted in Australia as a prerequisite for the grant of a Mareva order: *Siskina (Cargo Qwners) v Distos Compania Naviera SA (The Siskina)* [1979] AC 210.[55] This is subject to certain exceptions. A Mareva order can be granted where there is no pending proceeding before the court, and the parties seeking the order do not propound a cause of action but are claiming moneys in pending arbitration proceedings.[56] It can be granted prior to additional tax becoming due and payable under an assessment from the Commissioner of Taxation.[57] It can also be granted where the assets affected by the order are family assets of the defendant;[58] or where a third party is in control of assets which the defendant could require to be applied in discharge of the judgment debt.[59]

In *Deputy Commissioner of Taxation (Cth) v Ahern* [1986] 2 Qd R 342,[60] Thomas J followed *The Siskina* in setting aside service on two foreign defendants against whom only a Mareva order was sought, and no existing cause of action was asserted. In the United Kingdom, the practice arose of granting Mareva orders, the operation of which was conditional on the cause of action arising. The English Court of Appeal has reasserted the principle of *The Siskina*, thereby making it clear that there was no jurisdiction to make even conditional orders.[61] It is sometimes suggested that Mareva orders in aid of execution or pending a stay of judgment are also exceptions to the general rule requiring a vested and

55 *Zucker v Tyndall Holdings plc* [1993] 1 All ER 124 (CA). (However, for some qualification of the English position, see paras [2005]-[2006].) See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Brennan J at 621. This accords with the general position in relation to injunctions: see *Brereton v Milstein* [1988] VR 508, Murphy J at 517.

56 *Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274. See above, para [2004].

57 *Deputy Commissioner of Taxation v Sharp* (1988) 82 ACTR 1. See above, para [2004].

58 *Vereker v Choi* (1985) 4 NSWLR 277, Clarke J at 284. This decision was relied upon in *T S B Private Bank International SA v Chabra* [1992] 2 All ER 245, Mummery J at 242 (Ch).

59 See above, paras [2005]-[2006].

60 See also the decision to the same effect by the Privy Council in *Mercedes Benz AG v Leiduck* [1995] 3 WLR 718.

61 See Collins L, "The Legacy of The Siskina" (1992) 108 *Law Quarterly Review* 175. For the present position in the United Kingdom, see the *Civil Jurisdiction and Judgments Act* 1982 (UK) (followed in *Republic of Haiti v Duvalier* [1990] 1 QB 202 (CA)); *Rosseel NV v Oriental Commercial Shipping (UK) Ltd* [1990] 3 All ER 545 (CA); *T S B Private Bank International SA v Chabra* [1992] 2 All ER 245 (Ch). However, the extent of the doctrine expressed in *Siskina (Cargo Owners) v Distos Compania Naviera SA (The Siskina)* [1979] AC 210 has been called into question by the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 362, where Lord Mustill said that "the doctrine of the *Siskina*, put at its highest, is that the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action." The debate has continued in the recent decisions of *Department of Social Security v Butler* [1995] 1 WLR 1528 (CA) and *Mercedes Benz AG v Leiduck* [1995] 3 WLR 718 (PC). See also Aitken L, "The Juridical Basis of the Mareva Injunction" (1996) 70 *Australian Law Journal* 109.

accrued cause of action. On a proper analysis, this can be seen to be incorrect, as the cause of action in those situations has merged in the judgment, which is the perfection of the normal requirement for a vested and accrued cause of action.[62]

In *Coxton Pty Ltd v Milne* (unreported, New South Wales Court of Appeal, 20 December 1985), Hope JA (with whom Glass and Priestley JA agreed) observed (at 12) that:

> "The growing sophistication of commercial practice and the ability to use what laymen might well describe as paper tigers to provide barriers between the creation of debts and access by creditors to assets to meet them justifies the recognition of exceptions in appropriate cases."

In that case, the plaintiff claimed he was entitled to be subrogated to the rights of the defendant corporate trustee to be indemnified out of the trust property, which had passed to the third party beneficiary, whose creatures the trust and trustee in fact were. It was clear that the equitable right asserted was inchoate until the trustee had had judgment recovered against it for the relevant debt, or had paid the debt out of its own money. In some circumstances, the court is prepared, in effect, to pierce the corporate veil[63] where "logic and commercial reality"[64] require it. It has been held, without attempting to define or to limit the extent of the exception, that the necessary circumstances will exist when:

- the affairs of the defendant sued by a creditor for an alleged debt, and of the third party against whom the order is sought, are intermingled;
- the alleged debtor and the disposition of her or his assets are effectively controlled, in law, or in fact, by the third party;
- the debtor's assets will be insufficient to meet the debt; and
- the creditor, although having no vested or accrued cause of action against the third party, may become entitled to have recourse to the third party or the third party's assets to meet the debt, and there is a danger that the third party will send assets abroad or otherwise dispose of them.[65]

62 This analysis is consistent with that of the English Court of Appeal in *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, Hoffmann LJ at 375-376.

63 *Coxton Pty Ltd v Milne* (unreported, New South Wales Court of Appeal, 20 December 1985). See also *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No 3)* [1991] 4 All ER 783 (CA); *T S B Private Bank International SA v Chabra* [1992] 2 All ER 245 (Ch).

64 *Coxton Pty Ltd v Milne* (unreported, New South Wales Court of Appeal, 20 December 1985), Hope JA at 12.

65 *Coxton Pty Ltd v Milne* (unreported, New South Wales Court of Appeal, 20 December 1985), Hope JA at 13.

Where the order which is sought is against property held by a third party, the general principle outlined by the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 is that it must be established that the third party either holds, is using, has exercised or is exercising a power of disposition over, or is in possession of the assets of the judgment debtor, or there is some legally enforceable process available to the judgment creditor as a consequence of a judgment against the judgment debtor.[66]

Partial satisfaction may occur where a trustee or liquidator of the defendant is appointed under any judgment. If the liquidator or a trustee recovers a payment as a preference, that recovery will be available for distribution among creditors generally, the order not operating to give the plaintiff any security or priority. In *J D Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185, Lush J (at 188) seems to suggest in obiter dicta that an order should not lie in this situation because it would "be entirely ineffective to benefit the plaintiff, because the money would stand held for the benefit of creditors generally". If this is the correct interpretation of Lush J's statement, it is submitted that it should not be followed.

[2011] The plaintiff must show a sufficiently arguable case against the defendant. This is the usual requirement relating to interlocutory injunctions,[67] and is not the same as the need to show a danger of dissipation of assets. There will, inevitably, be some overlap of these matters in the exercise of its discretion by the court.[68]

In *Earthline Constructions Pty Ltd v State Rail Authority (NSW)* (unreported, New South Wales Court of Appeal, 26 October 1992), it was held that a Mareva injunction was validly granted in relation to a company against which there was no evidence of fraud, because it was a mere continuation of another company with the same directors, against which there was an overwhelming case of fraud. It was considered that there was a sufficient possibility that the fraud was "infectious" to justify the injunction against the successor company. It was also held that evidence given to the Independent Commission Against Corruption could be relied upon by the plaintiff to substantiate its case, even though there was a possibility that the evidence of that witness would not be available at trial.

66 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, Gaudron, McHugh, Gummow and Callinan J at 405-406.

67 See above, Chapter 18: "Injunctions". For a discussion of this in the context of Mareva orders, see *Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274, Clarke J at 279-280; *Szentessy v Woo Ran (Aust) Pty Ltd (No 1)* (1985) 64 ACTR 98.

68 See above, para [2009].

[2012] The danger of non-satisfaction of judgment is a third element. "No matter how strong the plaintiff's claim appears to be and how inconsequential the prejudice to a defendant by the ordering of security an order should not be made unless the risk of dissipation is established" (*Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274, Clarke J at 281). There have been numerous formulations of the test for the degree of danger that a potential judgment will not be satisfied, which must be established by the plaintiff.[69] These are all variations on there being evidence of a "risk" or "real risk", or that the defendant "may well" take steps[70] to dissipate assets, or that the risk to the assets "has materialised or will probably materialise".[71]

The plaintiff need not prove that the relevant assets will be put absolutely beyond reach. Evidence of a course of conduct by a defendant which may be viewed as seeking to stultify the effect of the court's order will suffice (*Australian Iron & Steel Pty Ltd v Buck* [1982] 2 NSWLR 889, Rogers J at 893). Nor need the plaintiff show that recovery would not be possible against assets in a foreign jurisdiction to which they might be removed. The prejudice is in the loss of assets from the jurisdiction.[72]

In assessing whether the test has been satisfied, the court looks through the eyes of a prudent, sensible person experienced in commerce, and asks whether that person can properly infer a danger of any judgment remaining unsatisfied by reason of assets being removed from the jurisdiction or otherwise dissipated or concealed.[73] It is not sufficient to show a "normal commercial fear that there is a possibility" of assets being dissipated, or that,

69 These are gathered in *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* (1985) 1 NSWLR 545, Young J at 557-558, and in *Patterson v B T R Engineering (Aust) Ltd* (1989) 18 NSWLR 319, Gleeson CJ at 323 (CA). Gleeson CJ's formulation was expressed, at 321-322, as "a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied". This was expressly adopted by von Doussa J in *Beach Petroleum NL v Johnson* (1992) 9 ACSR 404 (Fed Ct). See also *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1984] 1 All ER 398 (QB and CA).

70 *Parakalo Pty Ltd v E M Redmond & Co Pty Ltd* [1983] 2 Qd R 604, McPherson J; *Perth Mint v Mickelberg* [1984] WAR 230, Smith J at 234; *Abella v Anderson* [1987] 2 Qd R 1.

71 *Commissioner of Taxation (Cth) v Rosenthal* (1984) 79 FLR 11, O'Bryan J at 13 (SC Vic); (affd *Commissioner of Taxation (Cth) v Rosenthal (No 2)* (1984) 79 FLR 143 (SC Vic).

72 *West Clothing Co Pty Ltd v Sail America Foundation for International Understanding* [1988] WAR 119, Franklyn J at 120.

73 The origin of this test is in the judgment for *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 646, Lawton LJ at 671 (CA). It has been expressly applied or referred to in *Turner v Sylvester* [1981] 2 NSWLR 295, Rogers J at 305-306; *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* (1985) 1 NSWLR 545, Young J at 558; *Pearce v Waterhouse* [1986] VR 603, Vincent J at 606; *National Australia Bank Ltd v Dessau* [1988] VR 521, Brooking J at 532.

on the face of its balance sheet, a corporate defendant may appear to be insolvent.[74] The relevant degree of risk is not likely to be made out where the defendants are local persons with local assets which they could not or would not wish to dissipate, for example a defendant with an established local business or other assets unlikely to be sought to be liquidated simply in order to avoid judgment.[75] The onus of proving the risk of judgment being rendered fruitless is on the plaintiff (*J D Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185, Lush J at 187). Although the solvency of the defendant is essentially within the defendant's knowledge, the defendant "is not called upon to prove its solvency the moment it becomes a defendant and proceedings [for a Mareva injunction] … are not a means by the use of which it can be called upon to do so".[76]

It has been held that it is not sufficient for the grant of an injunction that the defendant has suffered adversity in business and is generally impecunious. The perceived danger that money coming into the hands of the defendant "will simply disappear in the expenses and perhaps even the losses of conducting the first defendant's business … does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim".[77] In *Reches Pty Ltd v Tadiran Pty Ltd* (1998) 85 FCR 514, Lehane J at p 520 made the following comments: "Where there is indeed an apparently imminent risk that a respectable foreign corporation will remove from the jurisdiction substantially all of its assets there, Mareva relief may, in the absence of counterveiling discretionary considerations, be thought to be appropriate. Where however, the evidence as to immediate or imminent risk is not particularly strong, then it seems to me that the likelihood of 'default' weighs in the balance, so that Mareva relief is likely to be refused."[78]

While the inference of risk cannot usually be drawn from the fact that a plaintiff has a sufficiently arguable cause of action,

74 *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* (1985) 1 NSWLR 545, Young J at 557.

75 *Parakalo Pty Ltd v E M Redmond & Co Pty Ltd* [1983] 2 Qd R 604, McPherson J setting aside an injunction granted against a long-established local company of substance. Having regard to the origin and purpose of the injunction, it will be easier to make out the relevant risk where the defendant is foreign, or peripatetic, or has few assets in the jurisdiction or assets which are easily movable.

76 *J D Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185, Lush J at 187.

77 *J D Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185, Lush J at 188. This is consistent with the limitation that a Mareva order will not be allowed to restrain the defendant from dealing with its assets in the ordinary course of her or his business: see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Gaudron J at 642; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264, the Court of Appeal at 276.

78 See also *Hadid v Lenfest Communications Inc* (1996) 67 FCR 446.

evidence going to the plaintiff's cause of action can in some cases be relied upon in drawing the inference of danger. Examples of this are where the case made out against the defendant is one of serious dishonesty involving diversion of money from its proper channels,[79] or where "the subject matter of the claim in the writ amounted to a conspiracy of significant criminality".[80] However, even in the face of such evidence, the court will not lose its cautious approach to the grant of Mareva relief.[81]

Finally, the plaintiff does not have to prove that the defendant has the intention of dealing with assets so as to put them beyond the reach of the plaintiff. It is sufficient to show that this would be the effect of the defendant's conduct.[82]

[2013] The standard of proof of danger of non-satisfaction of judgment is that the risk must be real and not fanciful,[83] but the authorities offer little more positive guidance on this question.[84] This attitude reflects the fact that the various prerequisites for a Mareva order will ultimately be considered together in the exercise of the court's discretion. In some cases, the strength of the proof of one element possibly has the effect of lowering the extent to which another must be shown.[85] It has been held that the test is not that

79 *Patterson v B T R Engineering (Aust) Ltd* (1989) 18 NSWLR 319 (CA); *Spedley Securities Ltd (in liq) v Yuill* (unreported, Supreme Court of New South Wales, Cole J, 24 April 1991); *Yuill v Spedley Securities Ltd (in liq)* (unreported, New South Wales Court of Appeal, 6 May 1991); *Pearce v Waterhouse* [1986] VR 603, Vincent J at 607; *Gibb Australia Pty Ltd v Cremor Pty Ltd* (1992) 106 FLR 453 (SC ACT); *J F T Constructions Pty Ltd v Wells* (unreported, New South Wales Court of Appeal, 11 April 1994). In all these cases, allegations or findings of fraud and misappropriation were significant factors in the relevant risk of dissipation being inferred.

80 *Perth Mint v Mickelberg (No 2)* [1985] WAR 117, Pidgeon J at 124 (FC). In this case, the court did not infer risk, as, in other proceedings, it was found that criminal charges to like effect were unable to be sustained against the defendant. This is not to suggest that a test of beyond reasonable doubt is to be imported into applications for Mareva orders. The circumstances in this case were very unusual.

81 *Patterson v B T R Engineering (Aust) Ltd* (1989) 18 NSWLR 319 (CA); *Pearce v Waterhouse* [1986] VR 603, Vincent J at 607.

82 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (CA); *Hiero Pty Ltd v Somers* (1983) 68 FLR 171 (Fed Ct), Ellicott J at 177-178; *Yorkwain Automatic Doors Ltd v Newman Tonks Pty Ltd* (1988) 12 IPR 290 (SC Vic); *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, Young CJ at 53. The occasional statements in the authorities referring only to the intention to place assets beyond the reach of the plaintiff, if they are intended to state the test exhaustively, put it too high and are contrary to authority: see *Perth Mint v Mickelberg (No 2)* [1985] WAR 117, Burt CJ at 118-119 (FC). The preferable view is that of the Queensland Court of Appeal in *Northcorp Ltd v Allman Properties (Australia) Pty Ltd* [1994] 2 Qd R 405, that the applicant for a Mareva order is not required to show that the purpose of the defendant's conduct is to prevent recovery of any judgment which might be obtained, but rather that it is sufficient to show there is a danger of dissipation of assets which is likely to prevent such recovery.

83 *Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274, Clarke J at 283.

84 See, for example, *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1984] 1 All ER 398, Kerr LJ (for the Court of Appeal) at 419; *Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274.

85 See above, para [2009].

the risk must be shown on a balance of probabilities, and further held that it would be undesirable to endeavour to formulate a precise definition of the standard of proof required to establish the existence of the relevant danger.[86] This approach should be preferred. The test whereby a Mareva order would only be granted if there were a more than usual likelihood of danger that any judgment would go unsatisfied as a consequence of the defendant's conduct has been expressly disapproved.[87]

[2014] The balance of convenience must also be considered (*Pearce v Waterhouse* [1986] VR 603, Vincent J at 607). Having regard to the nature of the remedy, once the other prerequisites are made out and subject to any other discretionary factors, the balance of convenience will almost inevitably lie in favour of the grant of the order, because the potential damage to the plaintiff of being unable to satisfy the judgment will outweigh the inconvenience to the defendant of being subjected to a properly drawn Mareva order.[88]

It may, however, be relevant to the question of the nature and value of the assets to be affected by the order. In *Pearce v Waterhouse* [1986] VR 603, the defendant argued that since the plaintiffs sought an equitable remedy, it was necessary to establish that they came to court "with clean hands" (at 607). Vincent J expressed the view that it was (at 607):

> "[N]ot the type of situation in which that kind of balance could be properly considered ... the remedy which is given is not to provide some benefit to one party or the other, but simply to prevent what is perceived as a possible abuse of the processes of the Court. It is not in my view relevant or appropriate to attempt to balance that possibility against the conduct of a plaintiff, creditable or discreditable, at some earlier stage."

[2015] General discretionary factors may be as diverse as the cases themselves. However, in the commercial context, it is clear that the possible effect on the defendant's reputation of an order

86 See *Patterson v B T R Engineering (Aust) Ltd* (1989) 18 NSWLR 319, Gleeson CJ at 325; and Meagher JA, who asked at 327: "What degree of proof is, then, required? Different judges have decided it in different ways. Without wishing to drown in a sea of semantics, I should have thought that the plaintiff is required to prove, on a balance of probabilities, that there is a real risk of the dissipation of assets." Rogers AJA at 327 expressly reserved his opinion on the question. See also *Demeter Cormack Pty Ltd v Caribbean Foods Ltd* (unreported, Federal Court, French J, 20 November 1991, at 11.

87 *Patterson v B T R Engineering (Aust) Ltd* (1989) 18 NSWLR 319, Gleeson CJ at 325; Meagher JA at 326 (CA). This was the test applied by Young J in *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* (1985) 1 NSWLR 545.

88 See, for example, *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, Young CJ at 54.

being made is a proper discretionary consideration. It has been said that:[89]

> "[I]n many situations a significant danger that the granting of an injunction on the basis of a finding that there is some risk of a concealment of assets could have a damaging effect on the reputation or business of a defendant and clearly considerable care is required for this reason alone."

ORDERS IN AID

[2016] The court has inherent power to order whatever is necessary to give effect to a Mareva order, subject to any statutory limitation.[90] The most common order in aid of a Mareva order is that the defendant give discovery of her or his assets. Courts have also appointed receivers and granted other types of relief. In *Hospital Products Ltd v Ballabil Holdings Pty Ltd* [1984] 2 NSWLR 662,[91] Rogers J said (at 669) at first instance:

> "The object must remain throughout to prevent disposal of assets in furtherance of the illegitimate aim of making oneself judgment proof and of stultifying the order of the court. Whatever needs to be done to achieve that objective, the court has power to order as part of its inherent jurisdiction. Whatever the *Supreme Court Act* 1970 (NSW), s 23, may mean, it certainly stands as a fount of power to make orders in aid of the exercise of the court's jurisdiction."

In *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538 the New South Wales Supreme Court noted that since the High Court decision in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, the jurisdiction to award Mareva orders has been more precisely outlined, namely, to prevent an abuse of the court process and the stultification of the administration of justice by allowing a party or non-party to remove relevant assets from the reach of the plaintiff. In light of such a clear jurisdictional

89 *Pearce v Waterhouse* [1986] VR 603, Vincent J at 607-608 (injunction granted). For an example of the danger to the reputation of a business in the granting of a Mareva order (and where the order was in fact dissolved), see *Parakalo Pty Ltd v E M Redmond & Co Pty Ltd* [1983] 2 Qd R 604, McPherson J at 606.

90 See also *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139 (CA) (order requiring defendant to transfer assets from one foreign jurisdiction to another to ensure they were located in a jurisdiction which would enforce any judgment; ultimately ordered such jurisdiction should be exercised with great caution). Defendants have also been ordered to sign letters authorising their Swiss banks to disclose the defendants' account documents to the plaintiff, under penalty of being disbarred from defending the proceedings: see *Bank of Crete SA v Koskotas* [1991] 2 Lloyd's Rep 587 (CA).

91 See Note (1986) 60 *Australian Law Journal* 240.

directive, Austin J in *Bax Global* (at 544) noted that "the Court must also have the power to order the disclosure of the nature and location of particular assets or assets of a class so that the Mareva relief is effective and not oppressive".

For the basis of the court's jurisdiction to grant a Mareva order, see above, para [2003].

[2017] The court has jurisdiction to order a respondent to a Mareva order to give discovery by affidavit of assets located both in and outside the jurisdiction, where the relevant assets had been in the jurisdiction at the time the proceedings were commenced.[92] The purpose of the affidavit is to allow the defendant to demonstrate, by specifying them, that he or she has ample assets to meet the plaintiff's claim.[93] It may be necessary for the applicant that the order show special grounds justifying its grant.[94] There is authority, at least in the case of Mareva orders in aid of execution, that, while the order may be confined to assets within the jurisdiction, the order for disclosure may extend to the defendant's worldwide assets (*Gidrxslme Shipping Co Ltd v Tantomartransportes Maritimos LDA* [1995] 1 WLR 299 (QBD)).

Discovery will not always be granted in aid of an order. For example, where particular assets can be identified and specified in the order as being of sufficient value adequately to protect the plaintiff, discovery is unlikely to be ordered.[95] Whatever the form of an order, it is incumbent upon a defendant, when required to specify bank accounts which the defendant controls,

92 *Ballabil Holdings Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155 (CA): see above, para [2008]. The better view is that the presence of assets in the jurisdiction at the time proceedings were commenced is not a necessary prerequisite to the making of an order. Where, in accordance with the principles discussed above, para [2006], a Mareva order is granted against a third party against whom the plaintiff does not have a direct cause of action, an order for discovery of assets against that party can also be made: *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 (CA). Thus, the principle is expressed by reference to the respondent to the order rather than just a defendant to the substantive proceedings.

93 *Ausbro Forex Pty Ltd v Mare* (1986) 4 NSWLR 419, Young J at 424. An example is *Yandil Holdings Pty Ltd v Insurance Co of North America* (1987) 7 NSWLR 571.

94 *Yandil Holdings Pty Ltd v Insurance Co of North America* (1987) 7 NSWLR 571 (special grounds found to exist). This requirement is derived from the decision of the English Court of Appeal in *Ashtiani v Kashi* [1987] QB 888.

95 In that situation in *Pearce v Waterhouse* [1986] VR 603, Vincent J at 608 considered that there was "no justification in the circumstances of this matter for such a serious intrusion [as the ordering of the discovery of assets] into the private affairs of the defendant". In *A J Bekhor & Co Ltd v Bilton* [1981] QB 923, the English Court of Appeal pointed out that it would decline to make orders for the discovery of documents or interrogatories which will have far-reaching and undesirable consequences, and which are unnecessary for the proper operation of the order. In *Bank of Crete SA v Koskotas* [1991] 2 Lloyd's Rep 587, the English Court of Appeal overturned an order for discovery in circumstances where the defendants had abandoned their opposition to the injunction, and it was plain that the immediate purpose of the plaintiff's application for discovery was to sustain the injunction.

to specify in relation to each bank account (*Ausbro Forex Pty Ltd v Mare* (1986) 4 NSWLR 419, Young J at 425):

(a) the name of the bank with which the account is held;

(b) the name of the branch;

(c) the number of the account;

(d) the name or names of the persons in whose name the account is; and

(e) the balance of the account as at the date of service of the order for discovery.

The court may also order the defendant to be cross-examined on her or his affidavit of discovery,[96] but it is recognised that defendants need protection from unduly oppressive, unnecessary or insufficiently relevant inquiries (*Planet International Ltd v Garcia (No 2)* [1991] 1 Qd R 426). The fact that cross-examination may traverse matters which are the subject of the main proceedings is not necessarily a sufficient objection to an order.[97] If the court orders the delivery of an affidavit, in aid of a Mareva order, setting out the particulars of financial accounts and information, a failure or refusal to provide such an affidavit may constitute a breach of the order — even on the grounds of privilege (*Vasil v National Australia Bank Ltd* (1999) 46 NSWLR 207).

[2018] The appointment of a receiver may be ordered. The power to appoint a receiver may be found in legislation.[98] Other sources of the power have not been closely examined.[99] In *Beach Petroleum NL v Johnson* (1992) 9 ACSR 404 (Fed Ct), von Doussa J appointed a receiver, observing (at 406) that the appointment of a receiver or receiver and manager in aid of a Mareva order:[100]

> "is a drastic step not lightly to be taken. The party seeking such a remedy must make out a clear case, not only that the protection of the interests of people to whom the company may

96 *A J Bekhor & Co Ltd v Bilton* [1981] QB 923 (CA).

97 *Planet International Ltd v Garcia (No 2)* [1991] 1 Qd R 426.

98 See, for example, *Supreme Court Act* 1970 (NSW), s 67. See *Ballabil Holdings Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155, Priestley JA at 165 (CA) (as there was independent power under the Act, there must be power to appoint a receiver in aid of a Mareva order).

99 *Hospital Products Ltd v Ballabil Holdings Pty Ltd* [1984] 2 NSWLR 662 (a receiver appointed to the assets of defendant against which a Mareva order ordered); *Ballabil Holdings Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155, Street CJ at 159 (expressly left question open, but proceeded on assumption of parties that there was power, held that receiver's authority extended to assets inside and outside jurisdiction); Glass JA at 164 (expressly did not consider question). See also *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65 (CA).

100 The report (at 413-414) sets out the form of order relating to both the order and appointment of the receiver and manager.

> be or become liable require protection, but also that a lesser remedy which does not involve removing the administration of the company from the directors would [sic] fit the circumstances of the case."

[2019] Other orders which may be made include an order for delivery up of chattels, orders for particular discovery, and interrogatories. In *CBS United Kingdom Ltd v Lambert* [1983] 1 Ch 37, the English Court of Appeal set out the circumstances in which an order could be made for delivery up of chattels in aid of a Mareva order (Lawton LJ (for the Court) at 44-45). Those circumstances are as follows.

First, there should be clear evidence that the defendant is likely, unless restrained by order, to dispose of or otherwise deal with the defendant's chattels in order to deprive the plaintiff of the fruits of any judgment. Moreover, the court should be slow to order the delivery up of property belonging to the defendant unless there is some evidence or inference that the property has been acquired by the defendant as a result of alleged wrongdoing.

Secondly, no order should be made for the delivery up of a defendant's apparel, bedding, furnishing, tools of trade, farm implements, livestock or any machines (including motor vehicles) or other goods, such as materials or stock in trade, which it is likely he or she uses for the purposes of a lawful business. Sometimes, however, furnishings may consist of objets d'art of great value. If the evidence is clear that such objects were bought for the purpose of frustrating judgment creditors, they could be included in an order.

Thirdly, all orders should specify as clearly as possible what chattels or classes of chattels are to be delivered up. The plaintiff's inability to identify what is to be delivered up and why is an indication that no order should be made. The order must not authorise the plaintiff to enter the defendant's premises, or to seize the defendant's property save by permission of the defendant. No order should be made for a delivery up to anyone other than the plaintiff's solicitor or a receiver appointed by the court. The court should appoint a receiver to take possession of the chattels unless satisfied that the plaintiff's solicitor has, or can arrange, suitable safe custody for what is delivered up. On rare occasions, the defendant's freedom of movement and the use of a passport have been restricted in support of a Mareva order (*Danieletto v Khera* (unreported, Supreme Court of New South Wales, Bryson J, 17 February 1995)).

It will be noted that this type of relief bears some resemblance to an Anton Piller order, and principles developed in that jurisdiction may be relevant if an order for delivery up of chattels is contemplated in aid of a Mareva order. Indeed, the possibility of an order for delivery up in aid of a Mareva order has been referred to without comment in Australian authorities.[101]

The court will make orders for particular discovery requiring the defendant to swear an affidavit regarding what has happened to particular assets, and the identity of third parties into whose hands they may have come.[102] Interrogatories regarding the defendant's assets may also be ordered (*A v C* [1981] QB 956 n, Robert Goff J at 959).

Finally, on the authority of the decision of the English Court of Appeal in *Bankers Trust Co v Shapira* [1980] 3 All ER 353, where the plaintiff is tracing the funds of a fraudulent defendant, an order in aid of a Mareva order is available against a bank requiring it to give discovery of all documents relating to the defendant's account with that bank. In order to obtain such an order, the evidence of fraud against the bank's customer must be very strong. The jurisdiction must be carefully exercised. Furthermore, the plaintiff must give an undertaking as to damages to the bank, undertake to pay the bank's expenses of compliance with the order, and further undertake to use the documents disclosed solely for the purpose of tracing the funds. The usual form of such an order requires that the documents be discovered to the plaintiff's solicitors. While such an order is generally sought in aid of a Mareva order against the defendant (and, additionally or alternatively, the bank), the English practice permits proceedings for such a discovery order to be brought against the bank alone without a concomitant Mareva order. This is often done in anticipation of seeking a Mareva order once particular funds have been located. In such a case, because the evidence of the defendant's fraud must be strong, the courts have also ordered that the bank not disclose the fact of the discovery order and the proceedings to anyone other than its legal advisers. The jurisdiction to make *Shapira*-type orders has been accepted in Australia.[103]

101 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Deane J at 623; *National Australia Bank Ltd v Dessau* [1988] VR 521, Brooking J at 529.

102 *Sharp v Australian Builders Labourers' Federated Union of Workers (WA Branch)* [1989] WAR 138. Seaman J also made orders in the nature of an Anton Piller order.

103 *National Mutual Life Association of Australia Ltd v Lirapa Pty Ltd* (unreported, Supreme Court of New South Wales, Clarke J, 5 February 1985); *Australian Bank Ltd v Brakey* (unreported, Supreme Court of New South Wales, Brownie J, 29 September 1987).

FORM OF ORDER AND VARIATION

[2020] The form of a Mareva order has developed on a case by case basis as part of the practice of each jurisdiction (and sometimes judge).[104] In this section, a reference to the defendant includes a third party against whom an order can properly be made in accordance with the principles discussed above, paras [2005]-[2006]. A draft of the order sought should be prepared by the plaintiff. Its precise terms will, of course, vary in the circumstances of each case. However, a number of principles may be identified:

- The plaintiff must give the usual undertaking regarding damages,[105] and should undertake to pay the reasonable costs of any third party in complying with the order. The plaintiff should also undertake to pay the reasonable costs incurred by any persons other than the defendant to whom notice of the order may be given, in ascertaining whether any assets to which the order applies are within their power, possession, custody or control, and in complying with the order, and further indemnify any such person against all liability which may flow from such conditions.[106] An undertaking to indemnify third parties will not always suffice.
- The order should bind only the defendant; that is, it is to be expressed to bind the defendant "by himself, his servants or agents". It should not be expressed to operate directly against third parties (for example, "the defendant, his servants or agents")(*Abella v Anderson* [1987] 2 Qd R 1, McPherson J at 4-5).

104 Sample forms of order appear in *Sharp v Australian Builders Labourers' Federated Union of Workers (WA Branch)* [1989] WAR 138, Seaman J at 141-143; *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, Young CJ at 55-56; Martin K J, "Mareva Injunctions" (1985) 59 *Australian Law Journal* 22 at 31-32; Sullivan A J, "Mareva Injunctions_Preparation and Conduct of Applications for (and Opposition to) a Mareva Injunction" (1992) 8 *Australian Bar Review* 205 at 223-225. In England, the High Court has issued standard forms for both worldwide Mareva injunctions and those limited to assets within the jurisdiction. These are to be used "save to the extent that the judge hearing a particular application considers there is a good reason for adopting a different form": cf the Practice Direction appearing at [1994] 1 WLR 1233.

105 For a case regarding the enforcement of an undertaking as to damages where a Mareva order had been discharged, see *Cheltenham & Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts* [1993] 1 WLR 1545 (CA).

106 *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806 (QB); followed in *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, Young CJ at 55. Undertakings given in support of a Mareva order must be precisely observed. Breach of such an undertaking may not necessarily be regarded as similar to a misrepresentation or non-disclosure of material facts, but, in an appropriate case, breach of an undertaking may result in discharge of the order: *Sabani v Economakis* (1988) The Times, (London), 17 June 1988 (QB).

- The order must relate to assets in the possession or control of the defendant, and must not purport to create security over those assets.[107] The order should be no wider than necessary, and should ideally be confined to identifiable assets.[108]
- The order should not be unlimited in amount, and provision for the defendant to have access to assets for living expenses, for payment of debts and for legal expenses should be made either at the time of the granting of the order, or by later variation.[109] Where the assets affected by the order are not money, the order should not be expressed by reference to the value of assets. As McPherson J observed in *Abella v Anderson* [1987] 2 Qd R 1 at 4:[110]

> "In so far as [the defendant's] assets do not consist of cash, it would presumably be necessary for him to have them valued in order to ensure that he avoids contravening the Court's order. That is contrary to the requirement that the language of an injunction should not be ambiguous, uncertain or indefinite: *Low v Innes* (1864) 4 De GJ & S 286; 46 ER 929. The order must inform the defendant precisely what it is that, on pain of attachment, he may not do."

Where the plaintiff intends to give notice of the order to banks and other third parties, the order should, as far as possible, give details of the bank (or other third party) branch, account or other particulars of the assets affected. However, failure to identify banks and other third parties in the order does not

107 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Deane J at 625. *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1992) 8 WAR 198 was a case of alleged contempt of a Mareva injunction, in which Walsh J was required to construe the word "assets" in the injunction. His Honour held that it should be interpreted in the context of the injunction, which renders those in breach of the order liable to penal sanctions: the word should be given its ordinary meaning and not the extended meaning it may have when used in specific legislation such as Bankruptcy Acts. Thus, none of the following were "assets" caught by the injunction: the equitable chose in action of a beneficiary to have a trust properly administered; a general or specific power of appointment under a trust deed; the right of a newly appointed trustee to call for a conveyance of the legal title to the trust property. Walsh J's judgment was upheld on appeal: *R & I Bank of Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 WAR 59.

108 *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, Young CJ at 55. It may not be possible to specify particular assets until after discovery has been given by the defendant.

109 *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552. The order should not simply be expressed to relate to the assets of the defendant to the extent that they do not exceed a particular value: see the comments of McPherson J in *Parakalo Pty Ltd v E M Redmond & Co Pty Ltd* [1983] 2 Qd R 604 and *Abella v Anderson* [1987] 2 Qd R 1. The court will, in its discretion, order such provision to be made even where the plaintiff lays claim to the entire find the subject of the order as a trust fund: *P C W (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (QB). The amount of permitted expenditure in the ordinary course of business in a specified period or for a specified purpose may be limited by the terms of the order: *Dillon v Baltic Shipping Co* (unreported, Supreme Court of New South Wales, Carruthers J, 23 September 1994).

110 It is therefore permissible to restrain a defendant from dealing with the contents of the defendant's bank accounts to the extent that they do not exceed a particular value.

preclude the plaintiff from giving notice to others on further information being obtained.[111]

The order should contain a proviso to the effect that a bank holding funds affected by the order is entitled to exercise any right of set-off it has in connection with facilities granted to the customer's account before it receives notice of the order, and that the right of set-off can be exercised in respect of interest accruing in the future as well as interest already accrued (*Oceanica Castelana Armadora SA v Mineralimportexport (The Theotokos)* [1983] 2 All ER 65, Lloyd J at 71 (QB)).

Any order requiring the delivery up of assets should make it clear that the assets will be held on behalf of the defendant until after judgment or further order, and will then be redelivered to the defendant unless they are made the subject of some other claim (for example, by a person entitled to claim under a writ of execution) on behalf of the plaintiff or some other creditor (*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Deane J at 625).

Where the order extends to affect foreign assets, it should be expressed not to extend to third parties. In *Babanaft International Co SA v Bassatne* 1990] Ch 13, the English Court of Appeal required the insertion of a proviso to the injunction to that effect, which became known as the "Babanaft proviso". Kerr LJ expressed (at 28) the view that the correct answer in principle would be a qualification that the order should not affect third parties unless and to the extent that it is enforced by the courts of the State in which the assets are located. While this suggestion was not adopted, it came to be incorporated in the refined Babanaft proviso approved by the English Court of Appeal in *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65:[112]

> "Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is

111 *Z Ltd v A-Z and AA-LL* [1982] QB 558 (CA). Notice to all parties including the defendant may be given (if the order so specifies) in the first instance by telephone, telex or facsimile in addition to the more formal means of notice prescribed by the rules of court.

112 Lord Donaldson MR at 84. This proviso has been adopted in Australia: *Cook v ANZ Banking Group Ltd* (unreported, Supreme Court of New South Wales, Brownie J, 23 June 1994). See also the judgment of the English Court of Appeal in *Re Bank of Credit & Commerce International SA* [1994] 1 WLR 708, for further discussion of the form of and practice relating to a worldwide Mareva order.

addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order."

The order may require discovery of the whereabouts of nominated assets and the identity of persons in control of them, as well as the preservation, discovery and, if necessary, delivery up of documentary evidence.[113] If discovery of foreign assets is sought, the plaintiff must undertake not to use the information obtained thereby without the consent of the defendant or the court.[114]

[2021] The variation or discharge of an order may be sought by either party or by an affected third party.[115] Such liberty to approach the court is always available. Frequently, a widely drawn order will be granted at first, but the lapse of time or further information may create circumstances where variation, or even dissolution, may be appropriate. The following factors were considered in acceding to an application to discharge a Mareva order which had stood for four months by consent (*Brereton v Milstein* [1988] VR 508):

(a) the length of time the injunction had stood;

(b) that the injunction was too wide and unnecessarily inhibiting;[116]

(c) that the defendants were suffering and would continue to suffer not inconsiderable hardship as a consequence of the injunction;[117] and

113 *Sharp v Australian Builders Labourers' Federated Union of Workers (WA Branch)* [1989] WAR 138, Seaman J at 141-143.

114 *Yandil Holdings Pty Ltd v Insurance Co of North America* (1987) 7 NSWLR 571, Rogers J at 577. In *Babanaft International Co SA v Bassatne* [1990] Ch 13, Kerr LJ at 33 criticised this requirement (CA). However, Neill LJ at 41 and Nicholls LJ at 46 supported it on the basis that a court should not abandon control of what use is made of the discovery which plaintiffs are able to obtain by means of such orders.

115 An innocent third party who intervenes in proceedings to seek a variation of a Mareva order by which he or she is adversely affected will generally be entitled to costs on an indemnity basis from the party who obtained the order, particularly where that latter party has opposed the variation: *Norilya Minerals Pty Ltd v Ireland* (unreported, Supreme Court of Western Australia, Kennedy J, 16 August 1994), applying *Project Development Co Ltd SA v K M K Securities Ltd* [1982] 1 WLR 1470.

116 The fact that a Mareva order is very extensive and, in particular, if it is unlimited regarding amount, will have an important bearing upon the approach taken in any application for variation: *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552, Powell J at 568.

117 For serious interference with the defendant's ordinary course of business as a ground for discharge or variation, see *Parakalo Pty Ltd v E M Redmond & Co Pty Ltd* [1983] 2 Qd R 604; *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 (CA).

(d) that the oppressive width of the injunction could be seen and used by the plaintiffs as a lever in their continuing negotiations with the defendants.[118]

The most common applications are, first, that the circumstances have changed so as to render the order too wide or totally unnecessary; secondly, for the conversion of an asset into another kind of asset; and, thirdly, to release assets to pay for the defendant's liabilities. On an application for variation, evidence adduced to found the original order and not objected to cannot be excluded.[119] On an application to convert assets (for example, by releasing funds to acquire an asset), the primary considerations will be the nature of the asset to be acquired, and the certainty that the acquisition would not disadvantage the plaintiff (*Vereker v Choi* (1985) 4 NSWLR 277, Clarke J at 284).

On an application for the release of assets to meet liabilities, the court must be satisfied that the application is not an attempt to have confirmed the dissipation of the defendant's assets, in an attempt to ensure that there would be no assets against which the successful plaintiff could execute.[120] In satisfying the court that assets subject to the order are required for a purpose which does not conflict with the policy underlying a Mareva order, the defendant must do more than state that he or she owes money to someone. The defendant must show that there are no other assets available out of which the debt could be paid.[121] An application for continuation of the Mareva order will be considered by the court in the same manner and having regard to the same factors as the grant or dissolution of an interlocutory injunction (*Deputy Commissioner of Taxation v Winter* (1988) 92 FLR 327, Yeldham J at 330 (SC NSW)).

118 See also *P C W (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (CA).

119 *Australian Iron & Steel Pty Ltd v Buck* [1982] 2 NSWLR 889, Rogers J at 892. Although this was an application for variation on the grounds of change of circumstances, there appears to be no reason why this principle should not apply generally to variation applications.

120 *Szentessy v Woo Ran (Aust) Pty Ltd (No 1)* (1985) 64 ACTR 98. The application for variation was refused in this case. See also *Atlas Maritime Co SA v Avalon Maritime Ltd (The Coral Rose) (No 3)* [1991] 4 All ER 783 (CA), where the court declined to release the foreign funds of a subsidiary company to pay legal fees in the face of evidence that the parent company had chosen to operate the subsidiary so as to leave it only with the frozen funds, and there was no evidence that the parent would not continue to meet the subsidiary's outgoings.

121 The origin of this principle is in the decision in *A v C (No 2)* [1981] 2 All ER 126, Robert Goff J at 127. A similar view is expressed in *Australian Iron & Steel Pty Ltd v Buck* [1982] 2 NSWLR 889, Rogers J at 890, which was referred to without criticism in *Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd* (1988) 14 NSWLR 552, Powell J at 569, and was followed in *Szentessy v Woo Ran (Aust) Pty Ltd (No 1)* (1985) 64 ACTR 98.

CHAPTER TWENTY-ONE

CONSTRUCTIVE TRUSTS

Barbara McDonald

INTRODUCTION

Definition

[2101] A constructive trust is generally described as a trust which is imposed by operation of law in circumstances where, according to equitable principles, it would be unconscionable for the legal owner of property to retain the beneficial interest in that property. Despite this general description, the examples of constructive trusts vary considerably in nature. In *Giumelli v Giumelli* (1999) 196 CLR 101 at 111, the High Court of Australia quoted Professor Scott who pointed out:

> "The word 'constructive' is derived from the verb 'construe', not from the verb 'construct' ... the court construes the circumstances in the sense that it explains or interprets them; it does not construct them."[1]

Unlike an express trust, it is imposed regardless of the actual or presumed intention or agreement of the parties.[2] In the sense that the imposition of the constructive trust is a response to the conduct of the person on whom it is imposed, it is, therefore, largely remedial in character; and yet the constructive trust also has many features which show that it is in some ways closer to

1 *Scott on Trusts* (4th ed, 1989), Vol 5, para 462.4.

2 Note, however, that in some cases the actual intention of the parties, together with detrimental reliance by the claimant, will be relevant to the imposition of a constructive trust: see below, para [2141]. Millett PJ also points out that a constructive trust arises from circumstances which are, ex hypothesi, known to the legal owner, for if they were not his conscience would not be affected, "Restitution and Constructive Trusts" (1998) 114 *Law Quarterly Review* 399 at 400. In contrast and due to the necessity of a charitable intention on the part of the settlor of a charitable trust, a "constructive charitable trust" cannot be imposed by a court as a remedial device, *Bathurst City Council v PWC Properties Pty Limited* (1998) 72 ALJR 1470 at [41] (discussed by Wright, D in "The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility" (1999) 14 *Journal of Contract Law* 221).

an express trust than to a pure remedy. The issue of whether a constructive trust depends for its existence on an order of a court (and, if so, whether it has a discretionary element like other equitable remedies), or whether it may arise by itself in certain situations is one of the many contentious issues that arise in any discussion of the constructive trust.[3] Constructive trusts are expressly excluded from the statutory requirements for writing and other formalities applicable to express trusts.[4]

Examples of the constructive trust

[2102] There are a number of situations which are accepted as giving rise to a constructive trust[5] and which are dealt with in detail below. The most well known is the constructive trust imposed on a fiduciary or trustee in relation to property acquired or held in breach of the fiduciary obligation or trusteeship, as in cases such as *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223; *Chan v Zacharia* (1984) 154 CLR 178 and *Boardman v Phipps* [1967] 2 AC 46.[6]

Another longstanding, but more controversial example, is the constructive trust imposed on a third party to a fiduciary relationship or trust who has received trust property or assisted in a breach of fiduciary obligations with knowledge of the wrongful nature of the fiduciary's conduct.[7]

Although most instances of the constructive trust fall within these two categories, it was said by Deane J in the High Court that neither principle nor authority requires the constructive trust to be confined to cases where there is some pre-existing fiduciary relationship (*Muschinski v Dodds* (1985) 160 CLR 583). In recent times, the constructive trust has gained significance in disputes concerning co-ownership of property or following the breakdown or ending of a domestic relationship or joint venture.[8]

3 See below, para [2106].

4 *Conveyancing Act* 1919 (NSW), s 23C(2); NT: *Statute of Frauds* 1677 (29 Car II c 3), ss 8, 65; *Property Law Act* 1974 (Qld), s 11 (2); *Law of Property Act* 1936 (SA), s 29 (2); *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Property Law Act* 1958 (Vic), s 53; *Property Law Act* 1969 (WA), s 34 (2); *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), Pt 12, Div 7, subs 1 (2).

5 See Austin RP "Constructive Trusts" in PD Finn (ed) *Essays in Equity* (Law Book Co, 1985) at 196. And see Dal Pont, G, "Equity's Chameleon — Unmasking the Constructive Trust" (1997) 16 *Australian Bar Review* 46.

6 This category is discussed below, para [2108]and ff.

7 See below, para [2121] and ff.

8 See below, para [2138] and ff.

These and other categories are still evolving: in *Muschinski v Dodds* (1985) 160 CLR 583, Gibbs J (at 595) referred to "the ill-defined limits of the rules relating to constructive trusts". A constructive trust may also arise in other situations, including the following discrete areas, some of which are dealt with elsewhere in this book:

- where property is acquired under a transaction which is liable to be set aside due to fraud, undue influence or the unconscionable nature of the transaction,[9] or where the property was obtained as a result of some deliberate wrongdoing;[10]
- possibly, and debatedly, where property is received or acquired by virtue of a mistake by the payer or where it is retained by the payee/recipient after he or she learns of the mistake.[11]
- in cases where a first mortgagee exercises a power of sale and receives proceeds which are more than enough to satisfy the debt, the excess being held on trust for the later mortgagees or the mortgagor;[12]
- in cases of mutual wills [13] and "secret" trusts; [14] and
- in cases where a vendor of land or other property has received the full purchase price or consideration under an agreement for sale or assignment (*Re Lind* [1915] 2 Ch 345). The exact nature of the purchaser's interest under an executory contract is unclear but it appears that, if the contract is specifically enforceable, the purchaser acquires an equitable interest in the property and the legal owner may then hold it on a constructive trust for the purchaser, although this

9 Although, in view of the decision in *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, it is arguable that the transferee has a beneficial, albeit voidable, title: see below, paras [2119]-[2120]. See also Ford H A L and Lee W A, *Principles of the Law of Trusts* (looseleaf service) para [22000]. See also *Lonrho PLC v Fayed No 2* [1991] 4 All ER 961 at 971 and *Greater Pacific Investments Pty Limited v Australian National Industries Limited* (1996) 39 NSWLR 143 (NSWCA). See also *Westdeutsche Bank v Islington LBC* [1996] AC 669 deciding that a payer under an ultra vires (and therefore void) contract did not have an equitable proprietary claim.

10 *Rasmanis v Jurewitsch* (1969) 70 SR (NSW) 407; *Black v Freedman* (1910) 12 CLR 105, where it was said by O'Connor J at 110: "Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character." *Black v Freedman* was recently cited in *Westdeutsche Bank v Islington LBC* [1996] AC 669, Lord Browne-Wilkinson at 716.

11 Contrast *Chase Manhattan Bank v Israel-British Bank* (1981) 1 Ch 105 at 114 and *Westdeutsche Bank v Islington LBC* [1996] AC 669 at 715. In the latter case, Lord Browne-Wilkinson supported the result but not the reasoning in *Chase*. He said at 715: "Although the mere receipt of moneys, in ignorance of [a] mistake [as to payment] gives rise to no trust, the retention of the moneys after the recipient learns of the mistake may well have given rise to a constructive trust."

12 *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 209: "a mortgagee selling under a power of sale is not an *express* trustee of the surplus for the mortgagor" (emphasis added). See also *Lloyds Bank v National Safety Council of Australia Victorian Division (in liq)* [1993] 2 VR 506 at 511.

13 *Birmingham v Renfrew* (1937) 57 CLR 666, and see Ford H A L and Lee W A, *Principles of the Law of Trusts*), paras [2220]-[22260]. See Mackie K, "Recent Developments in the Law Relating to Mutual Wills" (1997) 5 *Australian Property Law Journal* 95.

14 Ford H and Lee W A, *Principles of the Law of Trusts* (looseleaf service) paras [6250].

will be subject to the performance of the purchaser's side of the contract.[15]

- Possibly, and debatably, where an indigenous artist acquires copyright in an artwork while a fiduciary for his or her aboriginal community in respect of traditional ritual knowledge.[16]

Some further examples of the constructive trust have been suggested which may yet develop. Recently it was suggested[17] that circumstances in which a cinematographic film was made, involving the invasion of another's rights, such as by a trespass, might make it inequitable and against good conscience for the maker to assert ownership of the copyright in the film with the result that the maker might hold the copyright on a constructive trust.

The common basis and rationale of the constructive trust

[2103] The wide variety of situations in which the constructive trust will be imposed prompts the search for some common factor or underlying principle. The common factor appears to be that in all cases the courts of equity would regard it as unconscionable for the constructive trustee to assert a beneficial interest in the property or to deny that it is held on trust for the constructive beneficiary. A survey of the cases shows a number of reasons cited to justify the imposition of a constructive trust, some more specific than others:

- to give effect to equity's notion that the property belongs in equity to the constructive beneficiary due to some pre-existing property right;
- to reflect and give effect to equitable principles;
- to encourage strict observance of equitable obligations and to deter fiduciaries and third parties from undermining equitable interests;

15 *Chang v Registrar of Titles* (1976) 137 CLR 177, Mason J at 185, cf Jacobs J at 190 and see above, Chapter 13: "Equitable Assignments". See also *Lonhro plc v Fayed (No 2)* [1991] 4 All ER 961 at 971-2 and Heydon JD and Loughlan, PL *Cases and Materials on Equity and Trusts*, (6th ed, Butterworths, 2002) at [6.16]-[6.18]. Similarly, where a purchaser has undertaken to hold her or his title subject to a third party's right to repurchase, the purchaser will hold the title on constructive trust for the third party, *Bahr v Nicolay (No 2)* (1998) 164 CLR 604.

16 *Bulun Bulun v R & T Textiles Pty Limited* (1998) 157 ALR 193. See Weatherall, K, "Culture, Autonomy and *Djulibinyamurr:* Individual and Community in the Construction of Rights to Traditional Designs" (2001) 64 *Modern Law Review* 215 and Kenyon, A. "The Artist's Fiduciary — Australian Aboriginal Art and Copyright" (1999) 10 *Entertainment Law Review* 42.

17 *ABC v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1, Gummow and Hayne JJ at 22.

- to remedy other unconscionable behaviour or do justice in the circumstances of the case; and
- to remedy unjust enrichment, particularly where a constructive trust is the only effective way to do this.

In many cases, the constructive trust is an appropriate and powerful way to reinforce and give effect to equitable principles, for example, in the context of undue influence or fiduciary duties. In these areas its imposition is also a logical reflection of the proposition that the property involved *belongs in equity* to the victim of the undue influence or the breach of fiduciary duty. Particularly in cases of breach of fiduciary duty, the constructive trust, like the remedy of an equitable lien, overlaps with the equitable process[18] or device of "tracing" the property into the hands of the legal owner to restore the property to the equitable owner.[19] However, despite the fact that it shares this underlying rationale in some cases, as will be seen below, the constructive trust is not synonymous with tracing,[20] and each remedy is in certain ways more extensive and powerful than the other. On the one hand, tracing is a simpler and more powerful remedy where it is available because it may be used even against an innocent third party volunteer.[21] On the other hand, while the right to trace is lost as soon as the property in question is lost or dissipated in such a way that it is unable to be traced, the personal obligations attaching to a constructive trust, including the obligation to account or compensate for loss, will continue regardless. Depending on the circumstances, therefore, one remedy might be more attractive to a claimant than the other.

However, it is clear from the variety of examples given above that the operation of the constructive trust is not limited to cases where equity seeks to follow pre-existing property rights. It can be seen to have a much wider and gradually increasing operation based on the broader aim of equity to undo or remedy the effects of unconscionable behaviour in relation to property. Deane J, in *Muschinski v Dodds* (1985) 160 CLR 583 at 614 stated:

18 Millett LJ in *Boscawen v Bajwa* [1996] 1 WLR 328 at 334-5, see also *Gertsch v Atsas* [1999] NSW SC 898.

19 See below, Chapter 23: "Tracing".

20 For example, the House of Lords recently emphasised that when the beneficiary of an express trust traced into the proceeds of a life insurance contract, purchased partly with misappropriated trust monies, the beneficiaries were enforcing the express trust rather than seeking a constructive trust *Foskett v McKeown* (2001) 1 AC 102.

21 As in *Re Diplock* [1948] 1 Ch 465, and *Ministry of Health v Simpson* [1951] AC 251.

> "Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be *contrary to equitable principle*" (emphasis added).

Previously, in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 125, Deane J, in a minority judgment, had described the underlying principle in wide terms which did not limit the constructive trust to the confines of *equitable* principles:

> "[A] constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he has appropriated to himself in breach of his *contractual or other legal or equitable* obligations to another" (emphasis added).

From this passage, it appears that Deane J envisaged the constructive trust as a general remedy for unjust enrichment where *any* obligation recognised by law has been breached, although he might be thought to be confining his remarks to situations where the benefit held by the constructive trustee would but for the breach have passed to the plaintiff. In the circumstances of the case, he thought a constructive trust should have been imposed on the defendants due to their calculated breaches of their contractual duties in appropriating to themselves the goodwill of the plaintiff.[22] This suggestion is a novel and expansive one and is in direct contrast to the approach of Gibbs CJ in *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 at 378-379, where he impliedly rejected the notion of a constructive trust being a remedy in all cases of unjust enrichment.

There must clearly be a more specific rationale than mere "good conscience" for imposing a remedy in the nature of a trust rather than one of the other available remedies, such as damages, particularly if the circumstances do not support the notion that particular property held by a defendant *already belongs* in equity to the plaintiff.

That a constructive trust is an effective way of avoiding unjust enrichment is one justification for the imposition of a

22 See below, para [2108] and ff.

constructive trust in circumstances where other remedies would be ineffective to achieve that purpose,[23] and the concept of unjust enrichment as a general rationale underlying the availability of both common law and equitable relief is now well accepted in Australian law.[24] The Australian courts have not, however, gone as far as the Canadian courts in accepting unjust enrichment as a sufficient basis in itself for relief.[25] Nor is it ever a complete explanation, as Gummow J (at 503) pointed out in a discussion of the juridical basis of the constructive trust in *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485:

> "The constructive trust may be imposed as a cautionary or deterrent remedy even where there has been no unjust enrichment at the expense of the plaintiff ... In such situations [of a fiduciary's liability] the constructive trust operates not to restore to the [plaintiff] that of which it was deprived by the conduct complained of, but to enforce observance of the fiduciary duty not to prefer personal interest to duty to the plaintiff."

[2104] Why a proprietary remedy? Of the five reasons listed in the above paragraph for the imposition of a constructive trust, only the first, the recognition of some pre-existing property right, necessarily calls for a proprietary remedy.[26] So one question often recurs to which a convincingly complete answer has yet to be given: exactly what criteria require or justify the giving of a proprietary rather than a merely personal remedy? Arguably,

23 But not otherwise, *Roxburgh v Rothmans Pall Mall* (2002) 76 ALJR 203 at [57]. Contrast Mason J in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75-78 in which he gave qualified acceptance to the category of constructive trusts suggested by Learned Hand J in *123 East Fifty-Fourth Street Inc v United States* (1946) 157 F. Rep (2d) 68 in the hypothetical case of a restaurant owner who collected, from customers as a separate charge, a tax later found to be wrongly extracted by the authorities.

24 See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank* (1992) 175 CLR 353. See further, above, Chapter 4: "Equity and Restitution". See also Millett PJ, "Restitution and Constructive Trusts" (1998) 114 *Law Quarterly Review* 399.

25 See *Muschinski v Dodds* (1985) 160 CLR 583, Deane J at 614-615. Cf Toohey J in *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 153. Contrast *Rathwell v Rathwell* [1978] 2 SCR 436; *Pettkus v Becker* [1980] 2 SCR 834; *Soulos v Kortontzilas* [1997] 146 DLR (4th) 214, McLachlin J at 225-228; *Citadel General Assurance Co v Lloyds Bank Canada* (1997) 152 DLR (4th) 411 and see Hayton D, "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989). See also Gummow W M C, "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn P D (ed), *Essays on Restitution* (Law Book Co, Sydney, 1990). For further analysis of the constructive trust in the context of restitutionary claims, see above, Chapter 4: "Equity and Restitution"; Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, London, 1998); Birks P, *Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985); Birks P, *Restitution — the Future* (Federation Press, Sydney, 1992), Ch 5; Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995).

26 Burrows A, *The Law of Restitution* (Butterworths, London, 1993), p 415, appears to isolate this as the only justification for a proprietary remedy in the context of breach of confidence claims.

personal remedies, as between the plaintiff and the defendant, will usually achieve the other four objectives just as well.

The most common reason why a claimant seeks a proprietary rather than a personal remedy is to obtain priority over unsecured creditors when the constructive trustee is insolvent.[27] However, particularly in cases where the defendant was not under a fiduciary obligation to the claimant, it may be difficult to justify why the claimant is deserving of this priority.[28] Indeed, the approach of some commentators such as Goff and Jones[29] is to deal separately with the remedy according to whether the defendant is solvent or insolvent, so that third party rights can be considered as a matter of principle in the latter case.

There are other reasons too for a claimant to prefer a proprietary remedy.[30] There may be a danger of the defendant absconding. Limitation periods may differ according to the nature of the claim and the jurisdiction involved. The particular asset may have some inherent value to the claimant over and above its current value. The claimant may want increases in value of the asset to accrue to her or his account rather than to the defendant's.[31] In the case of a business set up by a fiduciary (and perhaps third parties) in breach of the fiduciary's obligations, the constructive trust may be a more attractive and practicable remedy than the remedy of account which can be open-ended and complex.[32]

Some commentators isolate the moral character of the defendant's conduct as a justification for imposing a proprietary remedy, for example, in cases of cynical or conscious

27 Cf where the defendant is solvent, "so that there is no need to pursue equitable remedies for there to be effective recovery" Gyles J in the Full Federal Court, (1999) 95 FCR 185 at 217, cited by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Limited* (2002) 76 ALJR 203 at [46].

28 See below, paras [2116]-[2119], for discussion of this rationale in the context of fiduciaries, where it is also not universally accepted. See also the discussion of this issue by Gummow J in *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485 at 505, and Oakley A, "Proprietary Claims and their Priority in Insolvency" (1995) 54 *Cambridge Law Journal* 377. See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 72 ALJR 1470 at [42].

29 Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, 1998), pp 81,88-89.

30 See also Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, 1998) p 76.

31 See also Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), para [325], citing *Westdeutsche Landesbanke Girozentrale v Islington London Borough Council* [1994] 1 WLR 938 on the issue of compound interest. See now the decision of the House of Lords [1996] AC 669.

32 Gummow W M C, "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn P D (ed), *Essays on Restitution* (Law Book Co, Sydney, 1990), p 72. See below, para [2115], for discussion of *Warman International v Dwyer* (1995) 182 CLR 544. On the remedy of account, see below, Chapter 26: "Taking Accounts".

wrongdoing.[33] Others point to the adequacy or inadequacy of other remedies as a suitable criterion.[34] In *Giumelli v Giumelli* (1999) 196 CLR 101,[35] the High Court of Australia went so far as to hold that a constructive trust should not be imposed, if in all of the circumstances of the case, there is an appropriate equitable remedy which falls short of the imposition of a trust. Recently Gummow J in the High Court of Australia has cautioned against "what, for some, appears to be a mesmeric fixation upon the (not always well understood) potential of equitable, particularly trust, remedies where what the common law offers will meet the case (*Roxborough v Rothmans of Pall Mall Australia Limited* (2002) 76 ALJR 203 at [46] (see also [57])).

Finally, in the cases dealing with constructive trusts discussed in the last section of this chapter, such as *Muschinski v Dodds* (1985) 160 CLR 583,[36] where there is no room for the notion that the claimant had some pre-existing property right which had survived the dealings of the parties, it is arguable that a proprietary remedy was appropriate because it achieved a just restitution to the plaintiff of the benefit unconscionably or unjustly retained by the defendant *in the same form* in which she had delivered it to him.

Nature of the constructive trust

[2105] Due to the variation in the circumstances in which a constructive trust will be imposed, the exact nature and characteristics of a constructive trust and of the constructive trustee's liabilities are difficult to describe in terms of universal application. In theory, perhaps, the constructive trustee ought to be subject to the same duties as an express trustee. However, in general, the express trustee is intended to have a continuing role in relation to the property. In contrast, the constructive trust, once it is declared by the court, will in all likelihood last no longer than is necessary for the constructive trustee to hand over the property to the

33 See *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 51-52. See also Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, 1998), pp 81,88-91, 118, 737, and see discussion of United States authorities by Gummow W M C, "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn P D (ed) *Essays on Restitution* (Law Book Co, Sydney, 1990), p 78.

34 For example, see Gibbs CJ in *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 at 379; and see also Mason A, "Themes and Prospects" in Finn P D (ed), *Essays in Equity* (Law Book Co, 1985), p 246.

35 Gleeson CJ, McHugh, Gummow, and Callinan JJ at 113, citing *Bathurst City Council v PWC Properties Pty Limited* (1998) 195 CLR 566 at 584-585, and *Napier v Hunter* (1993) AC 713 at 738, 744-745, 752.

36 See below, para [2138] and ff.

constructive beneficiary,[37] or to make an accounting of proceeds or profits.[38] Kearney J stated in *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 (at 504) in the context of a constructive trust imposed for breach of fiduciary duty:

> "It does not seem to me that the imposition of the constructive trust should be treated as having the effect of super-imposing wider obligations upon the constructive trustee than are necessary in order to afford to the plaintiffs the restoration of their property to which they became entitled upon the breach of the fiduciary duties."

There are two aspects of the discussion of the constructive trust which have tended to confuse a number of related issues. First, because of the often considerable overlap between the various personal and proprietary remedies available to the parties, there is a tendency to refer to remedies interchangeably so that the term "constructive trust" may be used when what is really meant or being sought by the claimant is a mere personal liability to account, rather than a proprietary remedy.[39] Secondly and more fundamentally, there is also the widely held view that the constructive trusteeship of a third party to a fiduciary relationship involves *only* a personal liability where it is fixed on a party who has merely assisted in the breach of fiduciary duty without ever receiving "trust" property.[40] This view raises the question whether it is appropriate to call such a person a "trustee" of *any* sort and leads to calls to discard the term "constructive trustee" altogether.[41]

37 So that it is akin to an order for conveyance — see *Giumelli v Giumelli* at (1999) 196 CLR at 112. See Millett J in *Lonrho PLC v Fayed No 2* (1991) 4 All ER 961 at 972 who likened the position of some constructive trustees to that of a vendor of property contracted to be sold and warned that "it is a mistake to suppose that in every situation in which a constructive trust arises the legal owner is necessarily subject to all the fiduciary obligations and disabilities of an express trustee."

38 See Meagher RP, "Constructive Trusts: High Court Developments and Prospects" (1988) 4 *Australian Bar Review* 67 at 71, where he doubts that a constructive trustee would be held liable to the full range of duties to which an express trustee is subject.

39 See Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 394. See also *Greater Pacific Investments Pty Limited (in liq) v Australian National Industries Limited* (1996) 39 NSWLR 143 at 152-3.

40 See, for example, Oakley A, "Proprietary Claims and their Priority in Insolvency" (1995) 54 *Cambridge Law Journal* 377 at 382; Birks P, *Restitution — The Future* (Federation Press, Sydney, 1992), pp 118-119 and the texts referred to there; Heydon J D and Loughlan PL *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, 2002), para [31.10.8]. See too *Giumelli v Giumelli* (1999) CLR 101 at 112, giving this as an example of a mere personal liability to account.

41 See Birks P, *Restitution — The Future* (Federation Press, Sydney, 1992), pp 107ff, who states that there is no sense in continuing to use the term "constructive trustee" as nothing is added to the tracing remedy on the one hand and the personal liability to account on the other by calling the defendant a "constructive trustee". See also discussion by Millett LJ in *Paragon Finance v DB Thakera and Co*. [1999] 1 All ER 400 at 409-414, a case concerned with limitation periods, calling for the discarding of the term "constructive trustee" where a plaintiff is necessarily confined to a personal remedy. See also Millett PJ, "Restitution and Trusts" (1998) 114 *Law Quarterly Review* 399.

However, it is submitted that this is a view which is both illogical and unsound. It is illogical because it cannot be reconciled with the underlying rationale of imposing a constructive trust in this context. If the basis of the liability is that the benefit obtained by the third party is regarded as "belonging in equity" to the principal or beneficiary of the fiduciary relationship, then even in cases of assistance without receipt, if the third party still holds the proceeds of that assistance or has invested the proceeds of that assistance in an identifiable fund or property, that third party should be subject to proprietary remedies in the same way as a fiduciary who has received a benefit which does not itself originate from trust property. If, on the other hand, the basis of liability is the dishonesty or fraud of the third party, then why should the constructive trust in this type of case be different in nature from the constructive trust in other cases of unconscionable behaviour?

It is unsound because it is submitted that there is little basis for making the distinction to be found in the authorities to date. If, for example, it had been found in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 that the third party, Consul, knew of the breach of duty by the fiduciary, there appears to be no reason why the plaintiffs should not have been able to claim that Consul held the land acquired due to the breach on constructive trust for the plaintiff. This indeed was the view of the majority of the New South Wales Court of Appeal[42] (whose judgment was overturned on another point), and of McTiernan J in the High Court ((1975) 132 CLR 373 at 386).

It is true that, in many cases of knowing assistance by a third party, the proprietary aspect of the liability may have lost its importance because the proceeds have been dissipated so that there is nothing left to which to *attach* the trust. However, while the personal liability of the constructive trustee may in some circumstances be the only *remaining* attribute, nevertheless this does not mean that the constructive trust *itself* becomes a mere personal liability any more than in the case of an express trust where the trust property has been dissipated by the trustee. To say that would rob the expression "constructive trust" of all meaning and be inconsistent with the conceptual basis of the constructive trust.

However, the reluctance of the court to grant remedies which *create* priority over unsecured creditors will continue to support the characterisation of this type of constructive trust as a mere personal liability.[43]

42 [1974] 1 NSWLR 443, Hutley JA at 471.

43 See above [2104] and [2116-2119].

Institution or remedy?

[2106] A vexed issue behind the description of the constructive trust as a trust "imposed by operation of law independently of the will of the parties" is whether a constructive trust arises *of itself* by operation of law or whether it depends for its existence on an order of the court. This issue is often expressed by asking whether the constructive trust is an institution or a remedy. If the former, there will be difficulty in determining exactly when it arises, and if the latter, there is the issue of whether the remedy is generally available and whether it is discretionary. These are matters of practical as well as conceptual importance.[44]

Many of the points made in discussion of these issues overlap with those concerned with the juridical basis for the constructive trust and the attempts by some to extend the availability of the constructive trust as a general remedy in cases of unjust enrichment or unfair or unconscionable behaviour.[45] In *Muschinski v Dodds* (1985) 160 CLR 583 at 613-614, Deane J discussed the issue as follows:

> "In a broad sense, the constructive trust is both an institution and a remedy of the law of equity … The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights … Like express and implied trusts, the constructive trust developed as a remedial relationship superimposed upon common law rights by order of the Chancery Court. It differs from those other forms of trust, however, in that it arises regardless of intention … The constructive trust shares, however, some of the institutionalised features of express and implied trust. It demands the staple ingredients of those trusts: subject-matter, trustee, beneficiary (or, conceivably, purpose), and personal obligation attaching to property."

44 Although some commentators criticise the debate as a "bogus discourse" (Birks P, *Restitution — The Future* (Federation Press, Sydney, 1992), p 117) or "idle" (Goulding J in *Chase Manhattan Bank v Israel-British Bank* (1981) Ch 105 at 124). Others describe the distinction as a matter of rhetoric and as unsound: Wright D, "The Statutory Trust, The Remedial Constructive Trust and Remedial Flexibility" (1999) 14 *Journal of Contract Law* 221. See also Wright D, *The Remedial Constructive Trust*, (Butterworths, Sydney, 1998).

45 See above, paras [2103]-[2104], and below, paras [2138]-[2140].

Deane J continued (at 614-615) that:

> "[N]otwithstanding that the constructive trust is remedial in both origin and nature, there does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust … Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence inter partes independently of any formal order declaring it or enforcing it.[46] In this more limited sense, the constructive trust is also properly seen as both 'remedy' and 'institution'. Indeed, for the student of equity, there can be no true dichotomy between the two notions … the remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in the particular circumstances."

In *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 153, Toohey J quoted Professor Scott[47] to the effect that the constructive trust exists *because* the defendant can be compelled to convey the property. In other words, like many equitable interests, the constructive trust arises of itself in circumstances where a court of equity would recognise its existence. In the words of Meagher and Gummow:[48] "[T]he decree recognises and enforces the trust, but does not create it; the trust arises immediately the circumstances exist in respect of which equity would construe a trust."[49] Predictability of equity's approach and clarity in the development of the constructive trust thus become all the more imperative.

46 Contrast the result in *Muschinski v Dodds* itself with the New South Wales Court of Appeal decision in *DPC Estates Pty Ltd v Consul Development Pty Ltd* [1974] 1 NSWLR 443 that Consul held the properties on a constructive trust from the moment of acquisition.

47 *Scott on Trusts* (3rd ed, 1967), para 462. The same passage is discussed in *Parsons and Parsons v McBain* [2001] FCA 376 at [10].

48 Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, 1997), para [1311].

49 See *Parsons and Parsons v McBain* [2001] FCA 376 in which the Full Federal Court rejected the notion advanced in *Re Osborn* (1989) 91 ALR 135, that the common intention constructive trust comes into existence only when declared by the court. *Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484, Burchett J at 48, makes the same point citing Oakley AJ "The precise effect of the imposition of a constructive trust" in Goldstein S (ed), *Equity and Contemporary Legal Developments*, (Hebrew University of Jerusalem, 1992) 427 at 433. See also Levine, J, "Timing of the Imposition of Constructive Trusts" (1997) 5 *Australian Property Law Journal* 74, and Dal Pont G E, "Equity's Chameleon — Unmasking the Constructive Trust" (1997) 16 *Australian Bar Review* 46 at 41-52. See also *Troja v Troja* (1994) 33 NSWLR 269 as to a *Baumgartner* constructive trust.

[2107] Like other equitable remedies, the discretionary nature of the constructive trust as a remedy is clear.[50] In recent cases where the courts have considered whether the circumstances of unconscionable conduct called for the imposition of a constructive trust, the "flexibility" of equitable remedies has been emphasised.[51] Even in those circumstances where the –availability of a constructive trust as a possible remedy is well-established, such as following a breach of fiduciary duty, it is by no means certain that a constructive trust will necessarily be accepted by the court as the appropriate remedy between the parties.[52] Despite the continued affirmation of the strict liability of a fiduciary, Australian cases indicate a greater willingness to give consideration to the effects of liability on the defendant. In *Chan v Zacharia* (1984) 154 CLR 178, Deane J (at 204) warned against an inflexible application of the principles of equity and noted that the court would not allow equitable remedies to be used for an unconscientious or unjust assertion of equitable rights.[53] The court will also take note of the effect on third parties of recognising a constructive trust retrospectively,[54] whether or not the defendant is solvent. For this reason, in *Muschinski v Dodds* (1985) 160 CLR 583,[55] the constructive trust took effect from the date of publication of the reasons for judgment. In relation to insolvency, the effect on unsecured creditors is a matter of continuing debate.[56]

50 See Burns F, "*Giumelli v Giumelli* revisited*:* Equitable Estoppel, The Constructive Trust and Discretionary Remedialism" (2001) 22 *Adelaide Law Review* 123, Wright, D, "The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility" (1999) 14 *Journal of Contract Law* 221 and articles referred to therein. See also Evans, S, "Defending Discretionary Remedialism", (2001) 23 *Sydney Law Review* 463.

51 See Gleeson CJ in *Green v Green* (1989) 17 NSWLR 343 at 355, 358, applying dicta of Browne-Wilkinson LJ in *Grant v Edwards* [1986] Ch 638 at 657. See also now *Giumelli v Giumelli* (1999) 196 CLR 101.

52 See below, para [2108].

53 See also *Warman International v Dwyer* (1995) 182 CLR 544, discussed below, para [2108].

54 *Giumelli v Giumelli* (1999) 196 CLR 101, where monetary compensation, secured by a charge, was the preferred remedy.

55 Cf *Re Sabri* (1996) 137 FLR 165. See also *Fortex Group Ltd (In receivership and liquidation) v MacIntosh* [1998] 3 NZLR 171.

56 See Goff R and Jones G, *The Law Of Restitution* (6th ed, Sweet & Maxwell, 1998), ch 2, and see above, paras [2103]-[2104], and below, paras [2116]-[2120].

CONSTRUCTIVE TRUSTS IMPOSED ON FIDUCIARIES AND TRUSTEES

Introduction

[2108] The constructive trust is one of a number of remedies both personal and proprietary imposed on a fiduciary who has acted in breach of fiduciary duty.[57] The personal remedies include an action for account of profits, an action for compensation or damages for loss suffered by the person to whom the duty is owed, rescission of contracts and the various procedures available for enforcement of fiduciary duties, such as prohibitory and mandatory injunctions. The other proprietary remedies include the equitable remedy of tracing the property and the equitable lien or charge over assets to secure the payment of sums found due.[58] The constructive trust, like account or tracing, is concerned with gains or benefits made by the fiduciary rather than with losses suffered by the beneficiary or principal.

The profit to which the constructive trust attaches may have been obtained as a result of a breach of either of the two limbs of the fiduciary obligation, that is, from conduct involving a conflict of interest or merely from conduct which involved making use of information or opportunities gained in the course of acting as a fiduciary. Thus in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 107-108,[59] Mason J stated:

> "A fiduciary is liable to account for a profit or benefit if it was obtained (1) in circumstances where there was a conflict, or possible conflict of interest and duty, or (2) by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position ... It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by misuse of his fiduciary position. The consequence is that he must account for it and in equity the appropriate remedy is by means of a constructive trust."

57 See generally above, Chapter 10: "Fiduciary Obligations". The constructive trust, like other equitable remedies, is a discretionary remedy. See above [2107].

58 See Gummow J in *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485 at 504.

59 See also Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 198-199, and *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

In *Chan v Zacharia* (1984) 154 CLR 178 at 199, Deane J points out that the breach of duty might involve an active breach or conflict of interest, such as an active pursuit of personal interest or misuse of position, while in other cases "there might be no breach of fiduciary duty unless and until there is an actual failure by the fiduciary to account for the relevant benefit or gain".

It will be noted that, in the passage quoted above, Mason J refers to the constructive trust as being the appropriate remedy in such cases. It is, however, by no means certain that a constructive trust will be the remedy sought or obtained in all cases involving a liability to account.[60] Apart from the fundamental issue, discussed above, of when a proprietary rather than a personal remedy is appropriate or justified, there are other considerations which will affect the choice or outcome: does the plaintiff want the asset or the money? Has the asset increased in value and might it continue to do so or has the original gain been dissipated? Is the defendant insolvent? Is it practicable to award a constructive trust, for example, over a business? Would a constructive trust have the effect of forcing the parties to continue in a relationship of conflict or ill-will, particularly in a business context? In *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 560, the High Court said that the outcome will depend on a number of factors: the nature of the property, the relevant powers and obligations of the fiduciary and the relationship between the profit made and the powers and obligations of the fiduciary. The finding of a constructive trusteeship is more appropriate in cases of specific assets which fall within the scope and ambit of the fiduciary responsibilities than in the case of a business which is acquired and operated.

[2109] The liability of a fiduciary to disgorge any profit or benefit is strict, that is, it applies whether or not the fiduciary was acting honestly or dishonestly,[61] recklessly, or negligently or with the best intentions.[62] This disregard of the fiduciary's intentions is reflected both in the imposition of liability and in the extent of the relief available. So just as it is no excuse for the fiduciary to say that he or she was acting at all times in ignorance of the breach of duty or in what he or she believed to be in the best interests of the beneficiary, so there is no additional relief of a punitive nature available against even the most dishonest

60 See Gummow W M C "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn P D (ed), *Essays on Restitution* (Law Book Co, Sydney, 1990), pp 71ff.

61 *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 199; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, Lord Russell at 144-145.

62 See further above, Chapter 10: "Fiduciary Obligations".

fiduciary. It is in this area that the deterrent nature of the constructive trust is strongly emphasised in the decided cases. The stringent rule is said to have as one of its purposes to ensure that fiduciaries generally conduct themselves at a level "higher than that trodden by the crowd".[63]

However, although the bona fides of the fiduciary will not excuse her or him from liability, it will be relevant when the court is considering whether or not the fiduciary is entitled to recompense or reimbursement for work done or expenditure incurred in making the gain which is now held for the benefit of the principal. In *Phipps v Boardman* (1964) 1 WLR 1014, the fiduciaries, whose bona fides, honesty and integrity were expressly recognised by the court, were held to be entitled to an allowance for their work and skill. Wilberforce J stated (at 1018) that, as the transaction involved a particular kind of professional skill for which it would otherwise have been necessary to employ an expert, "it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it". Furthermore, his view, with which the majority of the House of Lords agreed, was that payment should be on a liberal or generous scale.[64] In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, the High Court did not need to decide the issue, having held that no fiduciary relationship existed, but the New South Wales Court of Appeal, which had taken the contrary view, held that the defendant in that case would not be eligible for any such allowance: "It is one thing if a fiduciary has made an honest mistake, but it is an entirely different thing to reward him for his fraudulent conduct. Any reward allowed to HPI for what it did … would not be just, but unjust."[65] On the other hand, in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, a case concerned mainly with the remedy of account of profits, the High Court held, despite the finding that the defendant fiduciary in that case was "actively dishonest" (at 560) and had obtained "an identifiable profit from that dishonesty"(at 560), that the defendants were entitled to an "appropriate allowance for expenses, skill, expertise, effort, and resources contributed by them" (at 568).[66] Whether such an allowance should be made is a matter of judgment which will

63 *Meinhard v Salmon* 164 NE 545 (1928), Cardozo CJ at 546. See also *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485, Gummow J at 503.

64 *Phipps v Boardman* (1964) 1 WLR 1014 at 1018; House of Lords: [1967] 2 AC 46, Lord Hodson at 112.

65 *United States Surgical Corp v Hospital Products International Pty Ltd* (1983) 2 NSWLR 157 at 243. See also *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584, Bryson J at 596.

66 See also *Colour Control Centre Ltd v Ty* (unreported, NSW Supreme Court, Santow J, 24 July 1995).

depend on the facts of the given case (at 562), but this, like the issue of whether the fiduciary should be entitled to a share of the profits[67], would seem to be subject to the notion that the strict liability of the fiduciary should not be a "vehicle for the unjust enrichment of the plaintiff" (at 561).

In *Guiness plc v Saunders* [1990] 2 AC 663 at 701, Lord Goff dealt with the difficulty of reconciling an allowance by the court with the "fundamental" principle that trustees and fiduciaries were not entitled to remuneration for services rendered unless the trust instrument or agreement expressly authorised it. He suggested (at 701) that "a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees".[68]

Theoretically, uncertainty remains in Australia as to the availability of the constructive trust in cases where the gain is in the form of a bribe or secret commission to the fiduciary from a third party, as to which, see below. The more straightforward cases will be considered first.

Benefits gained by a trustee or fiduciary in breach of fiduciary duty by use of property

[2110] A constructive trust will arise where a trustee or fiduciary has obtained a benefit in breach of the fiduciary duty by use of trust property, or property held pursuant to a fiduciary relationship, or where the benefit emanates from such property. In these instances, once the breach of trust or duty has been established, the authorities are clear: the constructive trustee will hold the gain on a constructive trust for the beneficiary or principal. The classic case is *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223, originally authority for a narrow rule concerned with renewal of leases, but now seen as the basis or authority for, or alternatively merely as an illustration of, the more general principles of liability.

67 Note that the "share" of the fiduciary might be recognised as an allowance for his or her contribution to the profits or as a matter of causation of the profits. See below [2115].

68 See comment on this point by McCormack M, (1991) 12 *The Company Director* 90, particularly in relation to company directors.

Renewal of leases

[2111] The rule in *Keech v Sandford* is that a trustee of a tenancy who obtains a renewal of the lease for herself or himself holds the interest in the renewed lease as part of the trust estate. According to Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 200, the rule is applicable "regardless of whether the original lease was renewable by right or custom or whether the lessor was willing to grant a new lease for the benefit of the trust or whether there would, in the circumstances, be nothing inequitable in the trustee obtaining a renewal of the lease for his own benefit". The rule has been applied to fiduciaries other than trustees. In *Chan v Zacharia* itself, Dr Chan had carried on practice in partnership with another doctor, Dr Zacharia, for two years until the partnership dissolved. Their lease included an option for renewal. Within the option period but before the final winding-up of the partnership affairs was completed, Dr Chan obtained from the lessor a new lease for himself for two years. The High Court by a majority held that Dr Chan held the new lease upon a constructive trust for those entitled to the property of the dissolved partnership.

Deane J, in a thorough examination of the fiduciary principle, pointed out that the effect of the rule in *Keech v Sandford* is that vis-a-vis trustees, there is an irrebuttable presumption that the new lease was obtained by use of the position of advantage which the trustee enjoyed as the tenant at law, so that he or she holds the new lease as constructive trustee. The rule is modified somewhat vis-a-vis other fiduciaries, in that there is then merely a rebuttable presumption that the new lease was obtained by use of the fiduciary's position.[69]

Other instances of use or misappropriation of trust property

[2112] While the rule in *Keech v Sandford* is, strictly speaking, a rule concerning renewal of leases, the case nevertheless has been used as an authority for principles of more general application. Thus in *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350, the High Court comprising Dixon CJ, McTiernan and Fullagar JJ said:

> "The doctrine of *Keech v Sandford* is shortly stated by saying that a trustee must not use his position as trustee to make a gain for

69 *Chan v Zacharia* (1984) 154 CLR 178 at 201-203. See also discussion above, Chapter 10: "Fiduciary Obligations".

himself: any property acquired, or profit made, by him in breach of this rule is held by him in trust for his *cestui que trust* … It applies to all cases in which one person stands in a fiduciary relation to another."

There are many illustrations of the application of this more general principle to cases where a trustee or fiduciary has obtained a benefit by misappropriation or use, albeit bona fide, of trust property. In these cases, the imposition of a constructive trust and of a liability to account as a constructive trustee appears uncontroversial given the accepted strictness of a fiduciary's liability.

What is more contentious, however, is the identification of the gain itself and the *extent* of liability. In this area, there is considerable overlap with the equitable remedy of tracing which depends for its continued effectiveness on the ability to identify the property in the hands of the holder of the legal title, whether fiduciary or third party. Many of the cases concern one or both remedies and, in some of these cases, the actual remedy in the case may be to give a charge over the assets or order that the assets be handed over rather than a declaration of a constructive trust. Regardless of the actual nature of the proprietary remedy given, it is submitted that the principles expressed in the tracing cases on the issue of identification are equally applicable to cases of constructive trusts over gains.[70]

[2113] In many of the cases, the beneficiary will be seeking not only the original gain received by the trustee or fiduciary but also any increase in value of that benefit or any further profit derived from use of that benefit. In relation to unmixed gains, the following principles apply:[71]

- Where the proceeds or benefit obtained have been deposited in a bank account or invested in new property, the account or the new property will be held on a constructive trust.[72]
- Where the original benefit received is in the nature of identifiable property, such as shares, dividends, or real or personal property, that property will itself be held on constructive trust for the principal or beneficiary, as in *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223. In both cases, it is submitted that the words of the High Court in *Scott*

70 Note however that the constructive trust, unlike tracing, will survive as a personal remedy against the constructive trustee beyond the dissipation of the property.

71 See also Meagher R P and Gummow W M C, *Jacobs' Law of Trusts* in Australia (6th ed, Butterworths, Sydney, 1997), para [2710].

72 *Brady v Stapleton* (1952) 88 CLR 322; *Re Diplock* [1948] 1 Ch 465.

> *v Scott* (1963) 109 CLR 649 apply, namely: "… [W]here property is, in breach of trust, bought exclusively with trust moneys the beneficiaries may, instead of pursuing their personal rights against a trustee, elect to take the property." (McTiernan, Taylor and Owen JJ at 661.)

The mere fact that the trust property has become mixed with the fiduciary's own property will not defeat the claim. In such cases, there will be one of two results:

- "If a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."[73]
- Alternatively, if the trustee is able to make a practicable distinction between the trust and her or his own property, the trustee will hold a proportion of the property on a constructive trust.[74] This was the outcome impliedly favoured by the High Court justices in *Scott v Scott* (1962) 109 CLR 649 at 664, where they observed that such an approach was consistent with equity's approach to resulting trusts based on presumed intention of the parties as indicated by their contribution. They pointed out the anomaly which would be caused if the contribution of the "beneficiary's" money would lead to a (resulting) trust in a case where the "trustee" had no intention to defraud the "beneficiary" but not to any trust where the "trustee" intended to defraud.

Any increase in the value of the investment asset will then accrue to those for whom it is held in trust. In *Scott v Scott*, the High Court of Australia vehemently rejected the suggestion that the trustee should merely repay to the beneficiaries the original sum of trust moneys invested in a house, keeping the whole of the profit from the increase in the value of the house to himself. Rather, the beneficiaries were entitled to the profit attributable to their contribution to the purchase of the property.[75]

In New South Wales, the application of the strict approach to a fiduciary has been taken even further. In *Paul A Davies (Australia) Pty Ltd v Davies (No 2)* (1983) 1 NSWLR 337,[76] the defendants,

73 *Frith v Cartland* (1865) 2 H & M 417 at 418, quoted by Dixon CJ and Fullagar J in *Brady v Stapleton* (1952) 88 CLR 322 at 336; and see *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 109-110; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-62. See also *Natural Extracts v Stotter* (1997) 24 ACSR 110.

74 See *Brady v Stapleton* (1952) 88 CLR 322, where the actual remedy was that the shares involved be handed over.

75 See also *Re Tilleys Wills Trust* [1967] Ch 1179. See also *Foskett v McKeown* [2000] 2 WLR 1299.

76 For further discussion, see below, para [2326]. Contrast the position where monies have been *borrowed* from the beneficiary or principal, *Hancock Family Memorial Foundation Ltd v Porteous* [2000] WAR 198.

two directors of the plaintiff company, had purchased a guesthouse in their own names using moneys borrowed from the plaintiff company to provide the deposit with the balance, paid three years later, advanced to them by a bank secured by a mortgage on the property. They had also used money obtained from the plaintiff to improve the property and business during this time. The trial judge held that the defendants were in breach of their fiduciary duties and the issue for the New South Wales Court of Appeal was as to the proper remedy.

The New South Wales Court of Appeal held that the whole of the property, including the business, goodwill and profits, was held on constructive trust for the plaintiff. The *source* of the personal contribution by a fiduciary to property purchased with a mixture of trust and personal moneys will be relevant to the remedy given. The use of trust property to supply the necessary deposit had provided the whole opportunity for the trustees to gain, for without it they would not have been in a position to borrow the balance. Moffit P and Mahoney JA held that, where the personal contribution was dependent on the unauthorised use of the trust property, it could not entitle the fiduciaries to a share of the property. Hutley JA went further and held that resources gained by a fiduciary in breach of duty are not to be considered a personal contribution at all.[77]

Gains by a trustee or fiduciary other than by use of trust property

[2114] In cases where a trustee or fiduciary has obtained a profit, benefit or gain other than by use of trust property, for example, by use of the fiduciary position or of information[78] or opportunities obtained while acting as a fiduciary, both the threshold issue of liability and the issue of identifying the exact nature and extent of the gain flowing from the breach are often very difficult to determine. The first issue involves defining the scope of the fiduciary obligation and determining whether the fiduciary's conduct falls within it, and is dealt with above, Chapter 10: "Fiduciary Obligations". As to the second issue, the benefit may

77 The trustees were, however, entitled to allowances for their work and expenditure as though they were managers of a profit-making exercise. A similar result was reached in *Hagan v Waterhouse* (1991) 34 NSWLR 308.

78 Information is sometimes referred to as, or as analogous to, trust "property", for example, see Hutley JA in *DPC Estates v Grey and Consul Development* (1974) 1 NSWLR 443 at 470-471. See also McPherson B H, "Information as Property in Equity" in Cope M (ed), *Equity: Trends and Issues* (Federation Press, Sydney, 1995). However, due to its intangible nature, it falls more readily into this category than the last for the purpose of identifying the gain.

be in the form of money or property such as shares or real estate, or in the nature of a business opportunity, such as participation in a mining venture or access to a list of potential customers. Where the proceeds are readily equated with particular assets, the position appears to be clear: the person to whom the fiduciary duty is owed is entitled to the whole gamut of equitable relief and often it will be a matter of the successful principal or beneficiary making an election between, for example, an account or lien or charge, and the asset in whole or in part.

In *Phipps v Boardman* (1964) 2 All ER 187 at 208; House of Lords: [1967] 2 AC 46, where the gain to the trustee in that case was the acquisition of shares and the profit from them, Wilberforce J, whose judgment a majority of the House of Lords affirmed, declared that the shares were held by the defendants as constructive trustees for the plaintiff and ordered an account of the profits which had been made already. Gummow J, writing extra-judicially, comments that "[t]he shares were something the plaintiff might wish to sell, keep as an investment or otherwise turn to account. An enquiry as to profits, extending into the future, would have suited no one".[79]

[2115] Where, however, the opportunity taken by the trustee or fiduciary was used by the fiduciary to enhance or even to set up her or his own business, distinguishing the gain attributable to the actual breach of duty will be much more difficult. The fiduciary may have devoted a great deal of time, skill, effort and money to developing the business for her or his own benefit. The issue of how to compensate the beneficiary in those circumstances has been the subject of a number of Australian cases.

In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41,[80] the plaintiff, a United States company which manufactured and sold surgical stapling devices, distributed them in Australia through the defendant, HPI, as its exclusive distributor. Unknown to the plaintiff, HPI began to copy its surgical staplers and other products and applied for an Australian patent. It began to substitute its own staplers in orders for USSC staplers and then to market its own products to customers of USSC products. After the termination of the distributorship, USSC commenced proceedings claiming, inter alia, breaches of contract and fiduciary duty and seeking a declaration that HPI's business was held on constructive trust for USSC. The trial judge

79 Gummow W M C, "Unjust Enrichment, Restitution and Proprietary Remedies" in Finn P (ed), *Essays on Restitution* (Law Book Co, Sydney, 1990), pp 71-72.

80 See also *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 300-302; *Colour Control Centre Ltd v Ty* (unreported, NSWSC, Santow J, 24 July 1995).

found breaches of fiduciary duties but rejected a constructive trust as an appropriate remedy, ordering instead an account of profits to be secured by an equitable lien over the assets of HPI.

The New South Wales Court of Appeal[81] affirmed the trial judge's decision as to the existence of the fiduciary relationship but reversed his decision as to a constructive trust. The Court of Appeal held that a constructive trust was appropriate where a fraudulent fiduciary had exploited for her or his own gain an opportunity which the fiduciary should have pursued for the beneficiary and the constructive trust would be over the whole asset unless the fiduciary could prove some entitlement to a proportion. In this case, the circumstances of the case and particularly the high degree of fraud, deception and dishonesty involved in the attempt to steal the beneficiary's goodwill, warranted a constructive trust over the whole of HPI's assets without any allowances.

Ultimately, USSC failed to persuade the High Court that a fiduciary relationship existed between it and HPI,[82] leaving it to its contractual remedies for damages which were of little value against these defendants. Mason J was in the minority in finding that a fiduciary relationship did exist, but nevertheless he held that a constructive trust over *all* the assets of HPI ranged "far beyond the profits and benefits obtained by HPI in breach of its fiduciary duty" ((1984) 156 CLR 41 at 114). After referring to general principles of a fiduciary's liability to account, he noted that the propriety of granting relief by way of constructive trust is closely associated with the exact nature of the breach and the identification of the resulting benefit, and he referred to the particular problems of declaring a constructive trust over a competing business set up and operated by a fiduciary in breach of duty. Two approaches, discussed by Upjohn J in *Re Jarvis* [1958] 1 WLR 815, were possible: the one more favourable to the fiduciary was that he or she should hold as constructive trustee only the particular benefits which had flowed from the breach; the other less favourable to the fiduciary was to treat her or him as constructive trustee of the whole business, but with an allowance for time, energy, skill and financial contribution. In each case, the remedy should reflect as accurately as possible the true measure of the profit obtained from the breach. Two factors were critical here: first, a constructive trust over the whole business not only went far beyond the profits obtained by HPI in breach of duty, but failed to make any allowance for HPI's

81 [1983] 2 NSWLR 157.

82 See above, Chapter 10: "Fiduciary Obligations".

contribution; secondly, a constructive trust over the whole of HPI's assets would effectively bar HPI from competing in the United States market which would not have been in breach of its fiduciary duty. The result was not affected by the fraudulent nature of HPI's conduct, as equitable restitutionary relief against a dishonest fiduciary is the same as that against an honest one.

Plaintiffs in other cases have, however, been more successful. In *Timber Engineering v Anderson* [1980] 2 NSWLR 488 at 496, Kearney J in the Supreme Court of New South Wales declared a constructive trust over the whole business set up by an employee of the plaintiff company and to which he diverted the plaintiff's business using the plaintiff's resources in obvious (and fraudulent) breach of his fiduciary duty: the business "had its genesis in the resources and facilities" (at 496) of the plaintiff and the whole substance of the business as a viable business enterprise stemmed from the resources of the plaintiff.

In *Warman International Ltd v Dwyer* (1995) 182 CLR 544, the High Court upheld the decision of the trial judge granting an account of profits against a former state general manager of the plaintiff company (and the companies he controlled) who had dishonestly damaged the employer's business by diverting an agency agreement previously held by the employer to his own company. However, although the claim for an account of profits was successful, the trial judge held that, due to the defendant's skill, energy, effort, and contribution of capital, the defendants were entitled to one half of the goodwill of the business and profits.[83] He then declined to make a declaration of constructive trust over the remaining part of the business in favour of the plaintiffs as it would be undesirable to thrust the parties into a continuing business relationship when there was no comity or confidence between them. Ultimately, the High Court was to order that, in view of the close correlation between the defendants' business which resulted from the breach of duty and the business previously carried on by the plaintiff, the defendants were liable to account for the *entirety* of the net profits of the business, less an appropriate allowance for expenses, skill, effort and resources contributed.[84] The issue of a constructive trust was not argued in the appeal, but it would have been interesting to hear the High Court's views on the trial judge's point that a constructive trust would have the unfortunate effect of forcing the parties to continue in a difficult business relationship: this may well be an objection raised in

83 See also *Colour Control Centre Ltd v Ty & Ors* (NSWSC, 24 July 1995, Santow J.)

84 See above, para [2109], on the remuneration of fiduciaries.

similar cases, although the difficulties would vary according to the particular nature of the business.

Bribes or secret commissions paid to a fiduciary by a third party

[2116] It can be seen from the principles and cases outlined above that the liability to account for a benefit or gain as a constructive trustee arises simply from the fact that the benefit or gain was received in circumstances of conflict or potential conflict, or by use of or by reason of the fiduciary position or of opportunity or knowledge resulting from it (*Chan v Zacharia* (1984) 154 CLR 178, Deane J at 198-199).

In *Chan v Zacharia* (1984) 154 CLR 178 at 199 (emphasis added), where Deane J points out that in some cases there may be no breach of duty until the actual failure to account for the relevant benefit, he gives as an example of such a benefit "the receipt of an *unsolicited* personal payment from a third party as a consequence of what was an honest and conscientious performance of a fiduciary duty". In such a case it appears to be accepted that a constructive trust over that unsolicited benefit arises on receipt by the fiduciary.

Logically, one would think that the case for the imposition of a constructive trust would be even stronger when the payment to the fiduciary had been *solicited* in a dishonest or fraudulent breach of duty. However, an anomaly has arisen in the decided cases dealing with bribes or secret commissions received by the fiduciary from a third party in breach of the fiduciary's duty. The source of the problem is the case of *Lister v Stubbs* (1890) 45 Ch 1, which, despite widespread criticism and rejection in some quarters, continues to find the occasional supporter and has not yet been authoritatively overruled in an Australian court.

The facts in *Lister v Stubbs* were that the defendant was employed by the plaintiff, a silk-spinning and manufacturing company, as its foreman. His duties included buying materials for the plaintiff's business. The defendant placed large orders with a supplier in return for large sums of money by way of secret commissions. He invested most of the money in land and securities. The plaintiff claimed, inter alia, an account, damages, and the appointment of a receiver over the investments. It then sought an interlocutory injunction to restrain the defendant from dealing with the land and securities.

The trial judge held that, because the commissions were not moneys which belonged to the plaintiff *before* the defendant's wrongful acts (presumably, the failure to hand it over and the unauthorised investment in land and securities), the defendant was merely a debtor to the plaintiff rather than a trustee, so that the plaintiff was unable to trace into the investments. The Court of Appeal dismissed the plaintiff's appeal. Relying on the earlier authority of *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, Cotton LJ held that the moneys "cannot be said to be the money of the plaintiffs before any judgment or decree in some such action has been made" ((1890) 45 Ch 1 at 12-13).[85] Lindley LJ put forward two objections to the finding of a constructive trust, as follows ((1890) 45 Ch 1 at 15):

> "One consequence would be that, if Stubbs were to become bankrupt, this property acquired by him with the money paid by Messrs Varley would be withdrawn from the mass of his creditors and be handed over bodily to Lister & Co. Can that be right? Another consequence would be that, if the appellants are right, Lister & Co could compel Stubbs to account to them not only for the money with interest but for all the profits which he might have made by embarking in trade with it. Can that be right? It appears to me that those consequences show that there is some flaw in the argument ... I am satisfied that [the premises for these conclusions] are not sound ... the unsoundness consisting in confounding ownership with obligation."

[2117] A number of criticisms are made of *Lister v Stubbs*. In regard to Lindley LJ's first objection, it is asked what is the injustice to the mass of creditors if an insolvent debtor's estate is deprived of an asset to which it was not entitled in the first place. This rather tends to beg the question, because the whole issue is whether the money or asset *should* be regarded as the property *in equity* of the principal in the first place.

As to his second objection, Lindley LJ's difficulty with making a fraudulent fiduciary disgorge all the profits resulting from a breach of fiduciary duty, including the additional profits made from the investment of the original profit, seems at odds with the basic principles of fiduciary obligations, which have been well established and often applied since *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223. Although many cases are concerned with profits received in kind, there seems no logical reason for treating monetary gains differently from gains in kind, or, even more narrowly, for treating dishonestly acquired

85 As to interlocutory injunctions in cases of absconding debtors, see above, Chapter 20: "Mareva Orders."

monetary gains differently from innocent gains, as to which it appears accepted, as the words of Deane J indicate, that proprietary remedies apply.

A third possible objection to the finding of a constructive trust is that it is inconsistent to construe a person as both a debtor and a trustee at the same time, but it can be argued that there are many instances of different obligations arising from the one transaction, and the mere fact that one obligation is more extensive than the other is no grounds for objection. Obviously, the parties will not be able to insist on inconsistent remedies and may have to choose or elect which remedy they would rather follow. The so-called *Quistclose* trust[86] is an example of debt and trust co-existing.

In view of these criticisms, particularly the second, should *Lister v Stubbs* now be regarded as wrongly or correctly decided, or should it be treated as establishing a special rule with respect to bribes? *Lister v Stubbs* has had an uneven level of acceptance in Australia. It was applied by the High Court in *Ardlethan Options Ltd v Easdown* [1915] 20 CLR 285 at 292. The most notable recent authority in its favour is the judgment of Gibbs CJ in *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 at 379, as to which see further below, para [2119], where His Honour referred to the reasoning in Lindley J's judgment with approval. However, Gibbs J's comments should be read in the context of the facts of that case which concerned a loan to the fiduciary, rather than a bribe, so that different considerations apply and it is arguable the reasoning was more appropriate.

On the other hand, the decision is the subject of strong criticism by academic writers[87] and by some judges. In *DPC Estates v Grey and Consul Development* [1974] 1 NSWLR 443 at 470-471, in the

86 See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. A Quistclose trust arises in certain situations in which money is lent for a specific purpose which cannot be carried out. The money is then held on a resulting, or possibly an express secondary, trust back to the lender, who has a proprietary interest, and not merely a contractual right to be repaid.

87 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [544]; Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [1323]; Ford H and Lee W A, *Principles of the Law of Trusts* (looseleaf service), para 2260 ff; Finn P, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), p 513; Waters D, *The Constructive Trust* (Carswell, Toronto, 1964); Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, London, 1998), 87; Mason A, "Themes and Prospects" and Austin R P, "Constructive Trusts" in P Finn (ed), *Essays in Equity* (Law Book Co, 1985), pp 246 and 198 respectively; Millett P, "Bribes and Secret Commissions" [1993] *Restitution Law Review 7*, also published as "Remedies: The Error in *Lister v Stubbs*" in Birks P (ed), *Frontiers of Liability* (Vol 1, Oxford University Press, Oxford, 1994). Cf Birks P, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1985), p 388; Goode R, "Property and Unjust Enrichment", in Burrows A (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1991), p 216.

New South Wales Court of Appeal, Hutley JA, discussing a bribe, nevertheless distinguished *Lister v Stubbs*, saying that the decision should not be extended beyond its own special facts and that it should not apply where the breach of fiduciary duty had lead to the principal losing an opportunity: this was *analogous* to property previously held by the principal and thus a proprietary claim over the bribe would be appropriate. Hardie J agreed. In *Queensland Mines v Hudson* (1976) ACLR 28,658 at 28,708-9, Wootten J in the Supreme Court of New South Wales illustrated how the judgments in *Lister v Stubbs* and *Metropolitan Bank v Heiron* misunderstood previous authorities and applied Hutley JA's approach.

Elsewhere, *Lister v Stubbs* has been criticised, for example, in *Sumitomo Bank v Kartika Ratna Thahir* [1993] 1 SLR 735. In the decision of *Reading v The King* [1951] AC 507, the House of Lords accepted the principle that a bribe or secret profit may be recovered by the principal either as money had and received (a common law claim) or as an equitable debt, but, as the principal had already seized the bribe and it was the fiduciary seeking to recover it, the House did not have to concern itself with proprietary remedies.

Most academic opinion is that *Lister v Stubbs* should be overruled rather than merely limited. Some commentators take the view that this latter option is the least desirable, as "the more *Lister v Stubbs* is confined, the more anomalous it is".[88]

[2118] Encouraged by such criticism, the Privy Council in *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324,[89] a case on appeal from the Court of Appeal of New Zealand, disapproved *Lister v Stubbs* and other similar cases, applying instead *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223 and *Boardman v Phipps* [1967] 2 AC 46 to a case involving bribes. The defendant, Reid, had received the bribes during the course of his career as a Crown Prosecutor and Director of Public Prosecutions for the government of Hong Kong and had invested the bribes in three properties in New Zealand, two held by his wife and himself and one held by his solicitor. The properties had subsequently increased in value. Lord Templeman, delivering the Privy Council judgment, made a summary disposal of the objections raised to the imposition of a constructive trust over the bribe upon receipt by the fiduciary ([1994] 1 AC 324 at 331):

88 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, 1992), para [545]. See also Heydon J D, "Recent Developments in Constructive Trusts" (1977) *Australian Law Journal* 635 at 637.

89 See also Richardson, N, "Bribery and Constructive Trusts: The demise of *Lister v Stubbs*" (1994) *New Zealand Law Journal* 124; Allen T, (1995) 58 *Modern Law Review* 87.

> "First, it is said that if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery … Secondly, it is said that if the false fiduciary holds property representing the bribe in trust for the person injured, and if the false fiduciary is or becomes insolvent, the unsecured creditors of the false fiduciary will be deprived of their right to share in the proceeds of that property. But the unsecured creditors cannot be in a better position than their debtor. The authorities show that property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the cestui que trust and not to the trustee personally whether he is solvent or insolvent. Property acquired by a trustee as a result of a criminal breach of trust and the property from time to time representing the same must also belong in equity to his cestui que trust and not to the trustee whether he is solvent or insolvent."

Not only did the Privy Council reject the rationale for the ruling in *Lister v Stubbs* but it also showed that *Lister v Stubbs* and other cases such as *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 were both inconsistent with earlier authorities[90] and with the later House of Lords decision in *Boardman v Phipps*, which demonstrated the strictness with which equity regards the conduct of a fiduciary and the extent to which equity is willing to impose a constructive trust on property obtained by a fiduciary by virtue of her or his office. The Privy Council concluded ([1994] 1 AC 324 at 338):

> "If a fiduciary acting honestly and in good faith and making a profit which his principal could not make for himself becomes a constructive trustee of that profit then it seems to their Lordships that a fiduciary acting dishonestly and criminally who accepts a bribe and thereby causes loss and damage to his principal must also be a constructive trustee and must not be allowed by any means to make any profit from his wrongdoing."

In Australia, then, the issue awaits clarification by the High Court, but from cases to date[91] it does not appear that the Australian courts will be any more sympathetic to a fiduciary who has accepted bribes than the Privy Council in *Attorney-General (Hong Kong) v Reid* (*Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484 at [9]).

90 Such as *Re Caerphilly Colliery Co (Pearson's Case)* (1877) 5 Ch D 336.

91 See above, at [2117].

The fiduciary who has received a loan from the principal involving a breach of fiduciary duty

[2119] The case of *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 illustrates the fine distinction that may sometimes be drawn in the context of fiduciary obligations. The plaintiff's husband, Dr Daly, sought advice from a prominent and apparently prosperous firm of stockbrokers about the purchase of shares. An employee of the firm told Dr Daly that it was not a good time to buy shares and suggested that the money be placed on deposit with the firm until the time was right. The employee added that the firm was as "safe as a bank." Unknown to the employee, the firm was in a precarious financial position at the time. Dr Daly lent money to the firm at what was then a high interest rate. He later assigned the deposits to his wife. When the firm ceased trading and was found to be insolvent, Mrs Daly made a claim on the fidelity fund of the Sydney Stock Exchange which depended on her being able to establish a defalcation of moneys received by the firm as "trustee". She appealed to the High Court against the decision of Powell J in the Supreme Court of New South Wales, affirmed by the Court of Appeal, rejecting her claim.

The High Court dismissed her appeal. Clearly there was a fiduciary relationship between Dr Daly and the firm, and the court accepted that the firm had breached its duty to make a full and accurate disclosure of the fiduciary's own interests and of circumstances that would make the loan extremely disadvantageous from the principal's point of view. Yet, nevertheless, the court held that the receipt by the firm of the money lent to it by Dr Daly was not subject to a constructive trust and therefore not "trust" money. Gibbs CJ stated (at 377):

> "The argument [for a constructive trust] assumes that as a general rule when a person who stands in a fiduciary relation to another, and who has failed in his duty to make full disclosure, receives money from the person who has placed confidence in him, the money is impressed with a constructive trust. That seems to me to be too sweeping an assumption."

After noting that the case did not fit into the closest of the clearly established categories of constructive trust, that involving *profits* made by fiduciaries, Gibbs CJ then referred to general considerations of principle as to whether a constructive trust should be imposed to satisfy the demands of justice and good conscience. He dealt with the two objections to the imposition of a constructive trust outlined by Lindley LJ in *Lister v Stubbs*,

namely withdrawal of the sum from the general mass of creditors and the consequence that the fiduciary would also have to account for further profits made by use of the money. He described the reasoning of Lindley LJ as "impeccable when applied to the case in which the person claiming the money has simply made an outright loan to the defendant" (at 379).

But even more decisive than these objections in his view was the factor that "in deciding whether or not the money should be held to have been subject to a constructive trust it is not unimportant that the ordinary legal remedy of a creditor would have been adequate to prevent the firm from being benefited at the expense of the appellant" (at 379). In his view, a constructive trust in this case was unnecessary to protect the rights of the lender and would lead to the unjust consequences outlined in *Lister v Stubbs*.

Brennan J's judgment was against the plaintiff on a simpler and narrower basis. The plaintiff was at all times entitled to avoid the contracts of loan due to the breach of the fiduciary obligation of disclosure by the firm, and although, therefore, the loan was voidable, it was not however void. Until a lender elects to avoid the contract of loan, he or she cannot assert an equitable title to the money lent. The lender cannot at once have the contract on foot and deny the borrower the title to the money which the contract confers. To claim on the fidelity fund, the claimant had to be able to show that, at the time of receipt, the firm received the money as trustee. Here, in contrast, the loan contract gave the firm the beneficial title recognised in equity "albeit a beneficial title that is imperfect and liable to be divested by relation back in the event of avoidance of the contract of loan" (at 390). The relationship was therefore at all times that of creditor and debtor, not (constructive) trustee and beneficiary. Wilson J and Dawson J agreed with Gibbs CJ, and Wilson J also agreed with Brennan J.

[2120] A number of comments may be made about the result and reasoning in *Daly*. The first issue concerns Gibb CJ's acceptance that it would be unfair to the general mass of unsecured creditors if the principal were to be entitled to assert a constructive trust which would give priority in the case of the fiduciary's insolvency. As Gummow J points out in *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485 at 506, there may be a case for preferring the fiduciary claimant over the general creditors,[92] and that is, while ordinary creditors when dealing

92 See *Australian Securities Commission v Melbourne Asset Management Nominees Pty Limited* (1994) 121 ALR 626.

with the debtor take a usual commercial risk as to the possibility of the debtor becoming insolvent, it is not the case with the fiduciary claimant: inherent in the nature of the fiduciary relationship is the reposition of trust in the honesty of the fiduciary.[93] Gummow J refers to Privy Council and United States cases[94] supporting this approach, but concludes that "*Daly's* case … suggests this alone may not always suffice in Australian law to found a constructive trust, even though the defendant acted in breach of fiduciary duty to the plaintiff" ((1987) 76 ALR 485 at 506). It should however be noted that these arguments were not dealt with by Gibbs CJ. Another commentator notes that, while the reasoning based on the unfairness to the unsecured creditor may be valid in the case of an outright loan, "it ignores the added factor in *Daly* of the breach of fiduciary duty".[95]

Secondly, on the point that a constructive trust was unnecessary to protect the legitimate rights of the lender because a personal right to the repayment of the loan existed, such a view, if given a wide application, would surely lead to the rejection of a constructive trust in many situations: in most, if not all of the circumstances where a constructive trust is available, it is only one of a number of alternative remedies. Acceptance of this justification for rejecting a constructive trust is tantamount to acceptance as an overriding principle the view that a constructive trust should *only* be imposed when it is the *only* way of remedying unjust enrichment of the plaintiff. But, as is illustrated above, the remedying of unjust enrichment can only be seen in Australian law as one possible justification of the constructive trust, particularly in cases involving fiduciaries.

Thirdly, on the point that it would be inconsistent to treat a person as both a debtor and a trustee at the same time. Gibbs CJ quite rightly rejected the argument that a so-called *Quistclose* trust[96] (whether resulting or express) arose here, but it does not follow that therefore a *constructive* trust may not be found on the facts. To the contrary: the line of cases supporting the existence of *Quistclose* trusts is authority that there can be no objection, in principle, to a person being construed as a debtor and as a trustee at the same time.

93 Some see the notion of vulnerability and dependence as central to the finding of a fiduciary relationship: see above, Chapter 10: "Fiduciary Obligations".

94 *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC); *Re Kountze Bros* 79 F (2d) 98 (1935) at 102. See also now *Re Goldcorp* (1995) 1 AC 74 (PC).

95 Cope M, "Ownership, Obligation, Bribes and the Constructive Trust", in Cope M (ed), *Equity; Issues and Trends* (Federation Press, Sydney, 1995), p 114.

96 See above, para [2117].

Fourthly, can it be argued that, as the receipt of moneys on loan to the firm for its general purposes followed a breach of fiduciary duty *without which the receipt would never have occurred*, that the receipt *at that moment* represented a "gain" to the fiduciary which was, therefore, held on constructive trust on ordinary principles? This leads to the argument of Brennan J that the breach of duty merely made the loan voidable not void, and, until an election was made, the debtor was merely that and not a trustee. Although Brennan J does make the point that if the Dalys had found out the firm's true position before the insolvency, their election to treat the loan as void would have operated *retrospectively,*[97] so that then the initial receipt "might" have been treated as if by a constructive trustee,[98] he nevertheless says that the firm acquired a beneficial, albeit imperfect and avoidable, title and that the receipt by them was therefore not *at the time* "as a trustee" as required for a claim on the fidelity fund. This tends to leave unanswered the question of exactly *when* the constructive trust following the avoidance of the contract would arise, and a further question remains as to whether the result in *Daly's* case is consistent with the view in other areas that a constructive trust arises upon the receipt or acquisition of property in breach of duty by the fiduciary. The result is unsatisfactory as the Daly's position was therefore prejudiced even further by their fiduciaries' continued non-disclosure, which prevented them from making an election in time for it to be useful. However, Brennan J's judgement in *Daly* has been widely applied and approved.[99]

CONSTRUCTIVE TRUSTS IMPOSED ON THIRD PARTIES

Introduction

[2121] Third parties to a trust or other fiduciary relationship may, in some circumstances, become liable as constructive trustees where

97 In *Greater Pacific Investments Pty Limited (in liq) v Australian National Industries Limited* (1996) 39 NSWLR 143 at 153, the New South Wales Court of Appeal held that as a consequence of effective rescission, equity will treat the purchaser as a constructive trustee *ab initio*.

98 (1986) 160 CLR 371 at 390.

99 *Lonrho plc v Fayed* [No 2] [1991] 4 All ER 961 at 971, *Hancock Family Memorial Foundation Limited v Porteous* [2000] WAR 198 and *Greater Pacific Investments Pty Limited [in liq] v Australian National Industries Limited* (1996) 39 NSWLR 143.

they have been involved in a breach of duty by the trustee or fiduciary.[100]

The cases can be divided into two broad categories: the "recipient" cases and the "accessory" cases.[101] The first comprise of cases where the third party has at some time received trust property[102] and either still retains it or has passed it on to another; the second comprise of those cases where the third party may not have received any property that was the subject of the trust or fiduciary duty but has nevertheless participated in, induced or assisted with the breach of duty by the fiduciary.

Within these two main categories, there are many variations in the circumstances involved: the third party might be an agent of the trustee or of the fiduciary, a professional adviser, a banker or a "stranger", and may be acting for her or his own benefit or for the benefit of another. All of these variables are relevant to liability.

[2122] The *nature* of the constructive trustee's liability varies from case to case, depending on the type of involvement with the breach of duty. If there is property to which a constructive trust can attach, the liability will be both proprietary and personal, but if not, all that will remain will be a personal liability. An issue of continuing debate, discussed in the introduction to this chapter, is whether the constructive trust for knowing assistance is *necessarily* only a personal liability, and if so, whether there is any sense in describing such a person as a constructive trustee.[103]

The personal liability of a constructive trustee is, like that of an express trustee, twofold: to *compensate* the trust for any losses caused by the breach of duty and to *account* for any gains or profits made. It is, therefore, a powerful remedy leading to the imposition of an onerous liability towards someone to whom the defendant owed no pre-existing duty.

100 The right of action against such third parties is direct, not "derivative" through the fiduciary: this has significance for limitation periods, see for example, *Morlea v Richard Walter* (1999) 169 ALR 419.

101 Reference in this context is usually made to the "two limbs" of *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252, the first limb covering third parties who "receive and become chargeable" with trust property, the second limb covering those "who assist with knowledge in a dishonest and fraudulent design the part of the trustees". See also *Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378.

102 The same issues arise where the property is not subject to a trust but to some lesser fiduciary obligation: See Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 396-397, and see discussion of what "property" is encompassed in the "receipt" classification in Austin R P, "Constructive Trusts" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), pp 217-227 and Hutley JA in *DPC Estates Pty Ltd v Grey & Consul Development Pty Ltd* [1974] 1 NSWLR 443.

103 See above, para [2105].

Given that the third party was not under any fiduciary or other personal obligation to the claimant, the liability of the third party must rest on some other basis. This may either be the notion of property or the notion of fault, that is, in equitable terms, the unconscionable nature of the third party's conduct. The rationale for liability of a recipient is still a matter of debate, and, in this context, there is no consensus as to whether liability should be strict, or linked to negligence or dishonesty.[104] The rationale for the constructive trust imposed on third party accessories was the subject of extensive discussion by the Privy Council in *Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378. It referred to the balancing of the legitimate expectation of beneficiaries that third parties will refrain from intentionally intruding in the trustee-beneficiary relationship, with the necessity for everyday business not to be made impossible by third parties being held liable for unknowingly interfering in the due performance of the fiduciary's personal obligations. It concluded that, when searching for a touchstone of liability, "[b]y common accord dishonesty fulfils this role" (at 387).[105]

The classic statement describing the circumstances when a third party will be liable as a constructive trustee is found in Lord Selborne's judgment in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251:

> "Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

104 See below, paras [2131]-[2132].

105 For a discussion of the rationale of third party liability, see Loughlan P, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 *Oxford Journal of Legal Studies* 260. See also below, paras [2136]-[2137].

The traditional interpretation of Lord Selborne's dictum has tended to emphasise knowledge[106] of the breach of trust or duty as the cornerstone to liability. Although it is far from settled in Australia, the degree of knowledge required for, or sufficient for, liability appears to vary according to whether the case is a "recipient" case or an "accessory" case. Certainly, the English authorities in this area are notable for the conflicting views of judges both at first instance and in the Court of Appeal.[107] The Privy Council has recently complained of the tendency to cite, interpret and apply Lord Selborne's formulation as though it were a statute and in a manner "inimical to analysis of the underlying concept" (*Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378 at 386). In all jurisdictions, there has been a continued conflict between a "negligence standard" and a "dishonesty" standard for liability, and again the standard may well differ according to whether the case concerns receipt of trust property or mere dealing.

[2123] There is a third possible category of case alluded to in Lord Selborne's judgment and that is the trustee de son tort (a trustee of or by her or his own wrong). This is the term used to describe someone who, although not appointed a trustee, intermeddles with trust matters or property or acts as though he or she were a trustee with respect to certain property (*James v Williams* [2000] Ch 1). Equity will treat such a person as though he or she were expressly appointed and the duties and obligations will be identical to those of an express trustee. The distinguishing feature of such a trusteeship is that the trustee was at all times purporting to act on behalf of those to whom the duty was owed rather than on her or his own account. If the third party is a banker, solicitor or other agent, it will be relevant to consider if he or she was acting beyond the normal duties of a person of that kind.[108]

Where a third party received trust property innocently, but after becoming aware of the trust or fiduciary obligation affecting the

106 In *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 258, the New South Wales Court of Appeal decided in the context of a receipt case that the third party bore the onus of proving that he or she did not have the requisite knowledge. Query whether the same position should apply for liability for gains or in accessory cases.

107 See below, paras [2132] and [2137].

108 For a detailed analysis of the trustee de son tort, see Austin R P "Constructive Trusts" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985). See also *Mara v Browne* [1896] 1 Ch 199, particularly Smith J at 209; *Blythe v Fladgate* (1891) 1 Ch 337; *DFC New Zealand v Goddard* [1992] 2 NZLR 581; Oakley A, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995), pp 65-67.

property, the third party will be liable for "inconsistent dealing", which is closely analogous to the knowing receipt liability.[109]

Priorities, the constructive trust, tracing, and personal remedies against third parties

[2124] Particularly in cases involving receipt of property, it is essential at the outset to put the constructive trust imposed on third parties in the context of the other remedies that may be available to the claimant,[110] and to distinguish it from the issue of priorities between competing interests in property.

The constructive trust and priorities

[2125] The constructive trust is concerned both with *liability*, whether to compensate for loss or account for gain, and with *property* in assets. A third party who holds property or funds that are subject to a constructive trust claim will not just be concerned to defend the liability aspects of the claim, but will also be concerned to retain or assert a better interest in the property than the claimant's. While liability, discussed in detail below, turns on the presence of knowledge or dishonesty, the issue of whether or not the third party may retain the property depends on the law concerning priorities,[111] and will essentially turn on whether the third party was bona fide, gave value and had "notice" of the claimant's rights. "Notice" for this purpose includes both actual notice and constructive notice, the latter applying where the person had knowledge of facts which would put a reasonable person on inquiry.[112] Subject to any statutory provisions giving protection to certain parties[113] the application of these principles leads to the following results:[114]

109 See generally Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994); and Austin R P, "Constructive Trusts" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), who deals with receipt and dealing together.

110 The complexity of distinguishing the different requirements for the different remedies has led to calls for some rationalisation: see, for example, Millett J in *El Ajou v Dollar Land Holdings* [1993] BCLC 735 at 759 and in "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71. See Oakley A J, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995), pp 63-64 and contrast Megarry V-C in *Re Montagu's Settlement Trusts* [1987] Ch 264.

111 This is discussed above, Chapter 3: "Equity and Property".

112 See further above, para [315].

113 Such as under the Torrens system.

114 See further above, paras [318]-[322].

- If the third party is an innocent or bona fide purchaser of a legal interest without notice, her or his interest is unassailable and will defeat any prior equitable claim to the property, allowing the third party to retain it.
- If the third party is an innocent or bona fide purchaser of an equitable interest without notice, the position will depend on whether the equities are equal and, if so, the general rule is that the first in time will prevail. Such a person, therefore, may or may not be able to defend a claim for the property to be handed over.
- Finally, if the third party is an innocent volunteer without notice, such a person will be unable to resist a claim that the property remains in equity that of the prior equitable claimant.

In all these cases, the innocence or bona fides and lack of notice of the third party will necessarily defeat any claim based on a constructive trust because, regardless of whether or not mere constructive notice is *sufficient* to constitute "knowledge" for the purposes of liability as a constructive trustee, and this is a difficult issue discussed below, the *lack* of even that degree of knowledge would certainly defeat any claim to a constructive trust.

The constructive trust and tracing

[2126] Where a person is able to assert an undefeated interest in property or in funds, that person may bring a tracing claim, the ability to trace depending on the notion that the property belongs in equity to the claimant. As discussed above, paras [2108]ff, the tracing remedy and the constructive trust overlap, but each has a field of operation where the other will not reach.[115] Tracing, being purely proprietary, persists against even an innocent volunteer but ceases once the property has been lost or dissipated. A constructive trust, relying not so much on the notion of property as on the culpability of the defendant, persists as a personal liability even when the property can no longer be traced or identified. The constructive trust, involving liability to compensate for losses and to account for gains will also be the more attractive remedy where either the property has depreciated in value or the claim is also for incidental profits made by the third party from use of the property.[116]

115 See Megarry V-C in *Re Montagu's Settlement Trusts* [1987] Ch 264 at 285, where he talks about their different origins. Contrast Harpum C, "The Basis of Equitable Liability" in Birks P, *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 19.

116 See Oakley A, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M, *Equity: Issues and Trends* (Federation Press, Sydney, 1995), p 81.

The constructive trust and common law remedies

[2127] The equitable remedy of the constructive trust may also exist side by side with the common law action for money had and received.[117] Once said to rest on notions of quasi-contract, but now firmly established as resting on principles of unjust enrichment,[118] such an action will exist in a number of situations,[119] for example, where money has been paid under mistake.[120] Although such claims are usually brought in two-party situations involving the claimant and the original payee, cases such as *Banque Belge v Hambrouck*[121] provide early examples of claims made against third party recipients. *Lipkin Gorman v Karpnale* [1991] 2 AC 548 is a prominent example of a plaintiff pursuing a common law restitutionary claim in preference to one in equity, so as to avoid the difficulties of establishing the requisite degree of knowledge for a constructive trust.

Although, in many cases the restitutionary claim for money had and received will allow the claimant to strip the defendant of benefits gained, being a personal claim it lacks the advantages which equitable tracing and the proprietary aspects of the constructive trust give to a claimant, particularly preference on insolvency. Nevertheless, in some cases it may appeal to a claimant as it has the advantage that liability depends purely on receipt and not on the knowledge of the recipient (although knowledge will be relevant to the defence of change of position[122]).

117 Although this is often referred to as "common law tracing", it is in fact no more than a personal action: *Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 572; Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, London, 1998), p 93 ff. The tracing nomenclature tends to confuse the issues.

118 See Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995); Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, London, 1998); Birks P, *Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985).

119 See for example *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 ALJR 203.

120 Until 1992 in Australia, the action would generally only apply in cases of certain mistakes of fact, as money paid under a mistake of law was treated as irrecoverable under the rule in *Bilbie v Lumley* (1802) 2 East 469. However, in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, the High Court held that money paid under a mistake of law was recoverable in the same way as in cases of mistakes of fact. See now also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. This change would have a substantial impact on the course of litigation in cases such as *Re Diplock* [1948] 1 Ch 465, where the third parties would now be subject, at least in Australia, to a claim for moneys paid out by the executors under a mistake, whether of law or fact. They would however probably have a defence of change of position: see further the discussion at [2128].

121 [1921] 1 KB 321 and others cases referred to in Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, London, 1998), p 93 ff.

122 *Lipkin Gorman v Karpnale* [1991] 2 AC 548. See also Oakley A, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M, *Equity: Issues and Trends* (Federation Press, Sydney, 1995), p 64, who predicted that *Lipkin Gorman* may herald the judicial creation of strict liability for knowing receipt in England.

The constructive trust and deceased estates

[2128] Where the third party has received property or funds from a deceased estate following a breach of duty by the executor or trustee, the third party will be liable to an "in personam" claim by the underpaid or unpaid beneficiaries, as in *Re Diplock* [1948] 1 Ch 465.[123] The court found the power to award this remedy in the ancient jurisdiction of the equity courts, inherited from the older ecclesiastical courts, to supervise the administration of deceased estates in order to ensure that "the assets of a deceased person were duly administered and came into the right hands and not into the wrong hands" (Lord Simonds in *Ministry of Health v Simpson* [1951] AC 251 at 266). It appears, from the court's own remarks in the case, that the power may be confined to cases concerning deceased estates, (at 265-266)[124] although some commentators argue that it should apply equally to inter vivos trusts where the equity courts have an analogous jurisdiction and the concern and powers to protect beneficiaries.[125] Be that as it may, there is no strong authority for such an action outside deceased estates and the necessity for and the very existence of the principles expounded in *Barnes v Addy* (1874) LR 9 Ch App 244[126] tend to indicate that no such action has been recognised. Wherever the remedy exists, it provides for a straightforward and non-fault-based liability, although there is uncertainty as to whether the defence of change of position would or should now be recognised as a defence to this equitable claim, in view of the recent acceptance of that defence in common law claims.[127]

123 See also *Ministry of Health v Simpson* [1951] AC 251. See further below, para [2336].

124 See Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 24.

125 See Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [2320]; Austin R P "Constructive Trusts" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), pp 214ff; Ford H and Lee W A, *Principles of the Law of Trusts* (loose leaf service), paras [17330] and [22690]; Birks P, *Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985), p 442; Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, London, 1998), p 704. See also Lord Nicholls "Knowing Receipt: the Need for a New Landmark" in Cornish W, Nolan R, O'Sullivan J and Virgo G (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) at 241. Cf other fiduciary relations falling short of a trust: Nourse LJ in *BCCI Ltd v Akindele* [2000] 4 All ER 221 at 236 cautions against strict liability, even with a defence of change of position, in commercial cases.

126 See above, para [2121].

127 In *Ministry of Health v Simpson* [1951] AC 251, the House of Lords rejected the defence of change of position to the equitable claim there. Contrast common law restitution actions where the defence is now accepted in England since *Lipkin Gorman v Karpnale* [1991] 2 AC 548, see also *Boscowan v Bajwa* [1996] 1WLR 328 at 335 and in Australia. See *Gertsch v Atsas* [1999] NSWSC 898 in which the defence was accepted to a claim by the sole beneficiary of a deceased person's intestate estate against the recipients of pecuniary legacies under a will which was later proved to be a forgery. See also *ANZ Banking Group v Westpac Banking Corp* (1988) 164 CLR 662; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

Liability for knowing receipt of trust property and property subject to a fiduciary obligation

[2129] Liability for knowing receipt of trust property rests simply on the presence of two elements: receipt and knowledge. "Receipt" in this context means receipt in the recipient's own name or for the recipient's own benefit, but does not include receipt as an agent, such as a banker for a customer or a solicitor for a client.[128]

"Trust property" in this context is usually taken to mean tangible property or funds, although in *DPC Estates Pty Ltd v Grey & Consul Development Pty Ltd* (1974) 1 NSWLR 443, Hutley JA in the Court of Appeal of New South Wales referred to *Boardman v Phipps* [1967] 2 AC 46 as illustrating that the liability to account for advantages obtained by a fiduciary in the form of information and opportunity is precisely analogous to that in the case of property gained by a fiduciary. "It would seem, therefore, that the position of a third party obtaining from a fiduciary advantages in the form of information and assistance should be analogous to that of a third party obtaining property from a fiduciary."[129]

[2130] The element of knowledge has proved harder to define. It was in the context of a knowing receipt case that Gibson J set out a five-scale classification of knowledge in *Baden Delvaux v Societe Generale* [1983] BCLC 325. Although some commentators and judges have criticised it as the "zenith of complexity"[130] and although in the context of the second limb in *Barnes v Addy*,[131] the Privy Council has recently suggested that it be "best forgotten",[132] it does nevertheless illustrate how, where a term used may have many different meanings to different people, it is important that there be clarity on an essential criterion for liability. The *Baden Delvaux* five-scale classification of knowledge was as follows:

128 Or as a trustee, for example, in the case of solicitors who receive the proceeds of sale and hold them in their trust account in the ordinary course of business for a trustee: *Adams v Bank of New South Wales* (1984) 1 NSWLR 285, Hutley JA at 301; Moffit P at 290-292. See also Austin R P "Constructive Trusts" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), pp 228-229, who criticises the artificiality of this distinction. See also Aitken L, "The Solicitor as Constructive Trustee" (1993) 67 *Australian Law Journal* 4.

129 (1974) 1 NSWLR 443 at 470. See also Goff R and Jones G, *The Law of Restitution* (6th ed, Sweet & Maxwell, 1998), p 735.

130 Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1999), para [1335]: "involving an obsessive refinement of the distinction between degrees of knowledge and notice".

131 (1874) LR 9 Ch App 24: see above, para [2121].

132 *Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378, discussed below, para [2137].

- actual knowledge;
- wilfully shutting one's eyes to the obvious (or "turning a blind eye" or "Nelsonian" knowledge);
- wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;
- knowledge of circumstances which would indicate the facts to an honest and reasonable person; and
- knowledge of circumstances which would put a reasonable person on inquiry.

Meagher and Gummow describe the fourth scale as a "species of constructive notice" and the fifth as "constructive notice in the full sense, a purely equitable concept and one which evolved to govern the position of a third party seeking to set up a title as bona fide purchaser of a legal estate without notice of the equitable estate".[133]

[2131] Unfortunately, there is as yet no High Court authority in Australia on which scale of knowledge is required for liability, and particularly as to whether the fifth scale is sufficient for liability, in knowing receipt cases. But in the only Australian case to reach the High Court on the liability of a third party as a constructive trustee, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, a case involving assistance rather than receipt, Stephen J, with whom Barwick CJ agreed, tentatively recognised a distinction between the two categories of case as to the relevance of constructive notice. He quoted (at 410) the view of Jacobs J in his (dissenting) judgment in the Court of Appeal below that ([1974] 1 NSWLR 443 at 459):

> "The point of the difference between the person receiving trust property and the person who is made liable, even though he is not actually a recipient of trust property, is that in the first place knowledge, actual or constructive, of the trust is sufficient, but in the second place something more is required, and that something more appears to me to be the actual knowledge of the fraudulent or dishonest design, so that the person concerned can truly be described as a participant in that fraudulent dishonest activity."

133 Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), para [1335] and the authorities noted in n185 thereto.

Stephen J then went on ((1975) 132 CLR 373 at 410):

> "It is not clear to me why there should exist this distinction between the case where trust property is received and dealt with by the defendant and where it is not; perhaps its origin lies in equitable doctrines of tracing, perhaps in equity's concern for the protection of equitable estates and interests in property which comes into the hands of purchasers for value."

He points out that the most common operation of the doctrine of constructive notice is in dealings with real property, where for centuries investigation of title has been the usual course of business, but that apart from in the context of property transactions and perhaps banking business, the courts have been markedly reluctant to extend the application.[134]

The conclusion was that constructive notice in its equitable sense (the fifth scale from *Baden Delvaux*) was not a sufficient basis for liability for knowing assistance cases, but that at a minimum, the defendant must know of circumstances which would indicate a breach of trust or duty to a reasonable person (the fourth scale). However, Stephen J's comments should not be regarded as necessarily supporting the view that constructive notice is sufficient for liability in receipt cases.[135] Indeed, his approach lends support to the view that constructive notice is relevant to *property*, *priority* and *tracing* issues rather than to *liability*. Arguably, different considerations apply in the maintenance and protection of property rights, where the innocence or dishonesty of the parties is only one factor in the priorities question, to those that are relevant to liability. Generally speaking, in the Australian legal system, liability depends on fault or at least on the breach of some personal obligation. Once the protection of proprietary interests has been taken care of by the application of priority rules and the notions of tracing, the rationale for imposing a constructive trust liability on the defendant recipient, *in addition to* the loss of any proprietary interest in the property, must rest on the unconscionable character of her or his conduct: it is this which distinguishes the constructive trust from the other remedies available and this which gives the constructive trust its raison d'etre. "In determining whether a constructive trust has been created, the fundamental question is whether the

134 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 412. See also Megarry V-C in *Re Montagu's Settlement Trusts* [1987] Ch 264, who discusses the origins and operation of the doctrine of constructive notice in property dealings.

135 Indeed, he points out that the cases relied on in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 were all receipt cases where the defendant had actual knowledge of the facts, that is, the fourth scale.

conscience of the recipient is bound in such a way as to justify equity in imposing a trust on him."[136]

Furthermore, it is difficult to see why the criterion for liability to account for gains should vary according to whether the third party has benefited through receipt or assistance. In both cases it is the *benefit* which the claimant is seeking to strip, in whatever form that takes.

Perhaps a middle position is arguable: that the recipient affected by constructive notice in the equitable sense should be liable for the *loss* of trust property which has passed through her or his hands, but should only be liable to disgorge any *gains* if he or she has the same degree of dishonesty as required of an assistant. This approach would have the advantage of supporting "equity's concern for the protection of equitable estates" but at the same time not being unduly onerous on the innocent third party who negligently or unthinkingly failed to make inquiry.[137]

Cases in the lower Australian courts since *Consul Development* support the view that it is not necessary to prove dishonesty or want of probity for liability in receipt cases, and that knowledge of circumstances which would indicate the facts (that is, a breach of trust or duty) to a reasonable person will be sufficient, but in none of the cases has it been *necessary* to decide whether constructive notice in the equitable sense will also be sufficient.[138]

136 *Re Montagu's Settlement Trusts* [1987] Ch 264, Megarry V-C at 277. In the same case, at 273, Megarry V-C said: "The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man's conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee." See also *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50, Kirby P at 104; Austin R P "Constructive Trusts" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 228. Contrast Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 19, and other advocates of a strict liability in receipt: see authors cited at [2132] below.

137 See Loughlan P, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 *Oxford Journal of Legal Studies* 260 about balancing the protection provided to beneficiaries on the one hand and innocent third parties on the other.

138 *Ninety Five Pty Ltd v Banque Nationale de Paris* [1988] WAR 132; *Equiticorp Finance v Bank of New Zealand* (1993) 32 NSWLR 50. In *Ninety Five*, Smith J's reliance on the dicta of the New South Wales Court of Appeal in *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 to support his obiter dicta that constructive notice was sufficient for liability appears however to have overlooked the fact that that case was one of assistance rather than receipt and that any dicta were made in the context of a finding that there had been at least a deliberate abstention from enquiry. Kirby P in *Equiticorp* did not have to decide the question because he found the higher scales satisfied on the facts. Cf Ashley AJA in *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* (1998) 3 VR 133 and *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 3 VR 16 per Hansen J , holding that the defendant bank had actual knowledge and by reason of its wilful and reckless failure to make enquiries, "constructive knowledge" . See also *Doneley v Doneley* (1998) 1 Qd R 602.

[2132] The approaches in other jurisdictions vary considerably. The New Zealand cases are inconclusive.[139] Alternatively, while there were two lines of conflicting authorities in England as to whether a lesser degree of knowledge than actual knowledge or wilful ignorance would be sufficient, the weight of modern English authority until recently favoured the view that nothing short of dishonesty would be sufficient and that mere negligence in failing to make proper inquiry would not be.[140] Nonetheless, some cases suggested a shift to a slightly more objective standard of dishonesty involving "inferred knowledge" rather like the fourth of the *Baden Delvaux* scale.[141]

In *Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378, (an assistance case), the Privy Council, having noted that liability of the third party for assistance is fault based, also said that "different considerations apply to the two heads of liability. Recipient liability is restitution based, accessory liability is not" (at 386).[142] This tends to imply that the Privy Council views liability in receipt cases as being on a stricter or more objective basis than in assistance cases.[143] Two other aspects of the *Royal Brunei* decision support a more objective standard in receipt cases: one is the shift away from a stratification of degrees of knowledge to a more generalised inquiry as to the basis of liability; secondly, the point was made that the standard of what constitutes honest or dishonest conduct is not entirely subjective.

Developments in common law restitution cases and also an onslaught of academic opinion in favour of strict "restitutionary"

139 *Westpac Banking Corp v Savin* [1985] 2 NZLR 41; *Equiticorp Industries Group v Hawkins* [1991] NZLR 700; *Powell v Thompson* [1991] 1 NZLR 597; *Nimmo v Westpac Banking Corp* [1993] 3 NZLR 218. See now *Equiticorp Industries Group v R* (1998) 2 NZLR 481, leaving the question open.

140 *Carl Zeiss v Stiftung v Herbert Smith (No 2)* (1969) 2 Ch 276; *Re Montagu's Settlement Trusts* (1987) Ch 264; *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 per Alliot J; *Barclays Bank v Quincare* [1993] 1 WLR 484; *Westdeutsche Bank v Islington LBC* [1996] 2 AC 669, at 705-706 per Lord Browne-Wilkinson (obiter). Contrast *Nelson v Larholt* [1948] 1 KB 339; *Agip (Africa) v Jackson* [1989] 3 WLR 1367 at 1388.

141 *Eagle Trust v SBC Securities* [1993] 1 WLR 484. See also *Polly Peck International v Nadir (No 2)* [1992] 4 All ER 769. For a comprehensive survey of these cases, see Oakley A, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M, *Equity: Issues and Trends* (Federation Press, Sydney, 1995).

142 See also Lord Millett in *Twinsectra v Yardley* [2002] 2 All ER 377 at 404.

143 See also Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 19 and other advocates of a strict liability in receipt cited in the next footnote, below. Lord Millett in obiter dicta in *Twinsectra v Yardley* [2002] 2 AC 164 said "There is no basis for requiring actual knowledge of the breach of trust, let alone dishonesty, as a condition of liability. Constructive notice is sufficient and may not even be necessary. There is powerful academic support for the proposition that the liability of the recipient is the same as in other cases of restitution, that is to say strict but subject to a change of position defence."

liability may one day overtake the equitable approach based on knowledge in receipt cases, at least for English courts, but that remains speculative, despite the certainty with which some views are expressed.[144]

In *Bank of Credit & Commerce International (Overseas) Ltd (in liq) v Akindale* [2001] Ch 437 at 458, Nourse LJ in the Court of Appeal suggested a fresh approach, involving a single test for knowing receipt cases: "the test for knowledge in a claim for knowing receipt is simply whether the defendant's knowledge made it unconscionable for him to retain the benefit of the receipt?" It remains to be seen whether this single test is easier to apply than the five fold scale and whether it gains widespread judicial support.[145]

Liability for knowing assistance in a breach of trust or breach of fiduciary duty

[2133] A third party may become liable as a constructive trustee where he or she has knowingly assisted, induced or participated in a breach of trust or fiduciary duty by a trustee or fiduciary. This liability is imposed whether or not the third party has received property which was subject to the trust or obligation.[146] As a constructive trustee, the third party is liable to compensate the beneficiary or principal for loss of the property[147] and to account

144 See *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548. See also Birks P, "Misdirected Funds: Restitution from the Recipient" (1989) *Lloyds Maritime and Commercial Law Quarterly* 296; Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 24; Millett P "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71 at 85; Birks P "Gifts of Other Peoples' Money" in Birks P (ed), *Frontiers of Liability* (Vol 1, Oxford University Press, Oxford, 1994). All of the above are advocates of a strict liability for receipt, subject to the defence of change of position, which is now well entrenched as a defence at common law since *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. Although both involve the issue of bona fides and thus knowledge, the innocent recipient is much better protected by equitable tracing rules and the requirement of fault for liability as a constructive trustee than by the defence of change of position to any strict liability, particularly if that defence is given a narrow operation: see Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 21. The latter situation clearly favours the deprived claimant. See now Lord Nicholls, "Knowing Receipt: the Need for a New Landmark", in Cornish W, Nolan R, O'Sullivan J, and Virgo G (ed), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) advocating at 238_239 that "equity should now follow the law." However, in *BCCI Ltd v Akindale* [2000] 4 All ER 237 at 236, Nourse LJ doubted whether such a change would be commercially workable.

145 In *Criterion Properties Plc v Stratford UK Properties Plc* 2002 EWHC 496 (Ch) Hart J said "it is absolutely clear that — [Nourse LJ in *BCCI v Akendele* [2000] 4 All ER 237] — saw the unconscionability test as being a lesser test than the *Royal Brunei* dishonesty test" and expressed his approval with that result.

146 If trust property has been received the third party will be liable under both limbs of *Barnes v Addy* (1874) LR 9 Ch App 244: see above, para [2121].

147 See for example *Syrimi v Hinds* (1996) 6 NTLR 1.

for any gains or benefits received as a result of the assistance provided.[148] These gains may be in the form of property or funds received from another as a result of the breach of duty, or an opportunity or business set up as a consequence.[149]

The second limb of the *Barnes v Addy* (1874) LR 9 Ch App 244[150] dictum has tended to be construed strictly in this context, prompting many commentators to point out that:

- the liability of a third party assistant was already well established before *Barnes v Addy*;[151]
- Lord Selborne was not giving an exhaustive or complete description of the circumstances when a third party will be liable. His comments concern agents, but strangers and donees may also be liable; and
- the particular wording of Lord Selborne's dictum should not distract attention from the basic rationale of liability.

The High Court decision in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 removed much of the uncertainty for Australian courts about the basis of liability in this context. This certainty eluded the English Court of Appeal and lower courts which continued to debate the requirements for liability, with a wealth of academic comment and criticism accompanying every development. However, the Privy Council decision in *Royal Brunei Airlines v Philip Tan Kok Ming* (1995) 2 AC 378 discussed below,[152] gives clear guidance to those courts within its influence. In all cases, three basic elements must be satisfied for liability:

- participation, inducement or assistance by the third party;
- a breach of trust or duty by the trustee or fiduciary; and
- the requisite degree of fault on the part of the third party.

Assistance, participation or inducement

[2134] The question of whether or not the third party has assisted or participated in the breach of trust or fiduciary duty is a matter of

148 See for example, see *Biala Pty Ltd v Mallina Holdings* (1993) 11 ACSR 785.

149 See *Timber Engineering Co Ltd v Anderson* [1980] 2 NSWLR 488. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544, where an account of profits was ordered against third parties in such circumstances: see above, paras [2108]ff.

150 See above, para [2121].

151 See, for example, *Fyler v Fyler* (1841) 3 Beav 136, discussed in Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), pp 11ff.

152 Paras [2135] and [2137].

fact: there is obviously assistance if the third party's involvement was essential to the transaction, dealing or enterprise, but any positive conduct in the nature of assistance will be relevant, for example, the third party might provide a mechanism for a transaction or give advice as to how a transaction could be effected. Liability may extend to banks, agents or strangers.

The term "inducement" in this context tends to indicate a situation where the trustee or fiduciary has innocently committed a breach of duty at the third party's suggestion or following a deliberate deception by the third party. Liability in such cases was well established before *Barnes v Addy*, for example in *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840. See also *Fyler v Fyler* (1841) 3 Beav 550 at 568.

Breach of trust or fiduciary duty

[2135] It is now without doubt that third party liability applies as much to assistance with a breach of fiduciary duty as to assistance with a breach of trust. Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 396-397 stated:

> "[T]he principle ... extends to the case where a stranger has knowingly participated in a breach of fiduciary duty committed by a person who is not a trustee even though nothing that might properly be regarded as trust property — even property stamped with a constructive trust — has been received ... If the maintenance of a very high standard of conduct on the part of fiduciaries is the purpose of the rule [forbidding a fiduciary from profiting from her or his position] it would seem equally necessary to deter other persons from knowingly assisting those in a fiduciary position to violate their duty. If, on the other hand, the rule is to be explained simply because it would be contrary to equitable principles to allow a person to retain a benefit that he had gained from a breach of his fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom."[153] Lord Selborne's reference in *Barnes v Addy* (1874) LR 9 Ch App 244,[154] in the second limb, to a "dishonest and fraudulent design on the part of the trustee" has been variably construed. In *Consul Development*, Gibbs J said (at 396-3):

153 Many recent cases have concerned illegal transactions by company directors: see, for example, *Ninety Five Pty Ltd v Banque Nationale de Paris* [1988] WAR 132; *Equiticorp Finance v Bank of New Zealand* (1993) 32 NSWLR 50. For review, see Oakley A, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M, *Equity: Issues and Trends* (Federation Press, Sydney, 1995).

154 See above, para [2121].

> "Although in this passage Lord Selborne speaks of dishonesty and fraud it is clear that the principle extends to the case 'where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognisant': *Soar v Ashwell* [1893] 2 QB 390 at 396-397; *Lee v Sankey* (1872) LR 15 Eq 204, at 211; and in *In re Blundell; Blundell v Blundell* (1888) 40 Ch D 370 at 381 ... I respectfully agree with what was said in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 as to the meaning of: 'dishonest and fraudulent' for the purposes of the rule. This expression is to be understood by reference to equitable principles and, as I have already indicated, in my judgment it includes a breach of trust or of fiduciary duty."[155]

Contrary to the approach of Ungoed-Thomas J in *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, recent English cases have construed Lord Selborne's dictum as literally requiring that, for the third party to be liable, any breach of trust or duty must be dishonest and fraudulent on the trustee's fiduciary's part. The leading case is *Belmont Finance Corp v Williams Furniture Ltd* [1979] Ch 250, Buckley LJ with whom Orr LJ agreed.[156] This has also been the view taken in many New Zealand decisions.[157]

However, it is a view which leads to the untenable situation that, while even an innocent trustee or fiduciary is strictly liable, a dishonest third party who participates, assists and even benefits from a scheme or course of conduct which he or she actually knows to be in breach of the trustee's or fiduciary's duty will escape liability unless it can be established that the trustee or fiduciary also realised the breach.[158] This position has been criticised by several leading commentators[159] and led the Privy Council in *Royal Brunei Airlines v Tan Kok Ming* [1995] 2 AC 378 at 384-85 to conclude that:

155 See also McTiernan J at 386. Stephen J did not deal with this point. See also Kirby P in *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50(CE) at 105 and Thomas J in *Powell v Thompson* [1991] 1 NZLR 597 at 610-615.

156 See also *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Agip (Africa) v Jackson* [1989] 1 WLR 1367 (CA); *Eagle Trust v SBC Securities* [1993] 1 WLR 484.

157 *Westpac Banking Corp v Savin* [1985] 2 NZLR 41; *Equiticorp Industries Group v Hawkins* [1991] 3 NZLR 700 at 725; *Marshall Futures v Marshall* [1992] 1 NZLR 316 at 325; contrast *Powell v Thompson* [1991] 1 NZLR 597.

158 Note, however, that if the assistance amounts to "inducement", the third party would be liable on that basis outside the confines of *Barnes v Addy*: see above, paras [2121]ff and *Eaves v Hickson* (1861) 30 Beav 136.

159 See, for example, Loughlan P, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 *Oxford Journal of Legal Studies* 260 at 267 and Harpum C, "The Basis of Equitable Liability" in Birks P (ed), *Frontiers of Liability* (Oxford University Press, Oxford, 1994), p 12.

> "It cannot be right that in such a case the accessory liability principle would be inapplicable because of the innocence of the trustee ... [The trustee's] state of mind is essentially irrelevant to the question whether the third party should be made liable to the beneficiaries for the breach of trust. If the liability of the third party is fault-based, what matters is the nature of his fault, not that of the trustee."

Following their Lordships' decision, discussed below,[160] that the third party's liability rested on dishonesty, objectively assessed, they concluded that it was not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although they noted that this would usually be so where the third party assistant was acting dishonestly.

The Privy Council's view on this point thus accords with that of Gibbs J in *Consul Development*[161] and, it is submitted, it is the approach which best suits its equitable framework.

The fault of the third party

[2136] In most recent cases concerned with assistance by a third party, liability has turned on the application of Lord Selborne's dictum that the person must have "*knowingly* assisted" in the breach of trust and on whether the person had the *degree* of knowledge required for liability.

The decision of the High Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 dealt squarely with this requirement. In that case, a solicitor named Walton controlled the Walton Group of companies, of which the plaintiff was one, whose principal business was the development, renovation and resale of dilapidated buildings. In 1966, a management company within the group engaged a man named Grey as working manager of several of the companies whose main tasks were concerned with the location, acquisition and disposing of properties for the group. Clowes was an articled clerk employed by Walton in his legal practice. Clowes was also managing director of the defendant company, Consul Development, an investment company of the Clowes family which was in turn both a creditor and client of the Walton Group and Walton respectively. As articled clerk to Walton, Clowes knew Grey well, and in 1967, he told Grey that he wanted Consul to invest in property like the Walton Group. After an unsuccessful attempt

160 Para [2137].

161 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 398.

by Consul to purchase a property recommended by Grey, Grey became aware of some properties at Rozelle in Sydney which were on the market. He informed Walton who instructed him to negotiate on the Group's behalf, but Grey then told Clowes about the properties saying that Walton was not interested. During the earlier negotiations for the first property, Clowes had spoken to accountants employed by the Walton Group who had confirmed that the Group was having difficulty raising finance and that it was short of funds. Clowes successfully negotiated for Consul to purchase the Rozelle properties, agreeing with Grey that he would share half the profits and bear half the losses on resale. Grey told Walton that a third party had purchased the properties but Walton was unaware of Grey's and Clowes' involvement. A month later, Consul bought another property at Grey's suggestion on the same profit share basis without any disclosure to Walton.

The plaintiff sought to make Consul liable as a constructive trustee under the principle from *Barnes v Addy* (1874) LR 9 Ch App 244, on the basis that Consul, through Clowes, had knowingly participated in Grey's breach of fiduciary duty. The High Court by a majority, McTiernan J dissenting, held that Consul was not liable as a constructive trustee: the plaintiff had not proved that Clowes had "knowledge" of Grey's breach of duty. Stephen J, with whom Barwick CJ agreed, considered the issue in detail. After agreeing that Clowes did not have actual knowledge and that his failure to make inquiries from Walton did not amount to a wilful shutting of his eyes to the truth, he continued ((1975) 132 CLR 373 at 408):

> "Absent, then, both actual knowledge and calculated abstention from enquiry, Consul will only be liable as a constructive trustee if recourse may be had to the doctrine of constructive notice … That proof of knowledge is essential is not in doubt … It is said, however, that when Lord Selborne spoke of knowledge this must be taken to include constructive knowledge. Neither his Lordship's language in *Barnes v Addy* nor other authorities, apart from two recent decisions of Chancery judges,[162] appear to me to support that view. Lord Selborne contemplated that a necessary ingredient of this liability as constructive trustee was the existence of 'fraud and dishonesty' on the part of the stranger, 'of knowledge or suspicion on his part of an improper or dishonest design in the transaction'."[163]

162 As the rest of his judgment makes clear, Stephen J was referring to *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 and *Karak Rubber Co Ltd v Burden* [1972] 1 WLR 602.

163 *Barnes v Addy* (1874) 9 Ch App 244 at 252.

After discussing the cases dealing with receipt of or dealing with trust property and the role, if any, of constructive notice in that context, Stephen J continued (at 412):[164]

> "In my view the state of the authorities as they existed before *Selangor* did not go so far, at least in cases where the defendant had neither received nor dealt in property impressed with any trust, as to apply to them that species of constructive notice which serves to expose a party to liability because of negligence in failing to make inquiry. *If the defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust* the case may well be different, as it clearly will be if the defendant has consciously refrained from enquiry for fear lest he learn of fraud. But to go further is, I think, to disregard equity's concern for the state of conscience of the defendant.
>
> … In my view the law, as it now stands, did not require Clowes to make any further inquiry once he believed that the Walton Group was not in the market for the properties here in question. He had been told this by Grey and his own knowledge of the Group's financial situation, confirmed by his inquiries, supported the apparent truth of Grey's statement. *In that situation a reasonable honest man would not, in my view, have had knowledge of circumstances telling of breach of fiduciary duty* by Grey. This being the furthest extent to which any possible doctrine of constructive notice may go in such a case it follows that the doctrine, even if applicable, cannot impute to Consul the knowledge necessary to render it liable to the plaintiff." *(emphasis added).*

Gibbs J also held that on the facts Clowes could not be taken to have knowingly participated in Grey's breach. He too rejected the notion that strangers would be liable merely on the basis that circumstances would have put an honest and reasonable person on inquiry, when the strangers' failure to inquire had been innocent and they had not wilfully shut their eyes to the obvious. On the other hand actual knowledge of impropriety was not necessary (at 398):

> "It would not be just that a person who had full knowledge of all the facts could escape liability because his own moral obtuseness prevented him from recognising an impropriety that would have been apparent to an ordinary man."

164 For preceding discussion, see above, para [2131].

[2137] The concept of objective rather than subjective dishonesty accepted by the High Court in *Consul Development*[165] found support in the Privy Council in *Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378, an appeal from the Court of Appeal of Brunei Darussalam. Noting that more recent English decisions[166] had been strongly in favour of the test being one of dishonesty or want of probity rather than negligence and that this accorded with both the Australian approach and the preponderant view of leading academic commentators,[167] their Lordships continued (at 389):

> "[I]n the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity as distinct from the objectivity of negligence ... [H]onesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct ... Thus for the most part dishonesty is to be equated with conscious impropriety.
>
> However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective ... If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour ... The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances ... [A] court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes such as his experience and intelligence, and the reason why he acted as he did."

The Privy Council rejected the argument that negligence on the part of an honest third party should be a sufficient basis for liability, saying that, as a general rule, beneficiaries cannot reasonably expect that all the world dealing with their trustees

165 In terms of the *Baden Delvaux* scale of knowledge, the position in Australia is thus that any of the first four levels of knowledge (as to which see above, para [2130]) will be sufficient to hold a third party liable for knowing assistance or participation in a breach of trust or fiduciary duty.

166 *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 777. See also *Re Montagu's Settlement Trusts* [1987] Ch 264 at 285; *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 (CA); *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 293; *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484 at 495; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 754.

167 As to the position in New Zealand, their Lordships cited Henry J in *Springfield Acres Ltd (in liq) v Abacus (Hong Kong) Ltd* [1994] 3 NZLR 502 at 510, who observed that the law in New Zealand could not be regarded as settled.

should owe them a duty to take care lest the trustees are behaving dishonestly.

In a valiant attempt to avoid "tortuous convolutions about the 'sort' of knowledge required" their Lordships concluded that:[168]

> " 'Knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden* scale of knowledge is best forgotten."

If the House of Lords had adopted the Privy Council's formulation of an objective dishonesty approach, this would have amounted to an extension of the principles applied in most recent English decisions, where it had generally been accepted that a stranger could only be liable for "knowing assistance" if he or she fell within one of the first three categories of knowledge identified in *Baden v Societe Generale*.[169] "Objective dishonesty", as explained by the Privy Council, would appear to be satisfied by "knowledge of circumstances which would indicate the breach of duty to a reasonable person", the fourth level in the *Baden* scale and the standard accepted as sufficient by the High Court of Australia in *Consul Development*.

Many recent Australian cases now refer to the expression, "objective dishonesty", as the appropriate test in cases of accessorial liability.[170] Whether "objective dishonesty' is an easier test to apply than the test of whether a defendant "knew of facts which would indicate a breach of duty to a reasonable person" is debatable but the expression does have the virtue of simplicity.

But recently the House of Lords, while ostensibly "following" the *Royal Brunei* test, has instead "explained" it and in doing so, must be said to have added a further layer of complexity. In *Twinsectra Ltd v Yardley* [2002] 2 AC 164, the majority of the House of Lords held, with Lord Millett dissenting, that the test for accessorial liability should be dishonesty, but judged by a "combined objective and subjective test": a defendant would not be held to

168 [1995] 2 AC 378 at 392. The passage continues: "when the truth is that 'knowingly' is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind."

169 See above, para [2130], and see Oakley A, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments" in Cope M, *Equity: Issues and Trends* (Federation Press, Sydney, 1995), p 77.

170 See for example *Beach Petroleum NL v Kennedy* (1998) 48 NSWLR 1 at 87: "it was common ground that the appropriate test for .. accessorial liability was "objective dishonesty" in accordance with the reasons of the House of Lords [sic] in *Royal Brunei v Tan* [1995] 2 AC 378." The New South Wales Court of Appeal, dealing with a claim against a firm of solicitors for knowing assistance, emphasised that allegations of lack of prudence could not lead to a finding of dishonesty.

be dishonest unless it was established that his conduct had been dishonest by the ordinary standards of reasonable and honest people and he himself had realised that by those standards his conduct was dishonest.

It will remain to be seen whether in applying this essentially subjective test the English courts allow third parties to hide behind their own "moral obtuseness", as Gibbs J put it in *Consul Development Pty Ltd v DPC Estates Pty Ltd*.[171]

CONSTRUCTIVE TRUSTS BASED ON UNCONSCIONABLE CONDUCT

General principles

[2138] Although most if not all[172] constructive trusts are imposed against a background of or to avert unconscionable behaviour on the part of the constructive trustee, it is clear from the authorities that a claimant seeking to establish a constructive trust must do more than prove mere unfairness or unconscionable behaviour in the abstract: what must be proved is that it is unconscionable for the defendant to deny the existence of the claimant's interest, and further that the unconscionable character of this denial rests on some established equitable principle.[173]

There is now a considerable body of authority which supports the finding or imposition of a constructive trust in certain established categories of case,[174] and a claimant will proceed either by fitting the case into one of these categories or by attempting to persuade the court that the facts warrant the formulation of a new principle or category to cover the circumstances of the case. How far will the creation of new categories extend? According to Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 616-617,[175] the only limits will be the limits of equitable principles themselves.

171 The full quotation is in para [2136] above.

172 See fiduciary strict liability cases discussed above, paras [2108]ff.

173 On the meanings of unconscionability, see above, Chapter 2: "The Conscience of Equity". In *Keogh v Rush* [2001] NSWCA 227 at [29], Young CJ in Eq, with whom Mason P and Heydon JA agreed, stated "there are many situations where a person obtains an unexpected (and perhaps morally undeserved) windfall where there is nothing against the conscience."

174 See list above, para [2102].

175 Where he seems to have pulled back from his wider comments in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 referring to breaches of any legal or contractual obligations, discussed above, para [2103].

As to the general principles, the courts have continually asserted that mere unfairness will not justify the imposition of a constructive trust. In *Muschinski v Dodds*, Brennan J said (at 608):

> "There is no jurisdiction in an Australian court of equity to declare an owner of property to be a trustee of that property for another merely on the ground that, having regard to all the circumstances, it would be fair so to declare ... The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair."

In the same case, Deane J, after discussing the remedial character of the constructive trust[176] continues as follows (at 615):

> "The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles ...
>
> ... Thus it is that there is no place in the law of this country for the notion of 'a constructive trust of a new model' which, '[b]y whatever name it is described, ... is ... imposed by law whenever justice and good conscience' (in the sense of 'fairness' or 'what was fair') 'require it': per Lord Denning MR, *Eves v Eves*,[177] and *Hussey v Palmer*.[178] Under the law of this country ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion,[179] subjective views about which party 'ought to win' ... and 'the formless void of individual moral opinion'. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other ... Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership is vested should hold it to the use of or for the benefit of another. That is not to say that general notions of

176 Discussed above, para [2106].

177 [1975] 1 WLR 1338 at 1341, 1342.

178 [1972] 1 WLR 1286, at 1289-90.

179 *Wirth v Wirth* (1956) 98 CLR 228 at 232, 247.

> fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity."[180]

Early cases

[2139] Two early instances of trusts imposed to undo or avoid unconscionable conduct were *Rochefoucauld v Boustead* [1897] 1 Ch 196 in 1897 and *Bannister v Bannister* [1948] 2 All ER 133 in 1948, although, in the first case, the trust was regarded as an *express* trust based on actual intention rather than as a constructive trust.

In *Rochefoucauld v Boustead*, the plaintiff was the owner of some estates of land in Ceylon. The estates were subject to mortgages to a Dutch company. The plaintiff feared that her former husband intended to take over the mortgages to her prejudice and entered into an arrangement with the defendant whereby he would buy the estates from the mortgagees. He did so, and managed the estates for a time, remitting money to her out of the profits. After a while, these payments ceased but correspondence continued without any denial of her interest. Unknown to the plaintiff the defendant had mortgaged the estates to raise money for himself. When he became bankrupt, the estates were sold by the defendant's mortgagees. The defendant was discharged from bankruptcy and the plaintiff sought an accounting of his dealings with the property from the defendant on the basis that he had held the estates as trustee for her. The defendant pleaded inter alia that the trust alleged by the plaintiff was not evidenced by any writing as required by the *Statute of Frauds* 1677 (29 Car 11 c 3). The Court of Appeal held that the whole of the evidence established that the defendant had purchased as trustee for the plaintiff, that the *Statute of Frauds* could not be used in order to commit a fraud, and it was a fraud for a person to whom land was conveyed as a trustee, who knew that it was so conveyed, to deny the trust and claim the land as her or his own. The plaintiff was, therefore, entitled to a declaration that the defendant purchased the estates as

180 This part of Deane J's judgment was quoted with approval by Mason CJ, Wilson and Deane JJ in a joint judgment in *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148. In *Muschinski v Dodds*, Deane J (with whom Mason J agreed) found the particular basis for the constructive trust in that case in the "general equitable principles" governing repayment of contributions in cases of failure or dissolution of partnerships, joint endeavours and the like. See further below, para [2145].

trustee for her, subject to a charge for the amount paid out to the Dutch mortgagees. In dealing with the defence based on the *Statute of Limitations* 1623 (21 Jac I c 16) (which would not defeat a claim based on an express trust) the Court of Appeal also held that the trust in this case was "clearly an express trust ... one which both the plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises although there may have been no intention to create a trust. The intention to create a trust existed from the first" (at 208).

Rochefoucauld v Boustead, therefore, on the Court of Appeal's view, cannot be considered as an example of a *constructive* trust based on unconscionable conduct, although it is clearly very close to one. Yet if the trust in that case was truly an express trust, the case does lead to the question of when a party seeking to deny the validity of a trust *will* be able to rely on the absence of writing as required for a declaration of trust over land or the creation of an equitable interest in land. When will it *not* be a fraud to rely on the Statute? It appears that if both parties to the transaction *agree* to the creation of a trust, neither could rely on that agreement in the absence of writing, yet if one party seeks to pretend that the agreement did not exist or to allege that it was not binding, the trust will be recognised as valid. This is difficult to reconcile. For this reason, it may seem preferable and more logical to construe a case such as this as an example of a *constructive* trust[181] based on the common intention of the parties that the claimant should have a beneficial interest of some sort which is enforced because of detrimental reliance.[182] The second element of detrimental reliance then provides an identifiable and justifiable basis for avoiding or not giving effect to the statutory requirements. The facts of *Rouchefoucauld v Boustead* would support such a construction,[183] for presumably the plaintiff would not have entered into the arrangement unless the defendant recognised her continuing interest in the estates.

Bannister v Bannister [1948] 2 All ER 133 may also support such a classification. In that case, the defendant agreed to sell to the plaintiff her two cottages on the basis of his oral undertaking that she could live in a certain one of the cottages rent-free for

181 Although the plaintiff could not then have so easily avoided the limitations defence.

182 See below, paras [2141]ff.

183 Millett LJ in *Paragon Finance v DB Thakerar and Co* [1999] 1 All ER 400 at 409 treats *Rouchefoucauld v Boustead* as an example of a constructive trust based on the common intention of the parties: "[the trustee] does not receive the property in his own right but by a transaction by which both parties intend to create a trust from the outset ..."

as long as she desired. The undertaking was not noted in the formal conveyance of the properties to the plaintiff. When he sought to evict the defendant from the cottage, she counter-claimed for a declaration that the plaintiff held the cottage on trust for her for her life. The Court of Appeal held for the defendant: it was a fraud to insist on the absolute character of a conveyance for the purpose of defeating a beneficial interest which, according to the true bargain, was to belong to another, and such a fraud attracted the imposition of a constructive trust. The principle was not merely confined to cases in which the conveyance itself was fraudulently obtained (at 136):

> "The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is a fraud to cover which the Statute of Frauds … cannot be called in aid in cases in which no written evidence of the real bargain is available."

It should be noted that the court was using the term "fraud" here in its equitable sense, for the court then said that (at 136):

> "The conclusion that the plaintiff was fraudulent, in this sense, necessarily follows from the facts found, and, as indicated above, the fact that he may have been innocent of any fraudulent intent in taking the conveyance in absolute form is for this purpose immaterial."

In other words, the denial of their agreement was "fraud" in equity. As discussed above, to allow a clear distinction between those cases when failure to comply with the writing requirements will be fatal and those when it will not, it would seem desirable to recognise that crucial to the outcome in this case was the fact that the defendant had acted to her detriment in selling the cottages to the plaintiff at an undervalue on the basis of the agreement, and it is submitted that, in the absence of actual fraud, this factor should be regarded as essential in supplying the justification for the court's avoidance of the writing requirements of the *Statute of Frauds*.

Although it might be thought to be implicit in the decision, the identification of detrimental reliance as an essential factor to the imposition of a constructive trust was not made in *Bannister v Bannister*. It has, however, since been so identified in the more recent line of cases discussed below.

The modern context

[2140] Most of the modern cases involve disputes arising out of personal or domestic relationships.[184] With the increase of both the breakdown of marriages and the incidence of de facto relationships, the application and reaches of equitable doctrines have been continually re-assessed and strained to the limits as the courts have tried to grapple systematically with the multitude of different situations and claims which human relationships tend to engender. This task requires the courts to reflect changing community customs and attitudes, while at the same time avoiding the accusation that they are distorting established principles or engaging in judicial legislation. Principles developed in one era, such as those relating to presumptions of resulting trust or of advancement, may have become inappropriate in the rapidly changing social circumstances of modern times.

Most cases involving the breakdown of a relationship will now come within the jurisdiction of either the *Family Law Act* 1975 (Cth) or the legislation in most States and Territories dealing with recognised de facto relationships.[185] However, there are at least three types of cases where the general law continues to be relevant: cases involving relationships which fall outside the legislation, such as, in certain States, homosexual relationships; domestic relationships not involving an intimate relational partnership, which are only covered by the legislation in some States; cases where the relevant relationship did not in fact break down but merely came to an end on the death of one of the parties, so that the contest is then between surviving relatives; and cases of bankruptcy or insolvency of one of the parties, where the issue will be what property is available for the creditors.[186] Furthermore, even where the statutory regimes apply, the general law is not necessarily excluded, so that the principles established in the ensuing paragraphs continue to be of relevance and

184 However, for a recent example of an application of the broad principles set out in *Muschinski v Dodds* (1985) 160 CLR 583 and of a constructive trust imposed to prevent the unconscionable denial of the claimant's interest in some trademarks, in subversion of the true intent of certain written agreements between the parties, see *Carson v Wood* (1994) 34 NSWLR 9.

185 Legislation now exists in almost all states and territories. *Domestic Relationships Act 1994* (ACT); *Property (Relationships) Act* 1984 (NSW); *De Facto Relationships Act* 1991 (NT); *Property Law Act* 1974 (Qld); *De Facto Relationship Act* 1996 (SA); *De Facto Relationship Act* 1999 (Tas); *Property Law Act* 1958 (Vic) Part IX. See also the *Family Court Amendment Bill* 2001 in Western Australia which incorporates a definition of de facto relationship into the Western Australian family law legislation. In some jurisdictions, the legislation applies also to homosexual relationships: see, for example, *Property (Relationships) Act* 1984 (NSW).

186 See Dodds J and MacCallum R, "Bankruptcy and Matrimonial Claims" (1986) 15 *Melbourne University Law Review* 211; Parkinson P, "Property Rights and Third Party Creditors — The Scope and Limitations of Equitable Doctrines" (1997) 11 *Australian Journal of Family Law* 100.

capable of application. A critical issue for litigants then is whether the general law is more or less favourable than the statutory scheme.[187]

The most common type of claim for a constructive trust, based on an assertion that it is unconscionable for the legal owner to refuse to recognise the existence of the claimant's beneficial interest, is the case of the claimant, usually a spouse or de facto partner, having made a financial contribution towards the cost of acquiring, improving, or maintaining the property in question. The central task facing the court is what construction is to be placed on any indications of the intentions of the parties and what significance is to be attached to the conduct of the parties, particularly in the provision of support or housing or services of a direct and indirect kind. As Gleeson CJ points out in *Green v Green* (1989) 17 NSWLR 343 at 353:

> "It is clear that the mere existence of a matrimonial or de facto relationship, combined with express or implied undertakings to provide support and accommodation, will not form a sufficient basis for concluding that there is a constructive trust by virtue of which a proprietary interest in the home occupied by the parties is created ... In a legal system which does not include concepts of family or community property, and where an obligation on the part of a husband to house and provide for his wife is commonly regarded as an incident of the matrimonial relationship, an undertaking of the kind referred to cannot of itself confer upon a wife a legal or equitable interest in the matrimonial home ... The acceptance of an obligation on the part of the husband to house his wife would not normally be regarded as an undertaking to give her a proprietary interest in the home in which they live, and wives usually have reasons for living with their husbands other than an expectation that they will increase their assets."

He continued that, nevertheless, a court of equity would intervene to declare the existence of a proprietary interest in a family home on the part of a spouse or de facto partner where it would be unconscionable in accordance with equitable doctrines for the other partner to deny the existence of that interest.

The result of the recent developments is that there are now, in Australia, two bases on which a court may impose a constructive trust in such circumstances: in the first, the court is giving effect

187 See Bailey-Harris R, "Property Disputes in De Facto Relationships; Can Equity still Play a Role?" in Cope M (ed), *Equity: Trends and Issues* (Federation Press, Sydney, 1995).

to a proved common intention where there has been detrimental reliance upon that intention by the claimant; in the second, the court is not so much concerned with the intentions of the parties as in providing a remedy where there has been a pooling of resources for the purposes of a joint endeavour or relationship which has broken down. These two bases are now considered in detail.

Constructive trusts based on a common intention and detrimental reliance

[2141] Although a constructive trust is generally said to be distinguishable from an express trust, in that it is imposed irrespective of the intention of the parties, that proposition is not completely true in the category of case now being considered. In fact, the common intention of the parties may be a relevant consideration in that it provides the background or foundation for the characterisation of the conduct of the defendant, in denying the claimant's beneficial interest, as "unconscionable conduct" to support the imposition of a constructive trust. It may, for example, be the conduct of one party in relying on strict legal requirements, such as those for an enforceable contract or the writing requirements for dealings with land, to deny the *intended* arrangement of affairs between the parties that provides the essential element of unconscionable conduct.

The nature of the common intention necessary for this type of constructive trust and the relationship and distinction between the resulting trust and the constructive trust[188] have been issues which have provided fertile ground for argument and confusion in decided cases over the last two decades.[189] In Australia, the recent developments have been at State Supreme Court level, the High Court has not had occasion recently to consider this category of the constructive trust.[190]

188 The common intention of the parties is also a critical factor in cases dealing with resulting trusts, because both the presumption of a resulting trust based on contributions to purchase price and the presumption of advancement made in certain family relationships will be rebutted by evidence of a contrary intention at the time of purchase: see *Calverley v Green* (1984) 155 CLR 242.

189 See *Gissing v Gissing* [1971] AC 886; *Pettit v Pettit* [1970] AC 777; *Allen v Snyder* [1977] 2 NSWLR 685.

190 Except in the context of commenting that the operation of the constructive trust is not *restricted* to cases based on common intention: in *Baumgartner v Baumgartner* [1987] 164 CLR 137 at 146-147, citing with approval the judgments of Mahoney and Samuels JJA in *Allen v Snyder* [1977] 2 NSWLR 685.

The consistent approach of the Australian courts, and of the English courts since the House of Lords in *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886 authoritatively disapproved Lord Denning's "constructive trust of the new model"[191] based on broad notions of fairness and justice, has been to insist on the proof by the claimant of two essential elements, leading to a finding that denial of the claim would be unconscionable:[192]

- a common intention of the parties that the claimant was to have a beneficial interest in the circumstances of the case; and
- conduct by the claimant to his or her detriment on the faith of that intention.

Common intention

[2142] It is now well established that, in order to found a constructive trust in this category, the party seeking to establish a constructive trust must be able to prove an *actual* common intention of the parties that the claimant should have a beneficial interest in the subject property. The notion that a trust might be imposed on the basis of mere fairness or an intention *imputed* to the parties by the court by reference to what they might or would or should have intended in particular circumstances has been firmly rejected by the courts.

In *Allen v Snyder* [1977] 2 NSWLR 685 at 693, Glass JA (with whom Samuels JA agreed), discussing cases in which a trust that was not evidenced in writing had been recognised, said as follows:

> "The trust is enforced, because it is unconscionable of the legal owner to rely on the statute to defeat the beneficial interest … But when it is called a constructive trust, it should not be forgotten that the courts are giving effect to an arrangement based upon the actual intentions of the parties, not a rearrangement in accordance with considerations of justice, independent of their intentions and founded upon their respective behaviour in relation to the matrimonial home."

191 *Eves v Eves* [1975] 1 WLR 1338 at 1341.

192 See Sheller JA in *Bryson v Bryant* (1992) 29 NSWLR 188 at 214: "But the underlying element that called for remedy was not in all cases the fulfilment of the parties' intention, but the unconscionability, in particular circumstances, of one party being able to deny an interest to the other."

Glass JA went on to state that the proposition that the court could impose a trust on the basis of a common intention which does not actually exist but which is ascribed to the parties by operation of law was contrary to high authority in England and Australia.[193]

Proof of the common intention can be direct, as for example by evidence of express communications or agreement or the making of admissions, or the common intention may be inferred from conduct such as the making of contributions to the cost of the property or to expenses in maintaining it.[194] Indirect contributions or assistance, such as contributions to housekeeping, homemaking and child-rearing are more difficult to rely on at this stage, as the motives for their provision may vary widely and they are not so easily seen as specifically or exclusively referable to an intention as to a beneficial interest in property.

The relevant events leading to the finding of an interest in the claimant may have occurred before the acquisition[195] or after acquisition, and it is recognised that beneficial interests may change in the course of the relationship between the parties.[196] This point is an important point of distinction between this type of constructive trust and a resulting trust based on contributions to purchase price. In *Green v Green* (1989) 17 NSWLR 343, the relevant evidence consisted of the claimant's evidence of conversations between the parties, corroborated by the evidence of a person present at some of the conversations and by instructions given to a solicitor (and not acted upon before the death of the other party) to transfer the title to the property to the claimant.

The burden of proving the actual common intention of the parties is probably the most difficult aspect of a case from the claimant's point of view. There is a further difficulty in determining the exact *extent* of the claimant's beneficial interest,

193 *Gissing v Gissing* [1971] AC 886; *Pettitt v Pettitt* [1970] AC 777; *Hepworth v Hepworth* (1963) 110 CLR 309.

194 Gleeson CJ in *Green v Green* (1989) 17 NSWLR 343, following *Grant v Edwards* [1986] 1 Ch 638.

195 See *Banner ER Homes PLC v Luff Developments Limited* [2000] Ch 372, in which the Court of Appeal imposed a constructive trust where there was an agreement or understanding between two potential purchasers of a site that they would acquire and develop it together as a joint venture, on the basis of which the claimant did not put in its own bid and which the defendant, a sole purchaser, subsequently denied. It was inequitable for the sole purchaser to deny the claimant's interest. Chadwick LJ at 397 described the claim as a "*Pallent v Morgan* [[1953 Ch 43] equity": "it is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it." See also the judgment of Millett LJ in *Paragon v DB Thakerar and Co.* [1999] 1 All ER 400 at 509.

196 See Gleeson CJ in *Green v Green* (1989) 17 NSWLR 343 at 355-356.

because even if the parties clearly intended that the claimant should have *some* form of beneficial interest, they may not have considered the type of interest. "Even in a case where a court can infer an actual intention to share ownership of real estate it is, of course, extremely rare that the parties will be people of such sophistication that they advert to or contemplate some particular form of legal title" (Gleeson CJ at 355). Although prima facie the interest of the claimant will be that which the parties intended,[197] if the parties did not specifically address the matter, the court will use a flexible approach to reach a conclusion that best and most fairly gives effect to their intentions. In *Green v Green*, the conclusion of the majority of the Court of Appeal was that the two parties intended that the property be enjoyed by them both during their lifetimes and that the claimant should be provided with a home after the other's death. This led to a finding that they held the beneficial interest as joint tenants so that the claimant was then entitled to absolute beneficial ownership on the other's death (*Green v Green* (1989) 17 NSWLR 343, Gleeson CJ at 358).

In contrast to the result in *Green v Green*, the case of *Bryson v Bryant* (1992) 29 NSWLR 188 illustrates that, where the court draws the conclusion that a joint tenancy would best reflect the parties' intentions, the order of the death of the parties may critically affect the outcome. In that case, the Court of Appeal of New South Wales was considering a claim by the brother and sole beneficiary of a deceased woman that she at her death held a half beneficial interest in her matrimonial home, which had been in her husband's name from its acquisition some sixty years before. The court unanimously[198] held that there was no evidence of any common intention on the part of the deceased and her husband that she should have a beneficial interest in the property. But, more importantly, the majority (Sheller and Samuels JJA, Kirby P dissenting) also upheld a further objection to the relief claimed: the most appropriate and likely form of any beneficial interest would have been as joint tenant with her husband and, as she had predeceased him by a few months, any such interest would have passed to her husband by survivorship and would not have formed part of her estate. It was on this basis that Sheller JA (with whom Samuels JA agreed) held that it was not unconscionable for her husband's estate to retain the property and to deny the claim.

197 See *Gissing v Gissing* [1971] AC 886, Lord Diplock at 908; and *Green v Green* (1989) 17 NSWLR 343 at 355.

198 Kirby P reluctantly: see below, para [2148].

Detrimental reliance

[2143] The party claiming the constructive trust must be able to show that he or she has acted to her or his detriment on the faith of the common intention. Such conduct might, but need not,[199] involve expenditure of money or the making of a contribution to the acquisition of the property or the cost of maintaining it (See also *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132). Certainly any change in the party's legal position would be sufficient, as in *Bannister v Bannister* [1948] 2 All ER 133,[200] where the claimant had conveyed her cottages to the defendant on the basis of their mutual agreement.

In *Green v Green* (1989) 17 NSWLR 343 at 357, Gleeson CJ applied the principles set out in *Grant v Edwards* [1986] Ch 638 at 657,[201] where it was said that the relevant acts did not need to be "inherently referable" to the gaining of an interest in the house: "[O]nce it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify."

It appears, therefore, that although many acts of a domestic or personal nature[202] will not be regarded by the courts as necessarily indicative of a common intention that the actor should acquire an interest in property, but rather as equally referable to love and affection, these acts will be accorded a much greater significance at this second stage of the inquiry. For example, in *Green v Green* (1989) 17 NSWLR 343, the Court of Appeal, by a majority, accepted that the claimant's conduct in staying with her de facto husband, having his children and not returning to her native country were sufficient acts to her detriment.

Relationship to other doctrines

[2144] The overlap between the common intention constructive trust and the doctrine of estoppel, particularly in view of the developments in estoppel since the High Court decision in *Waltons Stores Interstate v Maher* (1988) 164 CLR 387, is of increasing theoretical and practical interest.[203] Many cases which are based on a

199 *Green v Green* (1989) 17 NSWLR 343, Gleeson CJ at 354, 355.

200 See above, para [2139].

201 See also *Austin v Keele* (1987) 61 ALJR 605.

202 Such as setting up and keeping house, contributing to general housekeeping, having a child, providing physical and material comfort and support.

203 Burns F, "*Giumelli v Giumelli*: Equitable Estoppel, The Constructive Trust and Discretionary Remedialism" (2001) 22 *Adelaide Law Review* 123.

common intention will also involve facts which might support a claim based on estoppel.[204] Both areas involve the same underlying rationale of undoing or preventing unconscionable conduct, but there are differences between them. On the one hand, estoppel would be preferable to a claimant who was misled by the representations of a person who had in fact no actual intention to create an interest for the claimant.[205] However, bearing in mind the uncertain nature of the remedy in estoppel cases, it might be thought preferable for a claimant to plead the constructive trust as by definition it would result in a proprietary remedy.[206] However, the High Court of Australia has recently implied that a constructive trust is a discretionary remedy of the last resort.[207] In cases where the common intention of the parties was sufficiently formed as to amount to an agreement, there may also be some conflict with the doctrines and rules of part performance.[208] Mahoney JA adverted to this conflict in *Green v Green* (1989) 17 NSWLR 343 at 367.

Constructive trusts after failed joint endeavours

[2145] The case of *Muschinski v Dodds* (1985) 160 CLR 583 opened up a new category of the constructive trust based on the notion that contributions to a joint endeavour which ultimately fails without attributable fault by the parties should be returned to the contributors. In the High Court, Deane J, with whom Mason agreed, drew an analogy with partnership and other cases where repayment of contributions may be ordered, and applied the same principles to the facts before the court. This in itself may not be surprising, but what makes *Muschinski v Dodds* significant is that, in imposing the *proprietary* remedy of the constructive trust, the court gave those principles a force which they had not previously contained.

The facts were that in 1976, Hilga Muschinski and Ronald Dodds purchased a property, on which stood a dilapidated old cottage,

204 See above, Chapter 7: "Estoppel". See *Giumelli v Giumelli* (1999) 196 CLR 101 at 112. See also *Rasmussen v Rasmussen* [1995] 1 VR 613, *Flinn v Flinn* [1999] 3 VR 71.

205 See Hayton D J, "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 244.

206 See also Parkinson P, "Doing Equity between De Facto Spouses: From *Calverley v Green to Baumgartner*" (1988) 11 *Adelaide Law Review* 370; Hayton D J, *The Law of Trusts* (2nd ed, 1993), Ch 9; and Ferguson P, "Constructive Trusts — A Note of Caution" (1993) 109 *Law Quarterly Review* 114.

207 *Giumelli v Giumelli* (1999) 196 CLR 101 at 113. See above [2104].

208 See above, Chapter 17: "Specific Performance".

for $20,000. They intended to restore the cottage as an arts and crafts centre to be run by Muschinski, and to erect a kit house elsewhere on the property in which they were to live. Muschinski provided the purchase price for the property and Dodds was waiting for the proceeds of a divorce settlement which would be put towards the cost of developing the property and building the kit house. Dodds said he would take no part in the venture unless the title to the property were put in both their names. After discussions with their solicitor, the property was put in their joint names as tenants in common. Ultimately, they were unable to get council approval for the house. Dodds' moneys proved less than expected and the venture failed before ever getting started. When they separated in 1980, Muschinski had contributed approximately $25,000 to the purchase and improvement of the property and Dodds approximately $2,000. She sought a declaration that she was the beneficial owner of the whole property.

Any basis for a *resulting* trust was rebutted by the clear evidence that Muschinski intended to make a gift of a half-share of the property at the time of purchase, and the court also rejected the argument that her gift was subject to a condition which would lead to the forfeiture of Dodd's interest if not complied with. There was also no basis for a constructive trust based on common intention, as again the only discernible common intention was concerned with the purchase and successful continuation of their venture. Nevertheless, the High Court held by a majority that the parties held their respective legal interests in the property on a constructive trust to repay to each her or his contribution and as to the residue for them both in equal shares. Deane J, with whom Mason J agreed, set out the basis for the constructive trust.[209]

After the full discussion of the general principles of the constructive trust, Deane J referred (at 617) to the need to discern a narrower and more specific basis for the imposition of a constructive trust, independently of the actual intention of the parties, than merely some broad notions of fairness or unjust enrichment. He found that specific basis by drawing an analogy with three situations in which the law, either in common law or equity, allows the recovery of contributions. The first was the case of a contract frustrated without fault by either side and where there was a total failure of consideration. The second was the case of premature dissolution of partnerships, dealing both

209 Gibbs CJ, while initially dismissing any notion of a constructive trust based on an intention *imputed* to the parties by the court, and preferring to deal with the case on the basis of the right to contribution of a person who has discharged a joint obligation, ultimately agreed to the orders recommended by Deane J.

with capital contributions and premiums. The third was the case of a contractual joint venture which collapses prematurely without attainment of the intended goal. The latter two were to be seen "as instances of a more general principle of equity", which was also reflected in the common law contractual rules regulating the first and which operated upon legal entitlement to prevent a person from asserting a legal right in circumstances where that would constitute unconscionable conduct (at 619-620). He went on to say (at 620):

> "Those circumstances can be more precisely defined by saying that the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specifically provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property *to the extent that it would be unconscionable for him to do so*." (emphasis added)

It will be noted from the proviso emphasised by italics that it may not necessarily be thought unconscionable for one party to retain a capital contribution made by another following the collapse of a joint endeavour. What circumstances would make it unconscionable, and was it so here? Deane J suggested that, in a purely commercial relationship, the assertion by one party that that party could keep the interest provided by the other without any adjustment for the unintended gross disproportion between their respective contributions would be plainly unconscionable. Although the parties were also in a personal relationship, which might in some cases call for the court to consider contributions other than those in the form of money, such as support, home-making and family care, the parties' personal relationship in this case did not survive the collapse of the planned commercial venture and the personal aspects did not override the unconscionable character of Dodds' assertion that he could retain a full one-half interest. It was no answer to say the gift was not subject to conditions: indeed it was the fact that there was no provision made for the unforeseen collapse which called equity's intervention into play to prevent unconscionable conduct.

[2146] *Muschinski v Dodds* represents a significant expansion of the operation of the constructive trust: not only does it expand the area of operation by taking the constructive trust into the field of failed joint endeavours, but it also emphasises the remedial

potential rather than the proprietorial nature of the constructive trust.

Several comments may be made about the principles applied in *Muschinski v Dodds*. First, given that the three situations on which the liability to repay contributions was based, namely partnerships, frustrated contracts, and contractual joint ventures, all involve a mere personal liability, Deane J does not make clear how the analogous situation in *Muschinski v Dodds* leads to the granting of a proprietary remedy and why a proprietary remedy rather than a mere personal one is necessary or appropriate in the circumstances. One answer might be that it was appropriate that the defendant, Dodds, should hold or repay the contribution he received from the plaintiff in the same form in which he received it, particularly where the form of that contribution remained unchanged.

It appears from *Roxborough v Rothmans of Pall Mall Australia Limited* (2002) 76 ALJR 203 at [46] and [57] that a constructive trust will not be considered in these other situations where other remedies are effective, for example, where the defendant is solvent and able to repay the money "had and received" or by which he or she was unjustly enriched.

Secondly, if a proprietary remedy was not only available but appropriate in the circumstances of *Muschinski v Dodds*, the argument might be raised that, by working backwards by analogy, a proprietary remedy should now be available and appropriate in the three situations first referred to. This again would significantly expand the operation of the constructive trust.

Thirdly, it is notable that the court in *Muschinski v Dodds* felt it necessary to deal specifically with two aspects which flow from the granting of a proprietary remedy. In order to avoid unfair prejudice to third parties, the court held that the constructive trust was to take effect from the publication of its reasons for judgment and not earlier (*Re Sabri* (1996) 137 FLR 165). Further, the court held that the constructive trust was only for the amount of the plaintiff's contribution and did not take with it a proportionate amount of the increase in value of the property, as the plaintiff had not made out a case that the retention of this by the defendant would be unconscionable. These points emphasise the truly *remedial* rather than proprietorial nature of this constructive trust. While it could be argued that, if the constructive trust reflects the availability of relief in equity,[210] the

210 See Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 615; Toohey J in *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 153; *Giumelli v Giumelli* (1999) 196 CLR 1.

constructive trust may arise as soon as the joint relationship or venture fails, because at that point it would be unconscionable for one party to deny the other's interest. Nevertheless, it is now clear that a constructive trust is not the only or the most appropriate remedy in all cases and that the court may prefer an alternative remedy.[211]

[2147] Despite the basis of the constructive trust in *Muschinski v Dodds* being firmly in the commercial, or at least contractual, sphere, the same reasoning was nevertheless quickly applied by the High Court again in *Baumgartner v Baumgartner* (1987) 164 CLR 137 to a purely domestic relationship.

In *Baumgartner v Baumgartner* the parties had lived together since 1978 in a de facto relationship in a unit belonging to the man. In 1979, the man bought some land in his own name, using the proceeds of the sale of the unit and by taking out a loan in his name. The parties then built a house for the family to live in. They pooled their earnings out of which they paid all their living expenses and commitments, including the mortgage instalments on the unit, rent while the house was being built and mortgage instalments on the house. The woman contributed approximately 45 per cent of the pool and the man approximately 55 per cent. They separated in 1982. The woman sought a declaration in terms that would recognise her beneficial interest in the property. The High Court emphasised that the land was acquired and the house built for the purposes of their relationship and that the pooling of earnings was designed to ensure that their earnings would be expended for the purposes of their joint relationship, including that of securing accommodation for themselves and their child, and for their mutual security and benefit. Applying *Muschinski v Dodds*, the High Court unanimously held that the man's assertion, after the relationship had failed, that the house, which was financed in part through the pooled funds, was his sole property or was his property beneficially to the exclusion of any interest at all on the part of the woman, amounted to unconscionable conduct which attracted the imposition of a constructive trust. The beneficial interests were in proportion to their contributions to the pooled funds, namely 45 per cent and 55 per cent, and were subject to further allowances to the man for his additional contributions of the proceeds of his unit and other adjustments in relation to circumstances since their separation.[212]

211 In *Giumelli v Giumelli* (1999) 196 CLR 1, due to the involvement of third parties, an order for monetary compensation, secured by a charge, was more appropriate.

212 Post-separation occupation of the property may be relevant if one party is excluded or dispossessed *Stone v Owen* [2001] 1 Qd R 419 at 423-425

The High Court's decision in *Baumgartner v Baumgartner* is generally considered to be significant for two reasons: first, because it applied the concept of the constructive trust based on unconscionable behaviour following a failed joint venture to a domestic relationship and did so other than by reference to some proved common intention;[213] secondly, the judgments of the court accorded theoretical recognition to the non-financial (or "in kind") contributions of the parties as well as to their financial contributions (at 149-150):[214]

> "Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common, subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind."

The constructive trust as developed in these two cases has fast become hailed as a more useful remedy than the resulting trust, which reflects only direct contributions to the cost of the property at the time of purchase[215] and takes no account of indirect or later contributions.[216]

The constructive trust since Baumgartner

[2148] Since *Muschinski* and *Baumgartner*, there are then now two alternative bases on which to argue that a constructive trust arises in cases of relationships involving the joint ownership, maintenance or enjoyment of property. One way is for the claimant to prove a common intention as to a certain beneficial interest and detrimental reliance on that intention. The alternative way is to show that there has been a contribution made to property in another's name, or resources pooled for the purchase or maintenance of property in another's name, for the purposes of a joint endeavour or relationship which has since failed.[217]

213 See Neave M, "The New Unconscionability Principle — Property Disputes Between De Facto Partners" (1991) 5 *Australian Journal of Family Law* 185 at 192, who said "[T]he decision in *Baumgartner* liberates Australian courts from the process of searching for 'common intention' and provides an important new basis for equitable intervention in favour of a de facto partner who has indirectly contributed to property held by the other partner."

214 An example of where non-financial contributions were taken into account following *Baumgartner* is *Parij v Parij* (1997) 72 SASR 153.

215 *Calverley v Green* (1984) 155 CLR 242, Gibbs CJ at 252; and see Samuels JA in *Bryson v Bryant* (1992) 29 NSWLR 188 at 227.

216 See Parkinson P, "Doing Equity between De Facto Spouses: From *Calverley v Green* to *Baumgartner*" (1988) 11 *Adelaide Law Review* 370.

217 Recent cases applying these principles include *Lloyd v Tedesco* [2002] WASCA 63; *Parij v Parij* (1997) 72 SASR 153.

Being only on a case by case basis, the development of these principles has been slow and neither basis has achieved the result which some commentators and parties would like to see, namely the equitable division of property taking into account all the social, family and economic circumstances of the parties as well as all aspects of their conduct and the changing community attitudes about the respective roles, obligations and rights of parties to personal relationships.[218] Widely diverging approaches can be discerned from two extracts from the judgments in *Bryson v Bryant* (1992) 29 NSWLR 188.[219] Kirby P, dissenting, said (at 204):

> "Nor should the 'brave new world' [of unconscionability] be confined to helping farmers' and bee-keepers' wives, leaving others, who have provided 'women's work' over their adult lifetime to be told condescendingly, by a mostly male judiciary, that their services must be regarded as 'freely given labour' only or, catalogued as attributable solely to a rather one way and quaintly described 'love and affection,' when property interests come to be distributed."

In contrast, Samuels JA remarked (at 229-231):

> "The jurisdiction which the Court exercises in such cases as this is not one which enables it merely to reward a dutiful spouse … To produce such a conclusion [that a wife would become entitled to any property acquired by the husband merely because she had carried out her role as a home-maker] would, in my opinion, carry the Court beyond the furthest confines of judicial activism."

The difficulties of proving the common intention and the subsequent conduct of the parties, where evidence may be scanty or incomplete, (perhaps due to the death of one or both of the relevant parties) or conflicting (due to conflict between the parties or lapse of time) and the unpredictability of the inferences that may be drawn from the same pieces of evidence[220] have prompted calls for the common intention constructive trust to be abandoned in favour of a more general approach based on unconscionable conduct.[221]

218 See Bailey-Harris, R, "Equity is Still Childbearing in Australia", (1997) 113 *Law Quarterly Review* 227.

219 See Riley, J, "The Property Rights of Home Makers under General Law: *Bryson v Byant*" (1994) 16 *Sydney Law Review* 412.

220 See the comments of Kirby P in *Bryson v Bryant* (1992) 29 NSWLR 188 at 197: "There will, inevitably, be room for differences of opinion … In the end, it is the judges who are highest in the court hierarchy who will have the last say."

221 See particularly Bailey-Harris R, "Property Disputes in De Facto Relationships; Can Equity still Play a Role?" in Cope M (ed), *Equity: Trends and Issues* (Federation Press, Sydney, 1995), pp 195ff and Neave M, "The New Unconscionability Principle_Property Disputes Between De Facto Partners" (1991) 5 *Australian Journal of Family Law* 185. See also Sheller JA in *Bryson v Bryant* (1992) 29 NSWLR 188 at 215: "[T]he search for common intention may, in some cases, divert attention from a sounder approach to the solution of the particular problem."

Although the more general approach of the High Court cases frees the court from either searching for, or being restricted, by the proven intention of the parties, the development of the principles set out in *Muschinski* and *Baumgartner* has not, however, fulfilled the expectations held out for them by some commentators. In particular, those principles have not been seen by courts in subsequent cases as allowing the court to use the constructive trust as a means of rewarding or recognising the unfair retention of the fruits of another's labour or efforts in *all* cases of joint endeavours or relationships. In *Giumelli v Giumelli* (1999) 196 CLR 101 at 111, although there was a joint endeavour, in the form of a partnership, between family members and others, the delay in resolving the dispute had significance for the type of relief and it was decided that monetary compensation, secured by a charge, was more appropriate than an order for conveyance, in order to do equity between the parties and certain third parties. The courts are still grappling with how to deal with purely domestic contributions and labour such as home-making, personal care and childcare. And this category necessarily only comes into play when there has been a *failure* or premature dissolution of a joint endeavour or relationship.[222] Unless the concept is widened, it, therefore, has no place in cases such as *Green v Green* where there was no such failure.[223] For this reason, the common intention constructive trust should continue to play a role in cases where the claimant can readily prove the two necessary elements of common intention and detriment to support the allegation of unconscionable conduct.

In either category, the due recognition of the respective "contributions" of parties to a personal relationship, whether direct or indirect, is a matter that will always be more straightforward in theory than in proof or application.

222 Although in *Troja v Troja* (1994) 33 NSWLR 269, Mahoney JA at 294 and 298, and Meagher JA at 300 noted that a claim for a constructive trust based on contributions made by the claimant would not be affected by the forfeiture rule, which prevents a person enforcing rights directly resulting from a crime such as felonious killing, because the entitlement arose *before* the killing.

223 *Bryson v Bryant* (1992) 29 NSWLR 188, Samuels JA at 230. Cf Kirby P at 200-204.

CHAPTER TWENTY-TWO

EQUITABLE COMPENSATION

Michael Tilbury and Gary Davis

INTRODUCTION

[2201] Compensation of the plaintiff is the object, not only of an award of damages at law, but also of two nominate remedies in equity: "compensation in equity" and "damages in equity". The existence of two monetary compensatory remedies in equity is historical. The first derives from equity's inherent jurisdiction.[1] The second is statutory, and is often referred to as "damages under *Lord Cairns' Act*", since it is derived from the *Chancery Amendment Act* 1858 (21 & 22 Vict c 27), which was sponsored by the then Solicitor-General of England, Sir Hugh Cairns, who later became Lord Cairns. Section 2 of this Act provided for damages to be awarded in lieu of, or in addition to, equitable relief by way of specific performance or an injunction.[2] Damages under *Lord Cairns' Act*, or equitable damages, are thus distinct from the remedy of equitable compensation.

Other monetary awards in equity are distinguishable. First, there are equitable restitutionary remedies that are generally available

1 See Davidson I E, "The Equitable Remedy of Compensation" (1982) 13 *Melbourne University Law Review* 349; Gummow W M C, "Compensation for Breach of Fiduciary Duty" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), Ch 2; Aitken L, "Developments in Equitable Compensation: Opportunity or Danger?" (1993) 67 *Australian Law Journal* 596; Davies J D, "Equitable Compensation: `Causation, Foreseeability and Remoteness'" in Waters D W M (ed), *Equity Fiduciaries and Trusts* (Carswell, Toronto, 1993), Ch 14; Rickett C and Gardner T, "Compensating for Loss in Equity: The Evolution of a Remedy" (1994) 24 *Victoria University Wellington Law Review* 32; Berryman J "Equitable Compensation for Breach by Fact-based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals" (1999) 37 *Alberta Law Review* 95; Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" and Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), Chs 10 and 13.

2 See McDermott P M, *Equitable Damages* (Butterworths, Sydney, 1994); Jolowicz J A, "Damages in Equity — A Study of Lord Cairns' Act" [1975] *Cambridge Law Journal* 224.

for breach of fiduciary duty or of a duty of confidence, whether by way of a constructive trust or an account of profits.[3] Secondly, there are those monetary adjustments (which may be compensatory or restitutionary) which are made in equity in specific contexts, as part of the process of other relief to which they are ancillary (*Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* (1992) 30 NSWLR 185). Thus, restitutionary monetary adjustments (commonly called an "indemnity") are made between the parties to a contract as part of the process of rescission of the contract,[4] for the purpose of securing "a giving back and a taking back on both sides".[5] Furthermore, compensatory monetary adjustments (commonly called "specific performance with compensation") are made between the parties to a contract for the sale of land where specific performance is ordered of the contract at the instance of the purchaser (or, sometimes, the vendor), and the vendor is required to compensate the purchaser for a contractual error or misdescription of the property which is the subject matter of the contract, but which is not such as to preclude the availability of specific performance.[6]

[2202] That a compensatory remedy should have developed in equity's inherent jurisdiction is hardly surprising; compensation is the fundamental remedial goal pursued in legal systems generally,[7] and there are "equity" cases in which monetary compensation is simply the most appropriate remedy available to the plaintiff. One example of this is where a defendant trustee has, in breach of trust, caused a loss to the trust estate and the plaintiff beneficiary wishes to recover that loss from the defendant.[8] But

3 See above, Chapter 21: "Constructive Trusts" and below, Chapter 26: "Taking Accounts". See also Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), paras [4012]-[4014], [4079]-[4097], [4105]-[4135].

4 See below, Chapter 25: "Rescission". See also *Brown v Smitt* (1924) 34 CLR 160; *Redgrave v Hurd* (1881) 20 Ch D 1 (CA); *Koutsonicolis v Principle (No 2)* (1987) 48 SASR 328; *Ballantyne v Raphael* (1889) 15 VLR 538; *Curwen v Yan Yean Land Co Ltd* (1891) 17 VLR 745; *Robinson v Abbott* (1894) 20 VLR 346.

5 *Newbigging v Adam* (1886) 34 Ch D 582, Bowen LJ at 595 (CA); affd *Adam v Newbigging* (1888) 13 App Cas 308 (HL). See also *Cheese v Thomas* [1994] 1 All ER 35 (CA).

6 See above, Chapter 17: "Specific Performance". See also Harpum C, "Specific Performance with Compensation as a Purchaser's Remedy — A Study in Contract and Equity" [1981] *Cambridge Law Journal* 47.

7 See Wright C A, "The Law of Remedies as a Social Institution" (1955) 18 *University of Detroit Law Journal* 376.

8 As in *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211. Equitable compensation is not the only source of monetary relief. Where the trustee admits that money is owed to the beneficiaries, an action in debt is maintainable at law: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [143]. Damages in lieu of an injunction may also be claimable under the *Chancery Amendment Act* 1858 *(Lord Cairns' Act)* (21 & 22 Vict c 27), s 2.

the existence of a general compensatory remedy in equity would not, from a historical point of view, sit easily alongside the common law action for damages, except where breaches of purely equitable rights are involved.[9] The theory upon which equitable remedies came to be premised was that their availability was dependent on the inadequacy of the remedy at law,[10] with the result that, as the law provided an adequate compensatory remedy, there was no general need for such a remedy in equity (See *Newham v May* (1824) 13 Price 749; 146 ER 1142). Purely equitable rights[11] are an exception, as the common law, which generally took no notice of equitable rights,[12] provided no remedies (compensatory or otherwise) for their breach.

Equitable compensation is still described as "a developing area of law" with its remedial rigour being "of comparatively recent vintage" (*Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJA at 90). It is, therefore, not surprising to find that, until recently, the incidence of compensatory remedies in equity was rare and that, when given, the remedies were somewhat obscure. This was, and sometimes still is,[13] because of the tendency to refer to them as restitutionary for the purpose of separating them from awards of common law damages. The influential decision of Street J in the Supreme Court of New South Wales in *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211[14] is a good example of this. However, while it suffices to speak of the obligation of a defaulting trustee who has control of a beneficiary's property under a "traditional trust"[15] as that of "effecting a restitution to the estate",[16] the use of such

9 See Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), pp 235-236.

10 *Harnett v Yielding* (1805) 2 Sch & Lef 549, Lord Redesdale LC at 553.

11 A purely equitable right is where equity is said to act in its "exclusive" jurisdiction (that is, in aid of equitable rights, for example, beneficiaries suing their trustee for breach of duty under an express trust), as opposed to its "auxiliary" or "concurrent" jurisdictions, where its remedy is available to support common law rights. An example of this is where the equitable remedy of specific performance is available to compel defendants to perform contracts of which they are in breach (breach of contract being a common law wrong).

12 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [140].

13 See for example *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [54].

14 The judgment in this case has been influential in Canada: *Guerin v The Queen* [1984] 2 SCR 335; and in England: *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515.

15 A "traditional trust" is principally a trust in which there are successive interests, or a bare trust the purpose of which is not yet accomplished: see *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).

16 *Target Holdings Ltd v Redferns* [1996] AC 421 (HL); *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 214.

terminology is inappropriate in the case of fiduciaries who, in breach of duty, cause loss to those with whom they have a fiduciary relationship. While Australian law remains cautious in respect of, even hostile to, expanding the notion of fiduciary obligations,[17] it is in the context of their breach that the modern remedy of compensation in equity is developing. In such cases, the object of the award is to restore those who have suffered loss to the position they would have been in if there had been no breach of duty.[18]

[2203] The question has arisen regarding the extent to which compensation in equity is informed by the principles of common law damages, for these principles are well-developed and provide ready-made solutions to problems that may arise in equitable compensation. The issue has split the Supreme Court of Canada, with half the judges favouring the application of common law rules by analogy, and the other half favouring the development of specifically equitable notions of compensation, having regard to policies underlying the equitable duty in question, and founded generally in equitable notions of fairness and common sense (*Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129). Given that, in this context, common law and equity pursue the same goals, these differing approaches will usually lead to the same result.[19] New Zealand law has certainly found room for the importation by analogy of common law principles of causation and remoteness where the duty in equity is of equivalent scope to contract and tort obligations.[20]

17 See *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, McHugh, Gummow, Hayne and Callinan JJ at 1082 ("distinct character of the fiduciary obligation"); *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 474 ("tendency apparent ... too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability"); *Paramasivam v Flynn* (1998) 90 FCR 489, 505 (FC) (no fiduciary duty to prevent occurrence of non-economic losses "where conduct complained of is within the purview of the law of tort"). See generally Chapter 10: "Fiduciary Obligations". See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; *Breen v Williams* (1996) 186 CLR 71 and see also Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987); McKendrick E (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992).

18 *Hill v Rose* [1990] VR 129, Tadgell J at 143-144; *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 952; *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 432.

19 *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest J at 148-152 (with whom Sopinka, Gonthier and Cory JJ concurred).

20 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA), Gault J at 681-682 (for Richardson P, Gault, Henry and Blanchard JJ), Tipping J at 688; see discussion by Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), pp 188-190 and see also *Day v Mead* [1987] 2 NZLR 443 (CA). As for English law, the issue was left open by the House of Lords in *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 438-439.

There is little in Australian law to support the view that common law principles will be directly imported, by analogy or otherwise, to deal with issues arising in cases of compensation in equity.[21] However this issue is ultimately resolved, it is inevitable that some differences between common law damages and compensation in equity will remain. One difference is that the availability and assessment of compensation in equity is, as with all equitable remedies, at the discretion of the court, though the scope for the application of equitable discretionary notions in the context of monetary remedies is much more restricted than in the case of specific remedies such as injunctions and specific performance.[22] The second, and most important, difference is that the equitable remedy of compensation, unlike damages, can always be given on terms, which is useful in cases where the court does not want to make the once-and-for-all award which it must make at law (*Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561 (CA)).

[2204] The second monetary compensatory remedy in equity, damages in equity, was created to deal with the procedural difficulties of plaintiffs before the introduction of the *Supreme Court of Judicature Acts* 1873 and 1875 (UK). It particularly enabled courts of equity to give complete relief by awarding damages in cases of which they were otherwise seized. The necessity for such specific legislation faded with the adoption of judicature systems in all Australian jurisdictions so that, although the remedy survives, it is not of great practical importance. Its main use is in cases of threatened injury and in subsidence cases. Although some authorities state that *Lord Cairns Act* damages may be awarded in relation to purely equitable rights,[23] its potential use has been overshadowed by the development of equity's inherent jurisdiction to award compensation.

21 For an exception, see *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [54], [92].

22 See Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), paras [3249], [3266], [4022].

23 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, Gibbs CJ, Mason, Murphy and Brennan JJ at 676; *Gas & Fuel Corp of Victoria v Barba* [1976] VR 755, Crockett J at 766; *Talbot v General Television Corp Pty Ltd* [1980] VR 224 (FC). See below, para [2221].

COMPENSATION IN EQUITY

The modern compensatory jurisdiction

[2205] The affirmation of a general equitable compensatory remedy, whose origins are grounded in the old Bill in Chancery to enforce compensation for breach of fiduciary duty,[24] occurred in the decision in *Nocton v Lord Ashburton* [1914] AC 932, the House of Lords there extending the remedy beyond the simple personal duty of an express trustee to account for lost trust assets and rendering them vulnerable to liability for loss generally.[25] The remedy has been received into Australian law,[26] as well as into the laws of Canada[27] and New Zealand.[28]

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24 *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 946; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest J at 141. See also McDermott P M, *Equitable Damages* (Butterworths, Sydney, 1994), Ch 1.

25 See Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 236.

26 *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 468; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Hayne J at 621-622; *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, McHugh, Gummow, Hayne and Callinan JJ at 1084-1085, Kirby J at 1098-2000; *McKenzie v McDonald* [1927] VLR 134, Dixon AJ at 146; *Holmes v Walton* [1961] WAR 96; *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211; *Daly v Sydney Stock Exchange Ltd* [1982] 2 NSWLR 421, Reynolds JA at 426-427 (CA); affd *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, McLelland J at 816 (varied as *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (CA), and as *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41); *Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd* [1983] 2 Qd R 508, Thomas J at 523; *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, Rogers J at 659-660; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1, Williams J at 13; *Hill v Rose* [1990] VR 129; *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687 (Fed Ct); *Biala Pty Ltd v Mallina Holdings* (1993) 13 WAR 11; *Murphy v Lew* (1994) 13 ACSR 10 (SC Vic); *Gemstone Corp of Australia Ltd v Grasso* (1994) 13 ACSR 695 (SC SA); *Dempster v Mallina Holdings* (1994) 13 WAR 124; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 (FC); *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, McLelland A-JA at 153-154 (CA); *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224, Ipp J at 278-279; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (CA); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 (CA); *Ferrari Investment (Townsville) Pty Ltd (in liq) v Ferrari* [2000] 2 Qd R 359 (CA); *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000); *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001); *Karam v Australia & New Zealand Banking Group Ltd* [2001] NSWSC 709 (21 August 2001); *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487.

27 Especially *Guerin v The Queen* [1984] 2 SCR 335; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129.

28 *Coleman v Myers* [1977] 2 NZLR 225 (SC and CA), Cooke J at 359-362; *Day v Mead* [1987] 2 NZLR 443 (CA); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA). See also *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, Cooke J (for the Court of Appeal) at 361; *Attorney-General (UK) v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 166, Cooke P at 172; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, Cooke P at 301; *Mouat v Clark Boyce* [1992] 2 NZLR 559, Cooke P at 566; *Everist v McEvedy* [1996] 3 NZLR 348, Tipping J at 355; *Gilbert v Shanahan* [1998] 3 NZLR 528, Tipping J (for the Court of Appeal) at 535-536.

[2206] The general equitable compensatory remedy is applicable, or considered potentially applicable, in five cases:

(a) in actions against trustees for the loss caused by the trustees' breach of trust;[29]

(b) in actions against fiduciaries for loss caused to plaintiffs by breach of fiduciary duty;[30]

29 *Partridge v Equity Trustees Executors & Agency Co Ltd* (1947) 75 CLR 149 (the trustee had acted in breach of a duty relating to the management and administration of the trust estate). See also *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159 (failure to collect debts); *Dalrymple v Melville* (1932) 32 SR (NSW) 596; *Clough v Bond* (1838) 3 My & Cr 490; 40 ER 1016 (failure to supervise co-trustees); *Graham v Gibson* (1882) 8 VLR (E) 43 (failure to supervise trustee-appointed manager); *Wills v The Trustees, Executors & Agency Co Ltd* (1900) 25 VLR 391 (improper retention of particular assets); *Fouche v Superannuation Fund Board* (1952) 88 CLR 609; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 (improper investment of trust assets); *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 (the trustee had improperly dealt with the trust funds); *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) (bare trustee improperly paid away trust funds); *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), special leave to appeal to High Court granted 21 June 2002 (solicitor-trustees disbursed trust funds contrary to provisions of investment agreement). See also *Mordecai v Mordecai* (1988) 12 NSWLR 58 (CA); *Murphy v Lew* (1994) 13 ACSR 10 (SC Vic).

30 *McKenzie v McDonald* [1927] VLR 134 (the defendant fiduciary was a purchaser who had breached the obligation of purchasing the vendor's property at arm's length); *Hill v Rose* [1990] VR 129 (director of a company had failed to make full and fair disclosure of the company's business when selling an interest therein to a purchaser); *Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd* [1983] 2 Qd R 508 (director had failed to avoid a conflict of interest and duty to the company); *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639 (promoter and a financier (because of involvement with the promoter) had breached their respective duties of disclosure to a company); *Holmes v Walton* [1961] WAR 96 (solicitor badly advised a client on making an investment); *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1 (person had wrongly used an opportunity provided in the course of negotiations to enter into a partnership agreement which did not materialise); *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687 (Fed Ct) (solicitor in breach of fiduciary duty in failing to disclose information to a client where information obtained in a situation involved a conflict of interest); *Yore Contractors Pty Ltd v Holcon Pty Ltd* (1990) 2 ACSR 663 (SC NSW) (director of a company liable to make compensation for breach of fiduciary duty); *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224 (non-disclosure by Vendor under Heads of Agreement that payment had already been made to corporation controlled by Vendor); *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (CA) (company director acted in ways that deprived company of ability to deal with its main asset); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 (CA) (conflict of duties owed by solicitors to those for which they were acting); *Ferrari Investment (Townsville) Pty Ltd (in liq) v Ferrari* [2000] 2 Qd R 359 (CA) (directors transferring valuable corporate asset, namely real estate agency's "rent roll", to another company controlled by them); *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000) (manager of real estate agency wrongfully takes and uses agency's confidential rent roll in own newly-started business); *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487 (employees diverting business opportunities of employer to themselves during employment); *Swindle v Harrison* [1997] 4 All ER 705 (solicitor making bridging loan to client failing to disclose hidden profit); *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) (solicitors failed to offer client opportunity of taking independent advice).

(c) in actions against defendants who, although not fiduciaries in respect of the breach in question, have acted in breach of an equitable obligation (even where a common law duty arises on the same facts);[31]

(d) in actions for breach of confidence resulting in loss to the plaintiff;[32] and

(e) in actions for loss flowing from a breach of contract founded on estoppel.[33]

The object of the remedy

[2207] Compensation in equity aims to restore the injured party to the position that existed before the wrong: "The object of equitable

31 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 (FC) (breach of equitable duty to exercise care and skill not amounting in the circumstances to a breach of fiduciary duty); *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, Handley JA at 56 (equitable fraud on a power, disadvantaging minority strata title proprietor); *Karam v Australia & New Zealand Banking Group Ltd* [2001] NSWSC 709 (21 August 2001) (unconscionability and economic duress by bank in relation to securing guarantees and mortgage securities). Cf *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, McLelland J at 816 (varied as *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (CA), and as *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41). Compare *Catt v Marac Australia* (1986) 9 NSWLR 639, Rogers J at 660; *Hill v Rose* [1990] VR 129, Tadgell J at 143. The Canadian and New Zealand authorities support the extension in principle of the remedy of equitable compensation to breaches of all equitable obligations: for example *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301 and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA); see further *Mahoney v Purnell* [1996] 3 All ER (undue influence); Heydon J D, "Equitable Compensation for Undue Influence" (1997) 113 *Law Quarterly Review* 8; Ho L, "Undue Influence and Equitable Compensation" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), Ch 11; Burrows A, "We Do This at Common Law But That in Equity" (2002) 22 *Oxford Journal of Legal Studies* 1 at 9; but see Birks P, "Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence (*Mahoney v Purnell*)" [1997] *Restitution Law Review* 72. See also Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 247 (extension of equitable compensation to all types of equitable wrongdoing to be "cautiously welcomed [as being] very useful in avoiding the pitfalls of all-or-nothing equitable rescission or specific performance decrees").

32 *Talbot v General Television Corp Pty Ltd* [1980] VR 224, Marks J at 243; *Concept Television Productions Pty Ltd v Australian Broadcasting Corp* (1988) 12 IPR 129, Gummow J at 136 (Fed Ct); *Green v Folgham* (1823) 1 Sim & St 398; 57 ER 159; *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, 167 DLR (4th) 577. See also *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000); *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 500. Although this is the established position in New Zealand *(Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354; *Attorney-General (UK) v Wellington Newspapers (No 2)* [1988] 1 NZLR 166; *Aquaculture Corp v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299), such an award is also explicable as an award of damages under the *Chancery Amendment Act* 1858 (*Lord Cairns' Act*) (21 & 22 Vict c 27), s 2 (*English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, Slade J at 399), or as an award of damages at law: *Seager v Copydex Ltd* [1967] 2 All ER 415 (CA); *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104; *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418 (CA). See Capper D, "Damages for Breach of the Equitable Duty of Confidence" (1994) 14 *Legal Studies* 313. See below, paras [2220], [2231].

33 See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; see also *Giumelli v Giumelli* (1999) 196 CLR 101. But it is more likely that compensation will be awarded as damages (at law) by asserting the unity of the doctrine of estoppel at law and in equity: see below, para [2232].

compensation is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation".[34] In its "core territory"[35] where compensation in equity is consequent upon a breach of a "traditional" trust, the object may be expressed as that of making "restitution" to the trust estate. Thus, in *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, at 214,[36] Street J said that the "obligation of a defaulting trustee is essentially one of effecting a restitution to the estate". The same expression may be justified in the case of a company director who has the power to dispose of company property and who does so for an improper purpose.[37] However, "restitution" is used here in the sense of "restoration", not in the sense in which that word is commonly used.[38] In normal parlance, a restitutionary award is aimed at the defendant's return of a benefit which the defendant received at the plaintiff's expense. Its object is to reverse the defendant's unjust enrichment,[39] rather than to restore the plaintiff to the position which existed before the injury. It is clear that, where compensation is the remedial response to a breach of a "traditional" trust, the object remains that of putting the beneficiary in the position that existed before the breach of trust.[40]

The distinction between awards of compensation and awards of restitution is crucial. Although the distinction is clear in

34 *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 272 (CA). See also *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 432; *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 952; *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Handley JA at [16]; *Hill v Rose* [1990] VR 129, Tadgell J at 143-144; *Frame v Smith* [1987] 2 SCR 99, Wilson J (dissenting) at 149; *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 713-714 (Fed Ct); *Yore Contractors Pty Ltd v Holcon Pty Ltd* (1990) 2 ASCR 663, Cole J at 669-670 (SC NSW); *Cook v Evatt (No 2)* [1992] 1 NZLR 676, Fisher J at 691 (HC). Compare *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1098 ("overall purpose of the law of fiduciary obligations is to restore the beneficiary to the position it would have been in if the fiduciary had complied with its duty").

35 Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 236.

36 See also *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 469; *Target Holdings Ltd v Redferns* [1996] AC 421 (HL); *Ex parte Adamson; Re Collie* (1878) 8 Ch D 807, James and Baggallay LJJ at 819; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, Brightman LJ at 543; *Guerin v The Queen* [1984] 2 SCR 335, Wilson J at 360-362.

37 *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 277. See further Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), pp 177-178.

38 See Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), para [3248].

39 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925, Robert Goff J at 938 (QB).

40 *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 435-436; *Fales v Canada Permanent Trust Co* (1976) 70 DLR (3d) 257, Dickson J at 271-272.

principle, it is often not clearly made in judgments. Indeed, the two terms are often, confusingly, used interchangeably.[41] Notwithstanding the distinction in principle between awards of compensation and restitution, the defendant's gain may be taken, for evidentiary reasons or simply for reasons of practical convenience, as the measure of the plaintiff's loss in claims for equitable compensation.[42] But without denying that an errant fiduciary often will be compelled by way of the remedy of *account of profits* to give up its gain,[43] it is, with respect, difficult as a matter of principle related to the remedy of *compensation in equity* to support statements of this nature, made in the court below in *Duke Group Ltd (in liq) v Pilmer*: "Compensation may be awarded even where there has been no loss suffered by the plaintiff but a pecuniary gain made by the fiduciary" and "[E]quitable compensation is a flexible remedy. One example of that flexibility is the fact that it may sometimes reflect the gain made by the fiduciary or a loss made by the victim".[44] The source of the confusion and the need to respect the essential difference between restitution and compensation has been well-put by Professor Birks:[45]

> "[W]e have begun to lose our grip on the language of compensation itself. The line between restitution of gains and compensation for losses has been muddied by the invocation of 'restitution' to denote a measure of compensation; ... [T]he instrument of this confusion is the difference between restitution of something to a person and the restitution of a person or thing to a previous condition. If this difference is not respected, 'restitution' can mean 'compensation'. A victim of a wrong seeking restitution to the position in which he found himself before the wrong will in all probability be seeking compensation for losses inflicted by the wrong. This muddle has to be cleared up."

41 See *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211; *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 952. The two terms are clearly distinguished in the speech of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1996] AC 421.

42 *Dempster v Mallina Holdings* (1994) 13 WAR 124 (SC WA); *Ferrari Investment (Townsville) Pty Ltd (in liq) v Ferrari* [2000] 2 Qd R 359 (CA); *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 501.

43 For example, *Warman International Ltd v Dwyer* (1995) 182 CLR 544, where it was clearly recognised that the same breach of fiduciary duty gave rise to a right in the plaintiff to choose between account of profits and equitable compensation: see (1995) 182 CLR 544, 556.

44 (1999) 73 SASR 64, Doyle CJ, Duggan and Bleby JJ at 243 and 248, respectively. See further, for example, *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, Handley JA at 56 (no part of function of award of equitable compensation to strip profits from defendants).

45 Birks P, "Epilogue" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 262. See also Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 176.

If equitable compensation is ever an appropriate response to breach of contract founded on estoppel,[46] then the remedy may be limited as justice requires.[47] Although compensation is generally directed to reversing the plaintiff's detriment by placing the plaintiff in the position which existed before the contract was made ("reliance loss"), occasion may demand that, instead, the plaintiff be put in the position which would have existed if the contract had not been breached ("expectation loss"). This will be the case where the only way of reversing the plaintiff's detriment is to give effect to the expectations which have been created.[48] As Brennan J explained in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 423:

> "The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion."

[2208] There exists Australian authority holding that punishment of the guilty party is, in the proper circumstances, a legitimate object of compensation in equity, in the form of the inclusion of an award of exemplary damages in equity for breach of fiduciary duty.[49] Although this view has support in the case law of other jurisdictions,[50] it is controversial in this

46 See below, para [2232], and generally above, Chapter 7: "Estoppel".

47 See *Restatement (Second) of Contracts* (American Law Institute, 1981), s 90.

48 *Giumelli v Giumelli* (1999) 196 CLR 101, Gleeson CJ, McHugh, Gummow and Callinan JJ at 123-125, Kirby J at 127; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 412; Brennan J at 429; Deane J at 442; Dawson J at 454; Gaudron J at 487; McHugh J at 501. See also *Waverley Transit Pty Ltd v Metropolitan Transit Authority* (1988) 16 ALD 253, O'Bryan J at 262-263; *Corpers (No 664) Pty Ltd v NZI Securities Australia Ltd* (1989) ASC 55-714. See also the cases on "proprietary estoppel" discussed in Finn P D, "Equitable Estoppel" in Finn P D (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 59.

49 *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 514 (and see full analysis at 503-515).

50 See *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA); *Cook v Evatt (No 2)* [1992] 1 NZLR 676, Fisher J at 705-707 (HC); *McKaskell v Benseman* [1989] 3 NZLR 75, Jeffries J at 90 (HC); *Norberg v Wynrib* (1992) 92 DLR (4th) 449, McLachlin J (dissenting) at 505-507; *J v J* (1993) 102 DLR (4th) 177; *Szarfer v Chodos* (1986) 27 DLR (4th) 388, Callaghan ACJ at 405 (HC Ont).

country.[51] The duties binding defendants in situations in which equitable compensation is a possible remedy[52] often contain an element of deterrence which, in principle, ought (in appropriate cases) to be reflected in the remedy that the court fashions,[53] provided that the defendant cannot be said to be punished twice, once by the award of compensation and once by the additional award of exemplary damages. By analogy to the availability of exemplary damages at common law,[54] the cases in which it is appropriate to award equitable compensation by way of punishment are those in which the defendant's conduct amounts to "conscious wrongdoing in contumelious disregard of [the plaintiff's] rights",[55] for example, where employees breached their fiduciary obligation through, inter alia, a "clearly conceived plan of lying in wait, as it were, in the employment of [their employer], clandestinely and systematically diverting business opportunities" from their employer to their own entity while waiting for that entity to become self-supporting (*Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 504). Where a breach of duty occurs in a commercial context, exemplary damages may generally be said to be inappropriate,[56] but may be

51 Young, Justice P W, "Exemplary Damages in Equity" (2002) 76 *Australian Law Journal* 227 has noted that the *Digital Pulse* decision "has divided equity lawyers as to its correctness". As to the situation prior to that decision, see the vigorous rejection of the notion in Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [259] and [4127], as well as the somewhat milder "much to be said for" the opposite view (while leaving the question open) in *Bailey v Namol Pty Ltd* (1994) 53 FCR 102, Burchett, Gummow and O'Loughlin JJ at 112-113. See also *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1098 ("purpose of equity's relief is not punishment but restoration") and *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, Handley JA at 56 (no part of function of award of equitable compensation to "strip profits from the defendants, or to punish them for wrongdoing"). See further *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, Somers J at 302 ("equity and penalty are strangers") and Michalik P, "The Availability of Compensatory and Exemplary Damages in Equity: A Note on the *Aquaculture* Decision" (1991) 21 *Victoria University Wellington Law Review* 391. Varying degrees of support for the possibility of a punishment objective are found in Spry I C F, *Equitable Remedies* (6th ed, Law Book Co, Sydney, 2001), p 636; Jensen D, "Punitive Damages for Breach of Fiduciary Obligation" (1996) 19 *University of Queensland Law Journal* 125; Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 183; Burrows A, "We Do This at Common Law But That in Equity" (2002) 22 *Oxford Journal of Legal Studies* 1 at 13; and in the Report of the Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247 (1997), paras [5.54]-[5.55].

52 See above, para [2206].

53 Gummow W M C, "Compensation for Breach of Fiduciary Duty" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 57. Cf Aitken L, "Developments in Equitable Compensation: Opportunity or Danger?" (1993) 67 *Australian Law Journal* 596 at 599-600.

54 See Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), Ch 5.

55 *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, Knox CJ at 77; see *Gray v Motor Accident Commission* (1998) 196 CLR 1, Gleeson CJ, McHugh, Gummow and Hayne JJ at 7; *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 503.

56 *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311.

awarded, nevertheless, where "the character of the defendants' conduct strikes at the heart of commercial integrity, upon which the business community, and ultimately the community as a whole, depends" (*Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 507).

RECOVERABLE HEADS OF DAMAGE

[2209] No limitation on the heads of damage recoverable in equitable compensation claims has emerged in the authorities. Economic loss, including such consequential economic loss as flows from the defendant's wrong,[57] has been the subject of compensation in nearly all the reported cases. However, it is clear that non-economic loss may also be the subject of a claim in equitable compensation.[58] "Non-economic loss" is widely understood in this context to include pain and suffering,[59] nervous shock[60] and injury to the plaintiff's feelings (including mental anguish,[61] discomfort, tears and anxiety,[62] and loss of memory[63]).

[2210] Aggravated damage is recoverable in principle in equitable compensation claims,[64] although it is unlikely to be claimable in a commercial context (*Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 (CA)). Aggravated damage is injury to the plaintiff's dignatory interest[65] (in this context, injury to the plaintiff's feelings), which is heightened by reference to the defendant's reprehensible conduct.[66] The conduct would be similar to that which justifies an award of exemplary damages.

In contrast, where the plaintiff seeks to inflate compensation for injury to reputation by reference to the defendant's reprehensible

57 The suggestion which is sometimes made that "consequential loss" is irrecoverable in equitable compensation is not borne out by the authorities: see *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 714-715 (Fed Ct). See also *Szarfer v Chodos* (1986) 27 DLR (4th) 388 (HC Ont); *Jacks v Davis* (1980) 12 CCLT 298 (SC BC) (further proceedings: *Jacks v Davis* (1980) 112 DLR (3d) 223 (SC BC)).

58 *Szarfer v Chodos* (1986) 27 DLR (4th) 388, Callaghan ACJ at 405 (HC Ont); *McKaskell v Benseman* [1989] 3 NZLR 75, Jeffries J at 90-91 (HC). See also *Frame v Smith* [1987] 2 SCR 99, Wilson J (dissenting) at 151. But see *Paramasivam v Flynn* (1998) 90 FCR 489, 505 (FC).

59 *Frame v Smith* [1987] 2 SCR 99, Wilson J (dissenting) at 151.

60 *Szarfer v Chodos* (1986) 27 DLR (4th) 388, Callaghan ACJ at 405 (HC Ont).

61 *Szarfer v Chodos* (1986) 27 DLR (4th) 388, Callaghan ACJ at 405.

62 *McKaskell v Benseman* [1989] 3 NZLR 75, Jeffries J at 91 (HC).

63 *Szarfer v Chodos* (1986) 27 DLR (4th) 388, Callaghan ACJ at 405 (HC Ont).

64 *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).

65 See *Broken Hill Proprietary Co Ltd v Fisher* (1984) 38 SASR 50, Olsson J at 66.

66 See Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), para [3216].

conduct, any claim for aggravated damages will probably have to be made, if at all, in defamation.[67]

PRINCIPLES GOVERNING EQUITABLE COMPENSATION AND ITS MEASURE

General principles

[2211] The nature and extent of the principles governing equitable compensation are controversial. Controversy centres on the nature of factors which limit awards of compensation in equity and on the principles informing the measure of compensation. There are two opposing approaches. On the one hand, principles may be found in the nature of compensation as a discretionary remedy available in equity's inherent jurisdiction. Speaking of the assessment of equitable compensation, Somers J said in *Day v Mead* [1987] 2 NZLR 443 at 462 (CA),[68] that "assessment will reflect that which the justice of the case requires according to considerations of conscience, fairness, and hardship and other equitable features such as laches and acquiescence". On the other hand, principles may be found in analogous rules relating to common law damages. For example, the factors which limit an award of damages at common law (that is, causation, intervening cause, remoteness, contributory negligence, mitigation and certainty) may, by analogy, be held applicable as such in the assessment of compensation in equity.[69]

The first of these approaches is, potentially, wider and more flexible. It concentrates attention on the nature of the duty, the character of the breach and on underlying policies. It requires, in principle, that all relevant factors be weighed against one another to determine what the justice of the case dictates in terms of compensation.[70] And it can make use, in appropriate

67 See *Addis v Gramophone Co Ltd* [1909] AC 488. See also *McKaskell v Benseman* [1989] 3 NZLR 75, Jeffries J at 90 (HC).

68 See also *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, Lamer CJC, L'Heureux-Dube, McLachlin and Stevenson JJ (SCC); *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 438-439.

69 *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest, Sopinka, Gonthier and Cory JJ (SCC). See also *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534 (CA) (application of statutory limitation period). But see *KM v HM; Women's Legal Education & Action Fund, Intervener* (1992) 96 DLR (4th) 289 (SCC).

70 *Day v Mead* [1987] 2 NZLR 443 (CA); *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, McLachlin J at 154 (SCC).

cases, of principles of assessment developed in the law of trusts, for example, the presumption that an asset would have been utilised to make a profit[71] or that it would have been sold at or near its highest value over a period.[72]

The second approach applies the common law limitation as such where limitation of compensation in equity is sought on a ground analogous to a limitation applicable to damages at law, the analogy usually being to damages in tort. For example, in *Burke v Cory* (1959) 19 DLR (2d) 252, the plaintiff, who purchased company shares as a result of false representations made in breach of fiduciary duty by the defendant stockbroker, was held by the Ontario Court of Appeal to be under a duty to mitigate his loss by selling the shares once he became aware of the true situation, and his award was reduced accordingly.[73]

Either approach is open to objection in so far as it attempts to provide a generalised solution to all cases of equitable compensation. As the High Court observed in *Warman International Ltd v Dwyer*: "It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts."[74] Thus, whether one or more of the limiting factors operates on an award of compensation in equity in any particular case depends, in principle, on the nature of the equitable obligation binding the defendant, the character of the defendant's breach and underlying policies.[75]

71 *Guerin v The Queen* [1984] 2 SCR 335.

72 See Ford H A J and Lee W A, *Principles of the Law of Trusts* (3rd ed, Law Book Co, Sydney, 1996), para [17120]; and see below, para [2217]. Cf *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 440.

73 See also *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest J at 148 (SCC); *Jacks v Davis* (1980) 12 CCLT 298 (SC BC); *Szarfer v Chodos* (1986) 27 DLR (4th) 388 (HC Ont); *Burns v Kelly Peters & Associates Ltd* [1987] 6 WWR 1 (CA BC); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664. For an Australian example of the application of a common law limitation, see *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [92], but his Honour's approach was not mirrored in the judgments of Handley and Hodgson JJA and appears, with respect, to be out of step with Australian judicial tendencies in this matter (special leave to appeal to High Court granted 21 June 2002); at the same time, note (in a context not involving limitations as such) *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 514 ("to hold that wrongful conduct which would attract an award of exemplary damages in an action in tort cannot attract exemplary damages if the cause of action is equitable creates an anomaly which, in this country, is not justifiable either by precedent or by principle").

74 (1995) 182 CLR 544, Mason CJ, Brennan, Deane, Dawson and Gaudron JJ at 559. The remark was made in the context of the remedy of account of profits, but cited in the context of the remedy of compensation in equity in *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1098.

75 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 247. See Gummow W M C, "Compensation for Breach of Fiduciary Duty" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 57 at pp 75-91; Davies J D, "Equitable Compensation: 'Causation, Foreseeability and Remoteness'" in Waters D W M (ed), *Equity Fiduciaries and Trusts* (Carswell, Toronto, 1993), Ch 14.

As was been put in a New Zealand case: "The proper focus ought to be on the scope of the duty in the circumstances".[76] Equity comprehends a range of duties and there is no principle that requires compensation in equity for dishonest breach by a trustee who has dissipated trust assets to be measured or limited in the same fashion as for a company director who has breached an equitable obligation to exercise reasonable skill and care.[77]

While this suggests that the first approach is the correct one, it overlooks the point that policy can dictate the application of a legal limitation to certain kinds of cases involving equitable compensation or, conceivably, to all such cases, and that where the legal limitation serves the same function as a limitation that would flow inherently from equity, there is no point in denying the generalised application of the legal limitation as such.[78] The point is encapsulated by the following passage:[79]

> "The issue then is whether the breach of duty by [the defendant] to act with reasonable diligence is to attract liability on a restitutionary basis by analogy with breaches of trust causing loss to the trust estate or breaches of fiduciary duties of loyalty and fidelity. The rationale for a restitutionary approach in those situations is the need to deter breaches of trust and confidence by those in a position to take advantage of the

76 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, Gault J (for Richardson P, Gault, Henry and Blanchard JJ) at 681.

77 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664. There are Australian cases that readily accept that not every breach by a fiduciary is necessarily an abuse of the fiduciary duties of fidelity and loyalty, yet still attract the remedy of compensation in equity. See for example *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 237-239; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 274; *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000), Austin J at [77]; *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [54]; *Karam v Australia & New Zealand Banking Group Ltd* [2001] NSWSC 709 (21 August 2001), Santow J at [425]. See also *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 491; *Bristol and West Building Society v Mothew* [1998] Ch 1, Millett LJ at 16-17. See further *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 56 (CA) (equitable wrongdoer not even fiduciary or trustee). Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000) divides (at p 174) the range of relevant equitable duties into seven categories.

78 See Davies J D, "Equitable Compensation: 'Causation, Foreseeability and Remoteness'" in Waters D W M (ed), *Equity Fiduciaries and Trusts* (Carswell, Toronto, 1993), p 297 at pp 305-312; Rickett C and Gardner T, "Compensating for Loss in Equity: The Evolution of a Remedy" (1994) 24 *Victoria University Wellington Law Review* 32.

79 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, Gault J (for Richardson P, Gault, Henry and Blanchard JJ) at 681. See also *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 432 ("The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same."); *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 247-248.

> vulnerable by using powers to be exercised solely for their benefit. Where that is not present as where a person, though under some fiduciary obligations, merely fails to exercise reasonable skill and care, there is no reason in principle for the law to treat that person any differently than those who breach duties of care imposed by contract or tort. That the liability arises in equity is no sufficient reason. Surely the stage has been reached in the development of the law where something more substantial than historical origin is needed to justify disparate treatment in the law of those in breach of the obligation to exercise reasonable care. The proper focus ought to be on the scope of the duty in the circumstances, with a consistent approach to compensating for breach. Only where good reasons exist is the differentiation warranted. They do exist where breaches of trust dissipate trust property, where there is abuse of fiduciary duties of fidelity and loyalty …"

If adopted (which seems more likely where the court accepts some fusion or mingling of law and equity)[80], the second approach would mean that in practice common law principles would often apply as such. This is because there are several points of intersection of equitable and common law obligations, that is, where the equitable obligation may be seen as having a close counterpart in the common law.[81]

It appears that Australian law (at least at the highest levels) is trending in favour of the first approach. Australian courts do recognise that the different types of equitable duty and so forth may affect the assessment of compensation in equity in particular instances, but this is accommodated within conventional equitable bounds rather than by application of common law principles as such: "Equity will not be concerned, as such, with the common law analysis. It will ask what would have happened if the appellants, as fiduciaries, had adhered to their

80 See below, para [2232]. But such a view on fusion is not essential: *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 514 ("no need to appeal to any perceived fusion between the principles of equity and those of the common law in order to invest the equity court with jurisdiction to award exemplary damages").

81 See for example *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest J at 153 (SCC) (failure to disclose secret profit — deceit); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, Gault J (for Richardson P, Gault, Henry and Blanchard JJ) at 680, Tipping J at 687 (failure by trustee to exercise reasonable care — ordinary negligence); *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [54] (carelessness by trustee or fiduciary — ordinary negligence); *Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 514 (dishonest breach of fiduciary duty or abuse of confidence — deceit); Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247 (1997), para [5.55].

obligations."[82] Emphasis is placed on the distinctive "dual functions"[83] — "compensatory and prophylactic"[84] of equity in this context, aptly expressed by Kirby J as follows:[85]

> "Where fiduciary obligations exist and have been breached, equitable remedies are available both to uphold the principle of undivided loyalty which equity demands of fiduciaries and to discourage others, human nature being what it is, from falling into similar errors."

Even if a court were minded to adopt the second approach and draw upon principles of common law, it must always be borne in mind that "there is no rigid rule [and] the variety of situations in which equitable damages [here meaning equitable compensation] may be assessed may not always lend themselves to application of the common law remedy of damages."[86] The approach of applying to compensation in equity principles applicable to damages at law will, fortunately, often produce the same result as an appeal to the inherent nature of equitable relief.[87]

[2212] Discretionary factors affecting equitable relief may act as limitations on equitable compensatory relief in two ways.[88] First, they may limit the availability of the remedy. This will occur where the court decides that those discretionary factors (such as

82 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1099; and see McHugh, Gummow, Hayne and Callinan JJ at 1084. See also *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 275 ("every fiduciary relationship must be carefully analysed to identify the particular obligations owed and the nature of the particular breaches found", citing *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow J at 463-464); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJA at 93-94 (CA).

83 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1100.

84 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1099.

85 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067 at 1098 (footnote omitted). See also *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 465 ("equity intervenes … to hold the fiduciary to, and vindicate, the high duty owed"), Kirby J at 492 ("purposes of equity … are somewhat different from those of the common law [including] ensuring the strict loyalty and good faith to beneficiaries, the dutiful enforcement of obligations, the deterrence of breaches by fiduciaries of their powers").

86 *Ferrari Investment (Townsville) Pty Ltd (in liq) v Ferrari* [2000] 2 Qd R 359, Thomas JA at 370 (CA). See also *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, McLelland J at 816 (appeal allowed: *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (CA), and varied as *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41).

87 See *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 (SCC); *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).

88 See *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 493-494; Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 183.

laches, clean hands, hardship or fairness) which are applicable in the particular fact situation before the court require that, in the overall balance of justice of the particular case, the remedy should be denied to the plaintiff.[89]

Secondly, discretionary factors may operate on the assessment of the compensation. Thus, for example, the plaintiff's delay in seeking compensation may, in the overall balance of justice, require that the plaintiff's damages be reduced for that period of delay: see below, para [2217].[90]

Factors limiting equitable compensation

[2213] It is the limiting factor of causation that has offered the greatest challenge in the modern development of the law governing compensation in equity. Although causation must, in justice, always be a limitation on the recovery of compensation in equity,[91] courts have struggled to reconcile that undoubted truth with the implications derived from the decision of the Privy Council in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465. A solicitor breached his fiduciary duty by failing to disclose to his client his personal interest in elements of a loan transaction arranged between the plaintiff and another client, which transaction turned out badly for the plaintiff. It was argued against the plaintiff in the claim for compensation that there was no evidence that the plaintiff had not received full value in the transaction and that the plaintiff would have been no worse off even if full disclosure had been made by the solicitor. The "rule of *Brickenden*"[92] is contained in the following remarks (Lord Thankerton at 469):

> "When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has

89 *Day v Mead* [1987] 2 NZLR 443, Cooke P at 451.

90 *Day v Mead* [1987] 2 NZLR 443, Somers J at 462. See also, by analogy, *Lever Brothers, Port Sunlight, Ltd v Sunniwite Products Ltd* (1949) 66 RPC 84 (account of profits).

91 *Target Holdings Ltd v Redferns* [1996] AC 421 (HL). See also Sir Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 244.

92 See *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 492.

> determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant."

Read strictly, "the test … seems to render it unnecessary even to inquire whether the loss would have occurred had there been no breach of duty"(*Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000), Austin J at [26]). Counsel have, on occasion, submitted as much.[93] Viewed in these absolute terms, *Brickenden* has the capacity to "present the spectre … that fiduciaries will be unfairly burdened with consequences that have no logical connection with their breach".[94]

The High Court has left open the authority of *Brickenden* for Australian law,[95] at the same time sending a "relatively clear signal"[96] that rule will be upheld. Still, it is plain that the law does not dispense with the need for some causal link to be established to legitimate a claim for compensation in equity. Where, *inter alia*, a plaintiff seeks compensation in equity for what has been lost by the fiduciary acting, "there directly arises a need to specify criteria for a sufficient connection (or 'causation') between breach of duty and … the loss sustained".[97]

Accordingly, it is the nature, not the existence, of a causal link inquiry that is the real issue. What is able to be discerned in the Australian case law is what one commentator calls (although not with specific reference to Australian law) a "very

93 See for example *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 91 (submission that "in the case of causation for purposes of determining equitable compensation, authority 'forbids speculation as to what might have occurred if not for the breach of fiduciary duty'.")

94 *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 494 (although his Honour's analysis led him to reject that spectre). See further Heydon J D, "Causal Relationships Between a Fiduciary's Default and the Principal's Loss" (1994) 110 *Law Quarterly Review* 328.

95 *Maguire v Makaronis* (1997) 188 CLR 449 at 471-472.

96 *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Priestley JA at 281, citing *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 474 (concern with apparent rigour of *Brickenden* explicable by tendency too readily to classify relationships as fiduciary, and "not self-evident that the response should rest in a general denial of the applicability of the reasoning in *Brickenden* to delinquent fiduciaries, particularly solicitors and other professional advisers").

97 *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 468. The significance of these remarks is magnified by the fact that their Honours had preceded them with the holding that causation issues did not emerge on the actual facts of the case, involving, as it did, the plaintiff having an equity to *rescission* of a transaction, which equity was "immediately generated" by the preceding breach of fiduciary duty. See further, Kirby J at 492 (*Brickenden* formulation contains "words which adequately meet the need for there to be some connection to the breach so as to exclude events which are too remote"). See also *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Gleeson CJ at 588, Hayne J at 621-622; *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 434; *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224, Ipp J at 279.

plaintiff-friendly"[98] attitude. Causation is dealt with by application of the full benefit of hindsight,[99] or by not speculating against the interest of the plaintiff (that is, by making assumptions against the defendant on the issue of causation),[100] or by allowing the plaintiff to lead only a minimum amount of evidence to discharge the evidentiary burden of causation.[101] There is an acceptance of the notion that, on account of differing causation analyses, a plaintiff may recover more in compensation in equity than might be recoverable at common law on the same facts.[102] The Australian cases strongly suggest that the analysis in equity is one of "but for", that is, "the inquiry [is] whether the loss would have happened if there had been no breach."[103] Thus, the plaintiff will recover compensation for those items of loss which, but for the defendant's wrong, the plaintiff would not have suffered.[104]

98 Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 176.

99 *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 273; *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Handley JA at [16]; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 235; *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11, Ipp J at 78 (SC WA). See also *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 439.

100 *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000), Austin J at [60]; *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224, Ipp J at 279; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687; *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 478-479. See also *Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1099-1100; *Gemstone Corp of Australia Ltd v Grasso* (1994) 13 ACSR 695; *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, Lord Thankerton at 469.

101 See *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000), Austin J at [66]. See also *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 490-91; *Huff v Price* (1990) 76 DLR (4th) 138 at 149, 175 (BCCA). Cf *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 440-441, where the issue of causation is approached in the same way as at common law.

102 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1099 ("differing approaches of equity and the common law to assessing the consequences of the wrong, and to whom that wrong is properly attributed"); *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Hayne J at 621-622.

103 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 215. See also *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1100; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Gleeson CJ at 588, Hayne J at 621-622; *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 491-494; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 275, 277; *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Handley JA at [16] (but see Young CJ in Eq at [92]) (special leave to appeal to High Court granted 21 June 2002); *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000), Austin J at [60]. See also *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJ at 94; *Swindle v Harrison* [1997] 4 All ER 705; *Gilbert v Shanahan* [1998] 3 NZLR 528 at 536 (CA).

104 *Target Holdings Ltd v Redferns* [1996] AC 421 (HL); *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 243-245 (FC); *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 215; *Hill v Rose* [1990] VR 129, Tadgell J at 144; *Charles Lo Presti Pty Ltd v Karabalios* [2000] NSWSC 395 (15 May 2000). See also *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11, Ipp J at 78 (SC WA).

Nevertheless, it is recognised that a fiduciary is not an insurer[105] and accordingly, the decision of *Brickenden* "is not … authority for the general proposition that, in no case involving breach of fiduciary duty, may the court consider what would have happened if the duty had been performed" (*Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJ at 93). A stringent test for causation is called for in the case of breach of duty by a trustee of a traditional trust who loses trust assets[106] or of a fiduciary who exercises fiduciary powers for an improper purpose (*O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 (CA)). It is in these, and like situations, that plaintiffs will benefit more readily from assumptions being made in their favour.[107] But injunctions derived from *Brickenden* against "speculation" do not prevent courts from being satisfied, on the basis of a strong enough evidentiary foundation, that the loss claimed would inevitably have been incurred.[108] As stated in *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 493:

> "What is forbidden is 'speculation'. In my view, the rule in *Brickenden* can quite comfortably co-exist with the exposition of principle by Street J in *Dawson*. Facts will not be 'material' if the relevant loss would have happened if there had been no breach. Both Lord Thankerton in *Brickenden* and Street J in *Dawson* were simply saying that, once a breach of fiduciary duty is shown, the inquiry is not a simple one as to what caused subsequent losses. Equity must strive to repair the breach of fiduciary duty lest the fiduciary in default could be exonerated too easily, the beneficiary suffer a double disadvantage: the courts being seen to wink at wrongdoing."

The stringent (from the defendant's perspective) or friendly (from the plaintiff's) characterisation of Australian law in this regard, while consistent with the cases, must be tempered by the realisation that almost all of the Australian cases that have considered the causation issue have involved breaches of

105 *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJ at 94.

106 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211.

107 For example, where a fiduciary fails to disclose material facts and the plaintiff enters into some transaction, it may be assumed that the plaintiff would have behaved as the realities of the case suggest and not have entered into the transaction had disclosure been made, foreclosing a hypothetical argument from the fiduciary that the non-disclosure was not the cause of the plaintiff's loss because the plaintiff might have entered into the transaction in any event: see *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465; *Gemstone Corp of Australia Ltd v Grasso* (1994) 13 ACSR 695. See also *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 478-479 (complete disclosure of material facts, but defendant in breach of a fiduciary duty in failing to advise of the importance of obtaining independent and skilled advice in respect of the contemplated transaction).

108 *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJ at 93-94. See also *Gilbert v Shanahan* [1998] 3 NZLR 528, Tipping J (for Richardson P, Keith and Tipping JJ) at 535-536 (CA).

fundamental trust or fiduciary obligations. But even in *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, where the obligation at issue was not a "true" fiduciary duty but the "mere" equitable obligation to take reasonable care, Ipp J (for the Full Court) still applied the *Dawson*-derived "but for" test, his Honour's concern there being to avoid what he regarded as the even more stringent test of *Brickenden*. Contrast New Zealand law which applies the common law causation test to breaches of lesser equitable obligations which are commensurate with common law duties (*Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664). Suggestions that Australian law might become less "friendly" for plaintiffs in similar situations are not, however, entirely absent.[109]

[2214] Following from the above, and according to traditional learning, remoteness and intervening causation will not limit awards of compensation in equity, despite being important limitations on common law damages. On this point, we have the very direct (albeit obiter) statement of the majority of the High Court: "there is no translation into this field of discourse of the doctrine of novus actus interveniens".[110] The reason is said to be attributable to the more absolute nature of the obligations in equity which generate claims for compensation.[111] Once equity is satisfied that the defendant's wrong is a cause of the plaintiff's loss, equity is not generally concerned to limit recovery either by identifying a more immediate cause[112] or by limiting liability by

109 *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [92] (contrast the much milder contemplation of Hodgson JA at [41]); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, Spigelman CJ, Sheller and Stein JJ at 94 ("even on … stringent test, which we assume, without deciding, is appropriate to … breaches of fiduciary duty (in the absence of participation or knowledge of fraud)").

110 *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 470. See also *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1099-1100; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Gleeson CJ at 588, Hayne J at 622; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 McHugh J at 426-427; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 275 (CA); *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Handley JA at [16]; *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 214-216; *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, Rogers J at 660; *Hill v Rose* [1990] VR 129, Tadgell J at 144; *Target Holdings Ltd v Redferns* [1996] AC 421 (HL); *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11, Ipp J at 77-78 (SC WA); *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, Brightman LJ at 543; *Guerin v The Queen* [1984] 2 SCR 335, Wilson J at 360-362; *Frame v Smith* [1987] 2 SCR 99, Wilson J at 150.

111 See especially *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 468-470, Kirby J at 492-494; *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1098-1099; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, Spigelman CJ at 277-278 (CA); *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 216.

112 *Powell v Evans* (1801) 5 Ves Jun 839; 31 ER 886; *Caffrey v Darby* (1801) 6 Ves Jun 488; 31 ER 1159; *Clough v Bond* (1838) 3 My & Cr 490; 40 ER 1016; *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC); *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, McHugh J at 427; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, Gleeson CJ at 588-589, Hayne J at 621-622.

reference to those policy considerations which, at law, confine the defendant's liability for unusual or unforeseeable losses.[113]

However, while remoteness and intervening causation can be of little relevance in cases of breaches of "traditional" trusts, where the defendant is required to restore a loss to the trust estate, where the nature of the obligation binding the defendant and the justice of the case so demand, the plaintiff's recovery can be limited. This is made clear in the Canadian decision of *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129. The plaintiff purchasers sued the defendant solicitor for breach of fiduciary duty in failing to disclose, in a conveyance of land intended for development, both the existence of, and secret profit received by, an intermediate purchaser. Following the purchase, the plaintiffs developed the property by erecting a warehouse on it. Owing to the negligence of third parties, namely soil engineers and a pile-driving company, the building began to sink and suffered extensive damage. Judgments obtained against the soil engineers and the pile-driving company could not be met in full. The plaintiff sought to recover from the defendant solicitor, in addition to the secret profit, the loss flowing from the subsidence. The Supreme Court of Canada held that this latter loss was irrecoverable. Either by reference to equitable considerations (McLachlin J at 160-161, 163) or by analogy to common law (La Forest J at 153), the defendant's liability was properly limited to losses arising before the intervention of third parties.[114]

[2215] Turning to mitigation, uncertainty and contributory negligence, first, the plaintiff's compensation for any item of loss may be excluded or reduced to the extent to which the plaintiff ought to have taken, or did take, action to avoid it.[115] As at law,[116] the burden of establishing that the plaintiff has failed to mitigate its loss may rest on the defendant (*Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 249).

113 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211; *Guerin v The Queen* [1984] 2 SCR 335; *Target Holdings Ltd v Redferns* [1996] AC 421, Lord Browne-Wilkinson at 434.

114 In light of the tenor of the discussion in paras [2211] and [2213], above, Australian law would likely approach this from the perspective of equitable considerations. See also *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 273 (CA), where Spigelman CJ adopted, as representing the law in Australia, McLachlin J's views on the insignificance of foreseeability. See further *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J (speaking in general terms) at 1098 ("limits … are those appropriate to enforcing the obligations of conscience").

115 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 249; *Burke v Cory* (1959) 19 DLR (2d) 252; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest J at 148, McLachlin J at 161-163.

116 *Watts v Rake* (1960) 108 CLR 158.

Secondly, there is, in principle, a point beyond which compensation is irrecoverable for any item of loss which cannot be established or quantified with the degree of precision which the facts require in all the circumstances.[117] However, a court will do the best it can on the materials before it.[118] Thus, where the facts so demand, lost chances will be valued.[119] In appropriate cases, the assessment of compensation will be a mere "guesstimate".[120]

Thirdly, although there have been cases from other jurisdictions where the plaintiff's compensation for an item of loss has been reduced to the extent to which that loss was seen as attributable to the plaintiff's own fault,[121] it can be said that the tide has turned away from apportionment.[122] The High Court, while not technically deciding the point, made its views very clear in *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067. In that case, the Full Court of the Supreme Court of South Australia, following a thorough review of authorities and detailed analysis, reduced on account of "contributing fault" the amount of equitable compensation awarded to the plaintiff for breach of fiduciary duty.[123] On appeal, the question did not have to be decided, the majority of the High Court holding that no relevant fiduciary relationship had existed. But their Honours, having previously ruled in *Astley v Austrust Ltd* (1999) 197 CLR 1 that contributory negligence could not be relied upon to reduce awards for breach of contract, expressed the strong view that *Astley* put "severe conceptual difficulties in the path of acceptance of notions of contributory

117 See McGregor H, *McGregor on Damages* (16th ed, Sweet & Maxwell, London, 1997), Ch 8.

118 *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 715 (Fed Ct).

119 *Markwell Bros Pty Ltd v CPN Diesels Queensland Pty Ltd* [1983] 2 Qd R 508 (plaintiff company sued two of its former directors and employees for breaches of fiduciary duty and recovered compensation, among other things, for the loss of a valuable distributorship, but one on which it had only a tenuous hold because of a strained and deteriorating relationship with its Japanese wholesaler). See also *Talbot v General Television Corp Pty Ltd* [1980] VR 224; *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11, Ipp J at 80, affd sub nom *Dempster v Mallina Holdings* (1994) 13 WAR 124, Pidgeon J at 134, Rowland J at 181 (SC WA).

120 *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1 (court assessed damages against defendants for breaches of fiduciary duty in a thwarted partnership agreement, although the unavailability of relevant financial data meant that the assessment would be virtually on a jury basis). See also *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 714-715 (Fed Ct); *Guerin v The Queen* [1984] 2 SCR 335.

121 *Day v Mead* [1987] 2 NZLR 44 (CA); *Burke v Cory* (1959) 19 DLR (2d) 252, Schroeder JA at 263-264 (CA Ont).

122 The suggestion has even been made that New Zealand developments call into "serious question" the jurisdiction to apportion recognised in *Day v Mead* [1987] 2 NZLR 44 (CA) and regularly applied since: see Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 182.

123 *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64, Doyle CJ, Duggan and Bleby JJ at 241-256.

negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty."[124]

The measure of equitable compensation

[2216] In *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, the High Court firmly pronounced that it is established in Australia by various judgments of the Court that "the measure of compensation in respect of losses sustained by reason of breach of duty by a trustee or other fiduciary is determined by equitable principles and that these do not necessarily reflect the rules for assessment of damages in tort or contract."[125] Therefore, the possibility must be countenanced that a court might recognise or measure recoverable loss as being greater under compensation in equity than in damages at common law (McHugh, Gummow, Hayne and Callinan JJ at 1085, Kirby J at 1099, 1101). By virtue of their reversal of the lower court's finding that a relevant fiduciary relationship had been present, the majority judges did not reach this issue. However Kirby J, who dissented on the fiduciary relationship point, went on to hold (at 1100) that the lower court had incorrectly assessed one component of the loss (the entitlement to interest) by relying on common law principles which were "not ... appropriate to the provision of equitable relief." The case of *Biala Pty Ltd v Mallina Holdings Ltd*[126] provides a further, striking illustration, with the plaintiff, in a situation where common law damages would have been calculated at $250,000, instead being awarded, with the full benefit of hindsight,[127] some $23 million in equitable compensation.

[2217] The date of assessment of the value of property, money or services for the purposes of an award of equitable compensation is sometimes identified as the date on which restoration of the

124 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, McHugh, Gummow, Hayne and Callinan JJ at 1085. See also Kirby J at 1101-1102. See further *Corporacion Nacional Del Cobre De Chile v Sogemin Metals Ltd* [1997] 1 WLR 1396; *Nationwide Building Society v Balmor Radmore (A Firm)* [1999] PNLR 606; Gummow W M C, "Compensation for Breach of Fiduciary Duty" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 86; Handley K R, "Reduction of Damages Awards" in Finn P D (ed), *Essays on Damages* (Law Book Co, Sydney, 1992), p 127.

125 *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, McHugh, Gummow, Hayne and Callinan JJ at 1084, and see cases cited there.

126 (1993) 13 WAR 11, affd sub nom *Dempster v Mallina Holdings* (1994) 13 WAR 124. See further Berryman J, "Some Observations on the Application of Equitable Compensation in WA: Dempster v Mallina Holdings Ltd" (1995) 25 *University of Western Australia Law Review* 317.

127 (1993) 13 WAR 11, Ipp J at 78. See also *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, McLelland A-JA at 154 (CA).

trust property should be made[128] or the date of judgment.[129] There can, however, be neither a general nor even a prima facie rule for fixing the appropriate date of assessment.[130] Rather, the date at which the assessment ought to be made is the date which the justice of the case requires in all the circumstances. Three factors in particular are relevant to the requirements of justice in this context.

The first is the nature of the obligation binding the defendant and the nature of the defendant's breach.[131] For example, within the context of express trusts,[132] the date of judgment may be an appropriate date at which to assess compensation where the case is simply that the defendant trustee has misappropriated trust property and is in continuing breach of the obligation to restore that property (the value of the trust property having increased in value between the date of breach and the date of judgment).[133] However, the date on which the trustee should reasonably have sold the trust property may be the appropriate date of assessment where the nature of the defendant trustee's breach was a delay in selling trust property which the trustee was under an obligation to sell.[134] Outside the context of express trusts, the position is, in the words of Tadgell J in *Hill v Rose* [1990] VR 129 at 143, that the "method of calculation of monetary compensation will vary according to the nature of the fiduciary obligation whose breach is to be redressed". This may result in value being taken as at the date of the breach of the duty in question,[135] or at any other date appropriate in all the circumstances.[136]

The second factor relevant to the requirements of justice is the fact that, in order to enforce the high duty assumed and to provide an adequate remedy, the courts will, when dealing with

128 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 216.

129 *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, McLelland A-JA at 154 (CA); *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, Ipp J at 235; *Guerin v The Queen* [1984] 2 SCR 335, Wilson J at 362; *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).

130 See Gummow W M C, "Compensation for Breach of Fiduciary Duty" in Youdan T G (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), p 57 at pp 69-73. Cf *Target Holdings Ltd v Redferns* [1996] AC 421 (HL), where no distinction is drawn between different types of duty.

131 See above, para [2211].

132 See also Waters D W M, *Law of Trusts in Canada* (2nd ed, Carswell, Toronto, 1984), pp 993-1005.

133 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211.

134 *Fales v Canada Permanent Trust Co* (1976) 70 DLR (3d) 257; *Re Bell's Indenture* [1980] 3 All ER 425 (Ch). See also *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515.

135 *Huff v Price* (1990) 76 DLR (4th) 138 (CA BC).

136 See *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 714-715 (Fed Ct) (date upon which resale most likely to have taken place).

a defaulting trustee (particularly one whose conduct is reprehensible), be strongly inclined to choose a date of assessment that favours the beneficiary rather than the wrongful trustee. This allows the courts, where appropriate, to assess compensation against a trustee at the best price of the property during the period of the breach.[137]

The third relevant factor is the response which the plaintiff has made, or ought to have made, to the defendant's breach ("mitigation").[138]

[2218] The incidence of taxation is irrelevant in the assessment of equitable compensation where the obligation of the defendant is to restore property to the trust estate.[139] The reason was given by Brightman LJ in *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 545:

> "The trustee's obligation is to restore to the trust estate the assets of which he has deprived it. The tax liability of individual beneficiaries, who have claims qua beneficiaries to the capital and income of the trust estate, do not enter into the picture because they arise not at the point of restitution to the trust estate but at the point of distribution of capital or income out of the trust estate."

This reasoning loses its force in those cases where equitable compensation does not involve the restoration of property to a trust estate (*Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, Brightman LJ at 545). In such cases, justice requires, at least prima facie, the application of the rule in *British Transport Commission v Gourley* [1956] AC 185, which was endorsed by the High Court in *Cullen v Trappell* (1980) 146 CLR 1. The effect of the rule is that, where the plaintiff is obtaining compensation for a loss which otherwise represents a taxable receipt, but the award of compensation is not itself taxable, then compensation is to be made of the plaintiff's loss after allowing for the notional taxation upon it. The rule is designed to ensure that plaintiffs receive compensation for no more than the loss which they actually suffer (*Digital Pulse Pty Ltd v Harris* (2002) 40 ACSR 487, Palmer J at 502). In the context of equitable compensation, this

137 Consider *McNeil v Fultz* (1906) 38 SCR 198; *Toronto-Dominion Bank v Uhren* (1960) 24 DLR (2d) 203 (CA Sask).

138 *Burke v Cory* (1959) 19 DLR (2d) 252, Schroeder JA at 263-264 (CA Ont). See above, para [2215]. See also *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, McLachlin J at 162-163 (assess as of date when plaintiff's behaviour became "clearly unreasonable").

139 *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515; *Re Bell's Indenture* [1980] 3 All ER 425, Vinelott J at 441-442 (Ch).

rationale may have to yield to other considerations which operate on the justice of the case. Thus, for example, the nature of the obligation of which breach is in issue may contain such an element of deterrence as to suggest that the rule in *Gourley's* case ought not to apply (with the effect that the plaintiff's compensation is assessed without any reference to notional or actual tax liability). Again, the defendant's conduct may be such as to justify the same conclusion.

[2219] Interest is available on awards of equitable compensation, according to the justice of the case, either pursuant to the inherent power of courts of equity to make awards of interest,[140] or pursuant to statutory provisions in all jurisdictions[141] (except Tasmania).[142]

The disadvantage of interest awarded in the statutory jurisdiction is that it excludes the recovery of compound interest in all cases,[143] whereas the equitable jurisdiction does not.[144]

In the past, the disadvantage of interest awarded in the inherent jurisdiction (compared to interest awarded in the statutory jurisdiction) has been that the rate tended to be low and relatively fixed (at 4-5%).[145] This rigidity, seemingly grounded in

140 *Holmes v Walton* [1961] WAR 96; *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 217-220.

141 *Supreme Court Act* 1933 (ACT), s 69(2)(a); *Supreme Court Act* 1970 (NSW), s 94; *Supreme Court Act* 1979 (NT), s 84; *Common Law Practice Act* 1867 (Qld), s 72; *Supreme Court Act* 1935 (SA), s 30c; *Supreme Court Act* 1986 (Vic), ss 58-60; *Supreme Court Act* 1935 (WA), s 32. For awards of interest pursuant to relevant statutory provisions in cases of equitable compensation, see *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 715 (Fed Ct).

142 *Supreme Court Civil Procedure Act* 1932 (Tas), ss 34-35, restricting awards of interest to cases of conversion and trespass to goods.

143 *Supreme Court Act* 1933 (ACT), s 69(2)(a); *Supreme Court Act* 1970 (NSW), s 94(2)(a); *Supreme Court Act* 1979 (NT), s 84(2)(a); *Common Law Practice Act* 1867 (Qld), s 72(3)(a); *Supreme Court Act* 1935 (SA), s 30c(4)(a); *Supreme Court Act* 1986 (Vic), s 60(2)(a); *Supreme Court Act* 1935 (WA), s 32(2)(a). But see now *Bank of America Canada v Clarica Trust Co* [2002] SCC 43 (26 April 2002), where the Supreme Court of Canada held it appropriate to award compound statutory pre-judgment interest in a breach of contract case.

144 See Finn P D, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), paras [254]-[255]. See also *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067, Kirby J at 1100; *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, Davies, Sheppard and Gummow JJ at 394; *President of India v La Pintada Compania Navigacion SA* [1985] AC 104, Lord Brandon at 116; *Tavistock Pty Ltd v Saulsman* (1991) 3 ACSR 502 (SC WA); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. Of particular importance is the conduct of the trustee-fiduciary: *Gordon v Gonda* [1955] 2 All ER 762, Sir Raymond Evershed MR at 767 (CA) and factors related to the nature of the breach: see *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64, Doyle CJ, Duggan and Bleby JJ at 237.

145 *Holmes v Walton* [1961] WAR 96, Virtue J at 97-98. See also *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 217-220; Ford H A J and Lee W A, *Principles of the Law of Trusts* (3rd ed, Law Book Co, Sydney, 1996), para [17120].

considerations of consistency,[146] has been at odds with the general proposition that the award and rate of interest was, subject to its determination being solely for compensatory purposes,[147] at the complete discretion of the court. A court awarding interest today would not feel constrained by the rates that prevailed in the past, whether exercising equitable jurisdiction as such,[148] or a more general power to award interest as damages on the late payment of money.[149]

EQUITABLE DAMAGES

The Lord Cairns' Act jurisdiction

[2220] The *Chancery Amendment Act* 1858 (21 & 22 Vict c 27), which is commonly called *Lord Cairns' Act*, was enacted to give courts of equity power to award damages either in lieu of, or in addition to, the equitable remedies of injunction and specific performance in cases of breach of contract and other wrongful acts: see s 2. This power survives, in more or less the same form,[150] in all Australian jurisdictions, by statute[151] or otherwise.[152]

146 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 220.

147 *Re Dawson (decd); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, Street J at 218. See also *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 13 WAR 11, Ipp J at 84-85.

148 See *Hill v Rose* [1990] VR 129, Tadgell J at 144 (court awarded interest to a plaintiff misled by a fiduciary into making a payment of $250,000, at the same rate as paid by the plaintiff to his bank in order to borrow the sum advanced); *Stewart v Layton (t/a B M Salmon Layton & Co)* (1992) 111 ALR 687, Foster J at 715 (Fed Ct) (rate of interest applicable under relevant statute applied); *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64, Doyle CJ, Duggan and Bleby JJ at 240 (compound interest at market rate), revd on other grounds in *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067.

149 *Hungerfords v Walker* (1989) 171 CLR 125. See also *Tavistock Pty Ltd v Saulsman* (1991) 3 ACSR 502 (where compound interest was awarded).

150 There are minor differences in wording between the statutes in the various jurisdictions, but these do not generally create any difference of substance: see *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, Dixon J at 295. An exception is the *Supreme Court Civil Procedure Act* 1932 (Tas), s 11(13)(b), which prohibits the award of equitable damages where "no breach of covenant, contract, or agreement, or no wrongful act (as the case may be), has been committed". This precludes the award of equitable damages in cases of threatened injury: see below, para [2221].

151 ACT: *Seat of Government Supreme Court Act* 1933 (Cth), s 11, applying the *Equity Act* 1901 (NSW), s 9; *Supreme Court Act* 1970 (NSW), s 68; *Supreme Court Act* 1979 (NT), s 14(1)(b), applying the *Equity Act* 1866 (SA), s 141 (but see *Brooks v Wyatt* (1994) 99 NTR 12, Kearney J at 27-28 (jurisdiction found in s 62)); *Judicature Act* 1876 (Qld); *Supreme Court Act* 1935 (SA), s 30; *Supreme Court Civil Procedure Act* 1932 (Tas), s 11(13); *Supreme Court Act* 1986 (Vic), s 38; *Supreme Court Act* 1935 (WA), s 25(10): see generally McDermott P M, *Equitable Damages* (Butterworths, Sydney, 1994), Ch 13.

152 In Queensland, the jurisdiction was originally created by a statute which was later repealed. The jurisdiction survived the repeal of the statute: *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245 (FC). See also *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851; McDermott P M, *Equitable Damages* (Butterworths, Sydney, 1994), pp 240-242.

The purpose of *Lord Cairns' Act* was originally to enable courts of equity to grant complete relief so that parties were not "bandied about ... from one Court to the other"[153] by having to go to a court of law for damages after the determination in Chancery of the suit for specific relief. However, this need fell away with the adoption in all jurisdictions of the judicature system, where a court is required as far as possible to give complete relief in the one proceeding,[154] and where a claim for damages can be made simply in conjunction with, or after, a claim for specific performance or an injunction, as the claim for specific relief does not generally involve an irrevocable election precluding the damages claim.[155] Nevertheless, the courts sometimes continue to award damages under *Lord Cairns' Act* where damages at law seem recoverable on the facts.[156] At other times, they award damages which are arguably either legal or equitable (see *Summers v Cocks* (1927) 40 CLR 321).

[2221] *Lord Cairns' Act* has developed functions which cannot readily be accommodated in an award of common law damages (*Johnson v Agnew* [1980] AC 367, Lord Wilberforce at 400). Thus the jurisdiction is not functionless,[157] although there is strictly no need for the invocation of *Lord Cairns' Act* in circumstances in which damages are recoverable at law.

First, damages can be awarded under *Lord Cairns' Act* in lieu of, or in addition to, specific relief in support of equitable rights, whereas the common law could not do so, as it did not generally take notice of equitable rights. In this context, *Lord Cairns' Act* has been used to justify the grant of damages in lieu of specific performance in cases of part performance,[158] in lieu of an

153 *Ferguson v Wilson* (1866) LR 2 Ch App 77, Sir G J Turner LJ at 88. See also *Bosaid v Andry* [1963] VR 465, Sholl J at 484; *Jaggard v Sawyer* [1995] 1 WLR 269, Millett LJ at 284.

154 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Chs 1-2.

155 See *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 for the position after the institution of proceedings but before judgment. See *Facey v Rawsthorne* (1925) 35 CLR 566 and *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, Mason CJ at 258-260, for the position after judgment. See also *Anglo-Danubian Co Ltd v Rogerson* (1867) LR 4 Eq 3.

156 Clear examples are *Dell v Beasley* [1959] NZLR 89, McCarthy J at 97; *Neylon v Dickens* [1987] 1 NZLR 402 (CA). See also *King v Poggioli* (1923) 32 CLR 222, Starke J at 250; *Johnson v Agnew* [1980] AC 367; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, Judge Mervyn Davies QC at 201. See also *Chapman, Morsons & Co v Guardians of the Auckland Union* (1889) 23 QBD 294; *McKenna v Richey* [1950] VLR 360, O'Bryan J at 372-373. But see *Madden v Kevereski* [1983] 1 NSWLR 305, Helsham CJ at 306-307.

157 The mistaken view that it is functionless was put in *Chapman, Morsons & Co v Guardians of the Auckland Union* (1889) 23 QBD 294, Lord Esher MR at 299.

158 *Price v Strange* [1978] Ch 337 (CA); *Douglas v Hill* [1909] SALR 28 (FC); *Dillon v Nash* [1950] VLR 293; *Bosaid v Andry* [1963] VR 465, Sholl J at 483-485. See also *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, Evatt J at 306; *O'Rourke v Hoeven* [1974] 1 NSWLR 622 at 626 (CA); *McMahon v Ambrose* [1987] VR 817, Murray J at 821; McGarvie J at 842 (FC).

injunction in cases of breach of confidential information[159] and of breach of a covenant which runs with the land only in equity,[160] and in addition to an injunction to protect an equitable interest in land (*Gas & Fuel Corp of Victoria v Barba* [1976] VR 755, Crockett J at 766). Equitable damages perform here the same function as equitable compensation. Nevertheless, the High Court has affirmed, obiter, that the award of damages in the exclusive jurisdiction is an "incidental object" of *Lord Cairns' Act*.[161]

Secondly, except in Tasmania,[162] damages can be awarded under *Lord Cairns' Act* in lieu of, or in addition to, specific relief in cases of threatened injury, whereas damages at common law can be awarded only in respect of accrued damage.[163] The possibility of damages being awarded in the case of threatened injury arises because both specific performance[164] and a quia timet injunction[165] are available to prevent threatened injury.[166]

Thirdly, damages superior to those available at law can be awarded under *Lord Cairns' Act* in cases of continuing wrongs[167] and subsidence cases covered by the decision in *Darley Main Colliery Co v Mitchell*.[168] Because equitable damages can be awarded once-and-for-all, so as to compensate for future losses,

159 *Talbot v General Television Corp Pty Ltd* [1980] VR 224, which was disapproved in *Concept Television Productions Pty Ltd v Australian Broadcasting Corp* (1988) 12 IPR 129, Gummow J at 136 (Fed Ct). See also *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, Slade J at 399 (Ch), explaining *Seager v Copydex Ltd* [1967] 2 All ER 415 (CA).

160 *Eastwood v Lever* (1863) 4 De GJ & S 114; 46 ER 859; *Elliston v Reacher* [1908] 2 Ch 374; *Baxter v Four Oaks Properties Ltd* [1965] Ch 816; *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321 (Ch).

161 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, Gibbs CJ, Mason, Murphy and Brennan JJ at 676. See also *Jaggard v Sawyer* [1995] 1 WLR 269, Millett LJ at 284. This view is criticised by Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2321]. But see Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), para [3258].

162 *Supreme Court Civil Procedure Act* 1932 (Tas) s 11(13)(b).

163 *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197 (no action for damages at law where writ issued before date of breach).

164 *Turner v Bladin* (1951) 82 CLR 463.

165 Quia timet: because he or she fears.

166 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851; *Fritz v Hobson* (1880) 14 Ch D 542; *Hooper v Rogers* [1975] Ch 43 (CA) (injunction); *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1863) 8 LT 237; *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512, Needham J at 516-517 (specific performance).

167 See *Isenberg v The East India House Estate Co Ltd* (1863) 3 De GJ & S 263; 46 ER 637; *Rombough v Crestbrook Timber Ltd* (1966) 57 DLR (2d) 49 (CA BC); *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321 (Ch); *Bracewell v Appleby* [1975] Ch 408; *Attorney-General v Blake* [2001] 1 AC 268, Lord Nicholls at 281. See also *Dicker v Popham, Radford, & Co* (1890) 63 LT 379 (Ch).

168 (1886) 11 App Cas 127: see, for example, *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245 (FC).

they are superior to common law damages, which, in this context, can cover only past or accrued losses and generally give rise to a multiplicity of proceedings.[169]

Restrictions on the availability of the remedy

Prerequisites

[2222] The power to award equitable relief by way of specific performance or injunction is a prerequisite to the availability of damages under *Lord Cairns' Act*.[170] Such power must exist when proceedings are instituted,[171] or, in principle, at any time before the hearing of the suit.[172] A claim for damages under *Lord Cairns' Act* need not be specifically pleaded once the plaintiff has claimed specific relief.[173]

This requirement excludes the award of damages under *Lord Cairns' Act* where the court has, in the circumstances, no power to award specific relief in any event.[174] Examples of this are where specific performance is refused on the ground that there is no valid contract,[175] or that the contract is illegal,[176] or that its performance is impossible (for example, because of a lack of

169 See *Mann v The Capital Territory Health Commission* (1982) 148 CLR 97 at 101; *Jaggard v Sawyer* [1995] 1 WLR 269, Bingham MR at 280, Millett LJ at 286. See also Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), paras [3014]-[3031].

170 *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, Dixon J at 295 ("title to equitable relief"); *McMahon v Ambrose* [1987] VR 817, Murray J at 818; McGarvie J at 842; Marks J at 848 (FC); *Bosaid v Andry* [1963] VR 465, Sholl J at 484.

171 *McMahon v Ambrose* [1987] VR 817 (FC); *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512; *Boyns v Lackey* (1958) 58 SR (NSW) 395, Hardie J at 405; *Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547, McLelland J at 552; *Davenport v Rylands* (1865) LR 1 Eq 302, Sir W Page Wood V-C at 307-308; *Ferguson v Wilson* (1866) LR 2 Ch App 77, Sir H M Cairns LJ at 91; *McRae v London, Brighton & South Coast Railway Co* (1868) 18 LT 226; *Western Electric Co (Aust) v Betts* (1935) 52 WN (NSW) 173. See also *Johnson v Agnew* [1980] AC 367; *Gilbey v Cossey* [1911-13] All ER Rep 644 (KB).

172 McDermott P M, *Equitable Damages* (Butterworths, Sydney, 1994), pp 82-83.

173 *Chancery Amendment Act* 1858 (*Lord Cairns' Act*) (21 & 22 Vict c 27), s 2. *Catton v Wyld* (1863) 32 Beav 266; 55 ER 105; *Willison v Van Ryswyk* [1961] WAR 87 (FC); *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, McPherson J at 251 (FC).

174 *Gallagher v Rainbow* (1994) 179 CLR 624 (HC). See also *Ferguson v Wilson* (1866) LR 2 Ch App 77, Sir H M Cairns LJ at 91. This is no longer a large category, for, while many of the discretionary factors which argue against the grant of specific relief (such as continuous supervision or personal services) were at one time regarded as going to the jurisdiction of the court, the more modern authorities treat such factors as relevant only to the discretion of the court: *Price v Strange* [1978] Ch 337, Goff LJ at 359-360; Buckley LJ at 369 (CA). See also Jones G and Goodhart W, *Specific Performance* (2nd ed, Butterworths, London, 1996), p 278; Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), paras [3216], [6006]-[6007], [6019]-[6027].

175 *Lewers v The Earl of Shaftesbury* (1866) LR 2 Eq 270; *Stimson v Gray* [1929] 1 Ch 629.

176 *Norton v Angus* (1926) 38 CLR 523, Isaacs J at 534. See also *Worthing Corp v Heather* [1906] 2 Ch 532.

subject matter upon which the decree can operate).[177] In principle, it is difficult to understand why specific relief should be impossible in such cases where the court is concerned with no more than the specific performance of an executory contract, which usually involves simply the engrossment of a document which will then give rise to rights and obligations at law. If specific performance is, in principle, available in such cases, then if that relief is refused as a matter of discretion, equitable damages ought to be recoverable. This position is put forward in the dissenting judgment of McGarvie J in *McMahon v Ambrose* [1987] VR 817 at 826-831.

However, the requirement does not exclude the award of damages under *Lord Cairns' Act* where the court refuses specific relief on the basis of some discretionary consideration.[178]

[2223] The nature of the right for which specific relief is sought can preclude the award of damages under *Lord Cairns' Act* under certain circumstances. The award of damages can be precluded where the plaintiff seeks to enforce by injunction a public right created by a statute which does not create a civil cause of action.[179] It can also be precluded where the plaintiff seeks an injunction, particularly an interim or interlocutory injunction, on the grounds of "justice or convenience", rather than in support of a clearly established legal or equitable right.[180] It seems likely that the courts will not extend the remedies available to plaintiffs by allowing the jurisdiction of *Lord Cairns' Act* to be called into play.[181]

177 *McMahon v Ambrose* [1987] VR 817 (FC); *Conroy v Lowndes* [1958] Qd R 375; *Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547, McLelland J at 552; *Ferguson v Wilson* (1866) LR 2 Ch App 77; *Hipgrave v Case* (1885) 28 Ch D 356 (CA). But see *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512.

178 *Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674, Isaacs J at 701; *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, Dixon J at 295; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, Gibbs CJ, Mason, Murphy and Brennan JJ at 677-679; *Weily v Williams* (1895) 16 LR (NSW) Eq 190, Owen CJ in Eq at 195; *Crampton v Foster* (1897) 18 LR (NSW) Eq 136, A H Simpson J at 138-139; *McKenna v Richey* [1950] VLR 360, O'Bryan J at 375; *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512, Needham J at 518; *Edward Street Properties Pty Ltd v Collins* [1977] Qd R 399 (FC); *Madden v Kevereski* [1983] 1 NSWLR 305, Helsham CJ at 307.

179 *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 (plaintiff sought a mandatory injunction requiring the demolition of a neighbour's house erected in alleged breach of a council planning ordinance): see Finn P D, "A Road Not Taken: the Boyce Plaintiff and Lord Cairns' Act" (1983) 57 *Australian Law Journal* 493 (Pt I), 571 (Pt II).

180 *Williams v Marac Australia Ltd* (1986) 5 NSWLR 529, (plaintiff sought and obtained an interlocutory injunction preventing the Registrar-General from registering a certain power of attorney, obtained allegedly by the fraud or breach of fiduciary duty of a third party); followed *Halaga Developments Pty Ltd v Grime* (1986) 5 NSWLR 740. See also *Wentworth v Attorney-General (NSW)* (1988) 12 NSWLR 191 (CA). On the need for legal or equitable rights to support injunctions, see *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 and, generally, Chapter 18: "Injunctions".

181 See Tettenborn A M, "Injunctions Without Damages" (1987) 38 *Northern Ireland Legal Quarterly* 118 at 140-141.

Discretionary considerations

[2224] Discretionary considerations ultimately govern the availability of equitable damages.[182] Such considerations, which are designed to locate the balance of justice in all the circumstances of the case, are relevant in determining whether the plaintiff should be awarded damages in lieu of or in addition to specific relief,[183] or whether both damages and specific relief should be refused (for example, due to the plaintiff's conduct).[184]

[2225] In principle, damages in substitution are available where the hardship to the defendant by the grant of specific relief outweighs the hardship to the plaintiff by the refusal of such relief, and damages are otherwise the appropriate remedy in the circumstances.[185] Factors which point in favour of the award of damages are[186] the potentially oppressive effect on the defendant inherent in the grant of specific relief,[187] the triviality of the plaintiff's injury,[188] the fact that the injury is capable of being

182 The intention of the Chancery Commissioners (upon whose work *Lord Cairns' Act* was based), was that damages under the Act would be as of right, but this view did not survive the passage of the Act through Parliament: see McDermott P M, *Equitable Damages* (Butterworths, Sydney, 1994), pp 32-33.

183 See above, para [2220].

184 *Sayers v Collyer* (1884) 28 Ch D 103 (CA) (acquiescence); *McMahon v Ambrose* [1987] VR 817, Marks J at 852-853 (FC) (laches). See also *Weily v Williams* (1895) 16 LR (NSW) Eq 190, Owen CJ in Eq at 195-196.

185 See *Wilson v Northampton & Banbury Junction Railway Co* (1874) LR 9 Ch App 279, Lord Selborne LC at 285, as understood in *Norton v Angus* (1926) 38 CLR 523, Knox CJ at 529.

186 See also *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley LJ at 316-317, A L Smith LJ at 322-323 (CA).

187 *Jaggard v Sawyer* [1995] 1 WLR 269 at 282, 283 and 289; *Dell v Beasley* [1959] NZLR 89 (SC) (where it would have been a hardship on the defendant specifically to enforce a contract for the purchase of realty, entered into under a misconception (partly but innocently contributed to by the plaintiff) that the property could be used for commercial, rather than residential, purposes). See also *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley LJ at 317, A L Smith LJ at 323 (CA); *Norton v Angus* (1926) 38 CLR 523; *R D McKinnon Holdings Pty Ltd v Hind* [1984] 2 NSWLR 121, McLelland J at 126; *Madden v Kevereski* [1983] 1 NSWLR 305.

188 *Price v Hilditch* [1930] 1 Ch 500 (where the diminution of light, resulting from the nearby erection of the defendant's building, caused only partial inconvenience rather than serious injury to the plaintiff, and damages, rather than a mandatory injunction to pull the building down, was the appropriate remedy). See also *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley J at 317, A L Smith LJ at 322 (CA); *Colls v Home & Colonial Stores Ltd* [1904] AC 179; *Curriers' Co v Corbett* (1865) 2 Drew & Sm 355; 62 ER 656; *Bowes v Law* (1870) LR 9 Eq 636. But see *Smith v Smith* (1875) LR 20 Eq 500; *Greenwood v Hornsey* (1886) 33 Ch D 471; and the facts of, and decision in, *Shelfer's* case.

estimated in money,[189] and the plaintiff's delay in relation to specific relief.[190]

These factors must be judged against one another and all the other factors in the case, and may well be outweighed by the unconscionable conduct of the defendant, for example in rushing to complete nuisance-causing buildings in an attempt to avoid a restraining injunction.[191] A factor which may particularly influence the court's discretion, especially in cases of trespass and nuisance, is that a potential effect of the grant of damages in lieu of specific relief will be the compulsory purchase of the plaintiff's proprietary right. Where this is so, the court will, in its discretion, be reluctant to award damages under *Lord Cairns' Act* as "the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict".[192] It will nevertheless award damages (at least in nuisance cases, there being a greater reluctance to rely on damages in trespass cases)[193] where the plaintiff's right is insubstantial,[194] and/or where the effect of the grant of specific

189 *Jaggard v Sawyer* [1995] 1 WLR 269, Millett LJ at 282-283. This fact was not established in *Wood v Conway Corp* [1914] 2 Ch 47 (CA) (the injury caused to the plaintiff and his property by the fumes and smoke discharged by the defendant's gasworks was of a growing and continuous nature and, damages being impossible to measure with any degree of certainty, the plaintiff was entitled to the injunction sought). See also *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, A L Smith LJ at 322 (CA); *Fishenden v Higgs & Hill Ltd* [1935] All ER Rep 435, Lord Hanworth MR at 443-444 (CA).

190 *Shaw v Applegate* [1978] 1 All ER 123 (CA) (the plaintiff, the beneficiary of a covenant by the defendant not to use neighbouring premises as an amusement arcade, delayed for a number of years before seeking injunctive relief. This was a factor in the court's determination that the appropriate remedy was damages, not an injunction). See also *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, A L Smith LJ at 322 (CA); *Senior v Pawson* (1866) LR 3 Eq 330; *Lockwood v London & North-Western Railway Co* (1868) 19 LT 68; *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616; *W H Bailey & Son Ltd v Holborn & Frascati Ltd* [1914] 1 Ch 598.

191 See *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley LJ at 317, 323 (CA). See also *Colls v Home & Colonial Stores Ltd* [1904] AC 179, Lord Macnaghten at 193.

192 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley LJ at 315-316 (CA). See also *Krehl v Burrell* (1878) 7 Ch D 551, Jessel MR at 554-555; *Jordeson v Sutton, Southcoates & Drypool Gas Co* [1899] 2 Ch 217 (CA); *Cowper v Laidler* [1903] 2 Ch 337, Buckley J at 341. See also *Tipler v Fraser* [1976] Qd R 272; *LDJ Investments Pty Ltd v Howard* (1981) 3 BPR 9614 (SC NSW).

193 *Eardley v Granville* (1876) 3 Ch D 826. See also *Goodson v Richardson* (1874) LR 9 Ch App 221; *Kelsen v Imperial Tobacco Co (of Great Britain & Ireland) Ltd* [1957] 2 QB 334; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) ATR 80-269 (SC NSW). But see *Bracewell v Appleby* [1975] Ch 408.

194 See also *Price v Hilditch* [1930] 1 Ch 500; *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 Ch D 757; *Holland v Worley* (1884) 26 Ch D 578; *Kine v Jolly* [1905] 1 Ch 480 (CA); *Corp of the City of Port Adelaide v South Australian Railways Commissioner* [1927] SASR 197, Murray CJ at 211-212.

relief would inflict great hardship on the defendant.[195] Damages will also be awarded where the grant of specific relief would leave the defendant at the mercy of the plaintiff's potentially extortionate demands,[196] in effect forcing the defendant either to buy the plaintiff's property at a wholly excessive price or keep the defendant's buildings down,[197] especially where it is clear that money is all that the plaintiff wants.[198]

[2226] Discretionary considerations do not assume the same significance in cases where damages are sought in addition to specific relief as they do in the case of damages in substitution. The purpose of additional damages is merely to compensate either for the consequential loss (especially that attributable to delay) flowing from the defendant's wrong,[199] or for the defendant's unperformed obligations.[200] However, the plaintiff's conduct may occasionally demand that damages not be awarded in addition to specific relief.[201]

The object of the remedy

[2227] Compensation is usually the object of an award of equitable damages. Thus, where such damages are awarded instead of, or in addition to, specific performance or an injunction in support of legal rights, and such damages would be recoverable at law,

195 *Jaggard v Sawyer* [1995] 1 WLR 269; *Sharp v Harrison* [1922] 1 Ch 502 (whereas the plaintiff would suffer no damage from the defendant's admitted breach of covenant in installing a new window on a neighbouring wall, the granting of an injunction would cause great hardship to the defendant, who had since let the premises and was willing to give undertakings to prevent any invasion of the plaintiff's privacy).

196 *Isenberg v The East India House Estate Co Ltd* (1863) 3 De GJ & S 263; 46 ER 637, Lord Westbury LC at 273; *Colls v Home & Colonial Stores Ltd* [1904] AC 179, Lord Macnaghten at 193; *Aynsley v Glover* (1874) LR 18 Eq 544, Jessel MR at 555; *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, Stamp J at 485-486 (Ch); *Bracewell v Appleby* [1975] Ch 408, Graham J at 416; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, Millett J at 896 (Ch).

197 *Jaggard v Sawyer* [1995] 1 WLR 269. This was alleged by the defendant, but not accepted by the court, in *Cowper v Laidler* [1903] 2 Ch 337.

198 *Senior v Pawson* (1866) LR 3 Eq 330 (the plaintiff, after filing proceedings for injunctive relief against the defendant for interfering with her light and air by their building development, had herself made an offer (though rejected by the defendants) to accept money by way of compensation). See also *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, Lindley LJ at 317 (CA). See also *Sampson v Hodson-Pressinger* [1981] 3 All ER 710, the Court of Appeal at 715.

199 *Griffin v Mercantile Bank* (1890) 11 LR (NSW) Eq 231 (FC); *Vanmeld Pty Ltd v Cussen* (1994) 121 ALR 619 (where damages in the nature of interest were awarded); *Grant v Dawkins* [1973] 3 All ER 897 (Ch); *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197.

200 *Soames v Edge* (1860) Johns 669; 70 ER 588. See also *Middleton v Greenwood* (1864) 2 De GJ & S 142; 46 ER 329; *Mayor of London v Southgate* (1868) 20 LT 107.

201 *Neylon v Dickens* [1987] 1 NZLR 402 (CA) (the plaintiffs delayed in claiming damages for lost income owing to the failure of the defendant vendors promptly to settle a conveyance of farm property until more than three years after the decree of specific performance).

their aim in tort is to restore the plaintiff to the position which existed before the tort. In contract, the aim is to restore the plaintiff to the position which would have existed if the contract had not been breached.[202]

However, where equitable damages are awarded in support of legal rights in circumstances where such damages (or a part of them) would not be recoverable at law,[203] their object must generally be to put the plaintiff in the position which would exist if the threatened wrong were not to occur. This is illustrated by *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, where the defendants had carried out excavation work on their land near its boundary with the plaintiff's land. The excavation work did not encroach on, nor cause subsidence of, the plaintiff's land, but would do so in the future. The plaintiffs sued the defendants for damages at law. The court held that damages at law were not available in the case of merely threatened injury to a legal right, but that equitable damages could be awarded in lieu of an injunction to restrain the threatened interference. Such damages were assessed on the basis that they would be sufficient to cover what would have been prevented, or compelled, by an injunction if granted. In other words, the assessment is made on the basis that the defendants be required notionally to do what is reasonable to prevent the injury's occurrence.

Where equitable damages are awarded in support of equitable rights, their object, like that of equitable compensation,[204] is generally to restore the plaintiff to the position which existed before the wrong.[205] In part performance cases, however, the position to which restoration is made must generally be that which would have existed if the contract had been performed (see *Price v Strange* [1978] Ch 337 (CA)).

[2228] Restitution, representing the expenditure saved by the defendant and measured as a reasonable licensing fee, is the object of equitable damages in those cases in which the court, by refusing specific relief, allows the plaintiff to acquire the defendant's

202 See above, para [2207]. This is assumed in the authorities: see, for example, *Bosaid v Andry* [1963] VR 465, Sholl J at 484.

203 This occurs in cases of threatened injury and continuing wrongs: see *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127: see above, para [2221].

204 See above, para [2207].

205 *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418 (CA) (defendants, having wrongly disclosed and used confidential information belonging to the plaintiff manufacturers, were liable in damages for the loss of manufacturing profits, as that would put the plaintiffs in the position they would have been in had the defendants committed no wrong). See also *Talbot v General Television Corp Pty Ltd* [1980] VR 224 (FC). But see *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718 (CA).

proprietary right. Thus, in *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, the defendant, in breach of a restrictive covenant requiring the plaintiff's consent for development on certain land, wrongfully erected buildings on the land. The court, awarding equitable damages in lieu of a mandatory injunction to demolish the buildings, assessed damages as the amount that the plaintiffs could reasonably have demanded for relaxing the covenant, that amount being determined as a percentage of the defendant's expected profit from the development.[206]

These cases are analogous to those cases at law in which "restitutionary damages", measured by the value of the use of the property to the defendant, are recoverable by the plaintiff where the defendant has wrongfully obtained the use of the plaintiff's property.[207] As a whole, this group of cases is quite exceptional,[208] but it has the imprimatur of the House of Lords.[209]

[2229] Punishment of the defendant in the form of exemplary damages is, in principle, an objective of equitable damages where such damages are awarded in support of legal rights and where, by reason of the defendant having acted tortiously[210] in contumelious disregard of the plaintiff's rights,[211] the plaintiff

206 See also *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499; *Bracewell v Appleby* [1975] Ch 408; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888 (Ch); *Jaggard v Sawyer* [1995] 1 WLR 269 (CA). And see *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 (CA).

207 See *Whitwham v Westminster Brymbo Coal & Coke Co* [1896] 2 Ch 538 (trespass); *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (detinue); *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Ll L Rep 359 (QB) (trespass and breach of contract); *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1991) 32 NSWLR 175 (detinue).

208 See *McKenna & Armistead Pty Ltd v Excavations Pty Ltd* (1956) 57 SR (NSW) 515; *Bilambil-Terranora Pty Ltd v Tweed Shire Council* [1980] 1 NSWLR 465, Samuels JA (dissenting) at 486; *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 (CA); *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 (CA); *Jaggard v Sawyer* [1995] 1 WLR 269 (CA). See also *Egan v State Transport Authority* (1982) 31 SASR 481, White J at 530; Ingman T, "Damages in Equity — A Step in the Wrong Direction?" [1994] *The Conveyancer and Property Lawyer* 110.

209 *Attorney-General v Blake* [2001] 1 AC 268. A majority of their Lordships approved the decision in *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321 and remarked that Brightman J's approach in that case was to be preferred to that of the Court of Appeal in *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, to the extent of any inconsistency in reasoning: [2001] 1 AC 268, Lord Nicholls (Lord Goff and Lord Browne-Wilkinson, concurring) at 283.

210 Exemplary damages are not generally recoverable in contract: *Gray v Motor Accident Commission* (1998) 196 CLR 1, Gleeson CJ, McHugh, Gummow and Hayne JJ at 6; *Addis v Gramophone Co Ltd* [1909] AC 488; *Vorvis v Insurance Corp of British Columbia* (1989) 58 DLR (4th) 193 (SCC). But see *Royal Bank of Canada v W Got & Associates Ltd* [1999] 3 SCR 408; 178 DLR (4th) 385.

211 *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, Knox CJ at 77; see *Gray v Motor Accident Commission* (1998) 196 CLR 1, Gleeson CJ, McHugh, Gummow and Hayne JJ at 7.

would be entitled to an award of exemplary damages at law.[212] Equity must here follow the law.[213]

Where equitable damages are awarded in support of equitable rights, punishment of the guilty party in exemplary damages must in principle be permissible, by analogy to the probable position in equitable compensation[214] and to damages awarded pursuant to a plaintiff's undertaking (*Smith v Day* (1882) 21 Ch D 421, Brett LJ at 428).

Recoverable heads of compensatory damages

[2230] Common law restrictions on recoverable heads of compensatory damages must, in principle, apply where damages are awarded under *Lord Cairns' Act* in support of common law rights. Equity here must follow the law.[215] Thus, where damages are awarded in lieu of specific performance, such damages would not usually encompass non-economic loss, such loss being generally irrecoverable at law in actions for breach of contract.[216] Again, damages for loss of bargain will not be recoverable in cases governed by the rule in *Bain v Fothergill* (1874) LR 7 HL 158.[217]

However, by analogy to the probable position in cases of equitable compensation,[218] there is probably no limitation on the heads of damage recoverable as equitable damages awarded in support of equitable rights.

Assessment of equitable damages

[2231] The common law rules relating to the assessment of damages generally apply in the assessment of damages under *Lord Cairns'*

212 See Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), Ch 5.

213 See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [307]-[309]. See below, para [2231].

214 See above, para [2208].

215 See above, para [2229]; below, para [2231].

216 See Heffey P, Paterson J and Robertson A, *Principles of Contract Law* (Lawbook Co, Sydney, 2002), pp 397-399.

217 See *Malhotra v Choudhury* [1980] Ch 52, Cumming-Bruce LJ at 77 (CA). The rule in *Bain v Fothergill* generally denies the purchaser damages for loss of bargain when the contract is repudiated due to a defect in the vendor's title.

218 See above, para [2209].

Act where that jurisdiction is employed in aid of legal rights.[219] In this context, equity clearly follows the law.[220] This generally means that equitable damages will take the same form as damages at law,[221] that the common law rules relating to limitations on damages awards will apply,[222] and that, although there is no prima facie date for the assessment of damages in equity,[223] damages will be assessed at the same date as at law (that is, the date which the justice of the case fixes in all the circumstances).[224] However, equitable damages ultimately remain discretionary, and this factor may be reflected in the assessment, by making allowance in the damages for a period in which the plaintiff is in delay.[225]

Where equitable damages are awarded in support of equitable rights, the principles applicable to the assessment of equitable compensation must generally apply by analogy,[226] although restitutionary awards have, exceptionally, been made in some cases.[227]

THE FUTURE OF EQUITABLE COMPENSATION AND DAMAGES

[2232] The future of equitable compensation and damages is inextricably bound up with the search for a proper role for the two remedies in a judicature system. In the modern context, equitable damages are close to being a "dead letter".[228] In the case of legal rights, equitable damages are only strictly necessary

219 *Wenham v Ella* (1972) 127 CLR 454, Barwick CJ at 460; *Johnson v Agnew* [1980] AC 367 at 400; *Attorney-General v Blake* [2001] 1 AC 268. See also *Johnson v Wyatt* (1863) 2 De GJ & S 18; 46 ER 281, Turner LJ at 27-28.

220 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 33.

221 *Neylon v Dickens* [1987] 1 NZLR 402 at 407, 410 (CA) (once-and-for-all rule applicable).

222 *Griffin v Mercantile Bank* (1890) 11 LR (NSW) Eq 231 (remoteness and certainty); *Dillon v Nash* [1950] VLR 293, Sholl J at 301-302 (FC) (remoteness and, probably, mitigation); *Edward Street Properties Pty Ltd v Collins* [1977] Qd R 399 (FC) (certainty); *Talbot v General Television Corp Pty Ltd* [1980] VR 224 (FC) (certainty).

223 *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512, Needham J at 518-519; *Madden v Kevereski* [1983] 1 NSWLR 305, Helsham CJ at 306.

224 *Johnson v Agnew* [1980] AC 367, the House of Lords at 400-401; *Neylon v Dickens* [1987] 1 NZLR 402 at 407 (CA).

225 *Malhotra v Choudhury* [1980] Ch 52 (CA); *Hickey v Bruhns* [1977] 2 NZLR 71.

226 See above, paras [2211]-[2219].

227 See above, para [2228].

228 Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 247.

in the two narrow groups of cases mentioned in para [2221]. Beyond these, *Lord Cairns' Act* ceases to be important in the case of legal rights where the assessment of damages will generally take place according to established legal rules.[229]

The potentially wider importance of *Lord Cairns' Act* lies in the protection it can give equitable rights. However, it is difficult to see any real need for the jurisdiction in this context, as that need is already met by the existence of the equitable remedy of compensation.[230] In any event, the *Lord Cairns' Act* jurisdiction can, in this context, have no greater role than that of equitable compensation.

Although its place has been questioned,[231] equitable compensation seems to have a secure function in modern law due to the absence of an alternative for the compensation of breaches of equitable rights. It is now a "vital part of [the] judicial armoury" of all the major Commonwealth jurisdictions.[232] However, some modern authorities compensate the breach of at least some equitable rights by an award of damages at law.[233] This approach is criticised by Meagher, Gummow and Lehane[234] on the ground that it involves a "fusion fallacy", that is, the availability of a common law remedy in support of an equitable right, something which would have been impossible before the adoption of the *Judicature Acts* of 1873 and 1875 (UK).[235] This essentially historical argument has tested the patience of some.[236] But it is fair to say, notwithstanding general statements in modern

229 See above, paras [2230]-[2231].

230 See Rickett C and Gardner T, "Compensating for Loss in Equity: The Evolution of a Remedy" (1994) 2 *Victoria University Wellington Law Review* 19 at 25.

231 Millett P, "Equity's Place in the Law of Commerce" (1998) 114 *Law Quarterly Review* 214 at 224-227. See discussion in Getzler J, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), pp 248-251.

232 Rickett C, "Compensating for Loss in Equity — Choosing the Right Horse for Each Course" in Birks P and Rose F (eds), *Restitution and Equity: Volume One, Resulting Trusts and Equitable Compensation* (Mansfield Press, London, 2000), p 173.

233 *Seager v Copydex Ltd* [1967] 2 All ER 415 (CA); *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418 (CA). See also *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104 (all cases involving breach of confidence).

234 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [221].

235 For criticism of this view, see Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), paras [1014]-[1020]. See also Burrows A, "We Do This at Common Law But That in Equity" (2002) 22 *Oxford Journal of Legal Studies* 1.

236 See, for example, *Youyang Pty Ltd v Minter Ellison* [2001] NSWCA 198 (8 October 2001), Young CJ in Eq at [54], [92] and [97]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, Gault J (for Richardson P, Gault, Henry and Blanchard JJ) at 681; Priestley L J, "A Guide to a Comparison of Australian and United States Contract Law" (1989) 12 *University of New South Wales Law Journal* 4 at 29 ("crossover" of remedies).

authorities,[237] that the Australian judiciary as a body has yet to embrace wholeheartedly the approach that asserts a fusion of the rules of law and equity.[238]

Nevertheless, it may be thought to be unlikely that Australian law will be able to remain isolated in this view in the long term. This suggests that there will develop a tendency, wherever possible, to equate the principles applicable to equitable compensation and damages with the rules relating to damages which have been well developed at law. This is a natural development in a post-judicature world.[239] Its danger is that it may lead to a failure to appreciate the operation, in appropriate contexts, of traditional equitable principles which, in the circumstances of the particular case, more appropriately mirror the equitable right breached.[240]

237 *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301 (CA); *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, La Forest J at 140-153; *Day v Mead* [1987] 2 NZLR 443, Cooke P at 451 (CA). See also *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, Deane J (dissenting) at 196 ("fusion of law and equity"); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Deane J at 446-447; *Hawkins v Clayton* (1988) 164 CLR 539, Deane J at 584 (by analogy). The classic statement of this view occurs in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, Lord Diplock at 924. See also *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 (specifically rejecting the attempt to revive the old equitable compensatory jurisdiction in the law of penalties).

238 See, at High Court of Australia level, *Maguire v Makaronis* (1997) 188 CLR 449 and *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067. See above, para [2211].

239 Mason A, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 240-242.

240 Davies J D, "Equitable Compensation: 'Causation, Foreseeability and Remoteness'" in Waters D W M (ed), *Equity Fiduciaries and Trusts* (Carswell, Toronto, 1993), Ch 14.

CHAPTER TWENTY-THREE

TRACING

Michael Christie

THE NATURE OF TRACING

Introduction

[2301] Tracing is a process of identifying property held by the defendant. In *Foskett v McKeown* [2001] 1 AC 102 Lord Millett, with whom Lord Hoffman relevantly agreed, said (at 128):[1]

> "[Tracing] is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property".

Tracing thus facilitates recovery from the defendant. It is not, strictly speaking, a remedy.[2] However, historically the term has

1 See also Lord Browne-Wilkinson at 109: "Tracing is a process whereby assets are identified"; Lord Steyn at 113: "tracing is a process of identifying assets: it belongs in the realm of evidence". "Tracing is a doctrine whereby, in certain circumstances, the owner of property is treated as being the owner of anything into which that property has been converted": Meagher R P and Gummow W M C, *Jacob's Law of Trusts in Australia* (6th ed, 1997), p 736. See Palmer G, *The Law of Restitution* (Little, Brown & Co, Boston 1978), Vol 1, p 175: "Through tracing, a person who in the first instance would be entitled to the restitution of money or other property is often permitted to assert his claim against a substituted asset — an asset which is traceable to or the product of such money or other property." See also Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), p 230: " 'Tracing' refers to the equitable regime for determining whether the identity of property can be followed as that property is confounded with other property, or as it passes from one form to another." See too *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 566. In *Re Montagu's Settlement Trusts* [1987] Ch 264 at 285 Sir Robert Megarry V-C described tracing as "primarily a means of determining the rights of property." For a criticism of Sir Robert Megarry V-C's definition see Millett P, "Restitution and Constructive Trusts" in Cornish W R et al (eds), *Restitution — Past, Present and Future* (Hart, Oxford, 1998), p 203.

2 For a contrary view, see Rotherham C, "Tracing and Justice in Bankruptcy" in Rose F (ed), *Restitution and Insolvency* (Mansfield Press, 2000); Rotherham C, *Proprietary Remedies in Context* (Hart, Oxford, 2002), pp 90-106.

been used to denote not merely the process of identification, but also the remedy which may result from successful tracing.[3] This is especially so in the equitable context, where it has been said that "the equitable doctrine of tracing is a remedy in rem".[4]

[2302] The definition by Lord Millett in *Foskett v McKeown*, above, will be adopted in this chapter. So understood, principles of tracing have developed both at common law and in equity. However, as discussed further below, the common law's contribution has been modest.[5] That is because "the common law's remedies are inadequate and its jurisprudence defective".[6]

[2303] Tracing in pursuit of equitable remedies typically arises in four situations. The first is where the wrongdoer has exchanged the claimant's original property for other property.[7] This is exemplified by the case of a wrongdoer who misapplies a sum of money and purchases land with it. The rules of tracing assist in determining whether the claimant has any entitlement to the proceeds of the misapplied funds — in this example, the land. The second situation is where the wrongdoer misapplies the claimant's property, mixes it with the wrongdoer's own property and acquires other property with it.[8] The rules of tracing will assist in determining what, if any, interest the claimant will have in the other property. The third situation is where there are two or more innocent claimants, whose property (typically money) has been wrongfully mixed by a wrongdoer with the latter's own property, and the wrongdoer subsequently dissipates part of the mixed fund or purchases other property with it. The rules of tracing assist in ascertaining the claimants' respective interests in the property remaining.[9] The fourth situation is where the wrongdoer has transferred a claimant's property to a third party,

3 See, for example, *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588 at 604 [31], *Scott v Davis* (2000) 204 CLR 333 at 409 [229], Gummow J, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203 at 216 [66], Gummow J at [66]; *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 369. In *Boscawen v Bajwa* [1996] 1 WLR 328 at 334 the Court of Appeal said: "Equity lawyers habitually use expressions 'the tracing claim' and 'the tracing remedy' to describe the proprietary claim and the proprietary remedy which equity makes available to the beneficial owner who seeks to recover his property in specie from those into whose hands it has come. Tracing properly so-called, however, is neither a claim nor a remedy but a process."

4 Meagher R P and Gummow W M C, *Jacob's Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), p 736.

5 See below, paras [2310]-[2315].

6 Millett P, "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71 at 71.

7 See below, paras [2316]-[2320].

8 See below, paras [2336]-[2347].

9 See below, paras [2348]-[2352].

who disposes of the property, and the claimant elects to follow the property and trace into the proceeds in the third party's hands.[10] It can be seen from these situations that fundamentally, tracing is concerned with substitution and mixing.

[2304] In *Foskett v McKeown* [2001] 1 AC 102 Lord Millett noted (at 128):

> "We also speak of tracing one asset into another, but this too is inaccurate. The original asset still exists in the hands of the new owner, or it may have become untraceable. The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it."

[2305] Tracing takes on special significance where the defendant is insolvent, or where the asset acquired with misappropriated funds increases in value. Indeed, it is these circumstances that tracing will be necessary for the claimant to maximise its claim. In the former type of situation, the courts have been required to reconcile the interests of the innocent claimant and unsecured creditors of the insolvent wrongdoer. The extent to which principles should be moulded to take into account the interests of such unsecured creditors remains an issue of considerable controversy.[11]

[2306] The equitable rules of tracing are complex.[12] They developed in the context of disputes between trustees and beneficiaries, [13] but now extend to a plethora of commercial situations.[14] Over time, they have been modified where their application could create an obvious injustice, though this is not to say that rules of tracing are merely "applications of equitable principles to do what is the just

10 See below, paras [2348]-[2355].

11 See below, paras [2355]-[2357].

12 The complexity of the tracing rules has been criticised: see, for example, Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, 1998), p 114 who argue that a satisfactory body of principle will only be achieved "when the rules of common law and equity are synthesised".

13 Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, 1998), p 114: "Equity's rules and presumptions, which determine whether a plaintiff can claim the product of his original property, were formulated in the context of litigation between the beneficiaries of a trust and the trustee in bankruptcy of a trustee who had mixed, in breach of trust, trust money with his own money in his own bank account. The sums in dispute were modest, and the withdrawals and deposits into the mixed fund few and easily monitored. The facts of many of the more modern decisions demonstrate that these simple days are long since gone." As to the historical origin of tracing see Oesterle D A, "Deficencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306" (1983) 68 *Cornell Law Review* 172 at 186-189.

14 See below, para [2315].

and equitable thing in the circumstances".[15] Significant refinements of principles of tracing continue to be made by the courts. Thus, in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 109, it was observed that "[t]he law relating to the creation and tracing of equitable proprietary interests is still in a state of development".[16] The pioneering work by Birks,[17] the seminal treatise by Smith[18] and the judgments and writings of Lord Millett,[19] have been very influential, as evidenced by the recent House of Lords decision in *Foskett v McKeown* [2001] 1 AC 102. Nonetheless, as will be seen below, important aspects of the law of tracing await judicial determination. These concern primarily (but not exclusively) the nature and availability of proprietary remedies following successful tracing. These in turn are related to the question of whether tracing forms part of the law of property[20] or unjust enrichment.[21] This issue is of fundamental doctrinal significance. Its resolution will have a major effect on the development of the law of tracing.[22]

15 *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 341. In *Foskett v McKeown* [2001] 1 AC 102 at 127, Lord Millett said: "The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no 'unjust factor' to justify restitution (unless 'want of title' be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property."

16 See paras [2315], [2356] below.

17 Birks P, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985), pp 358-401; "Overview: Tracing, Claiming and Defences" in Birks P, (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995); "The Necessity of a Unitary Law of Tracing" in Cranston R (ed), *Making Commercial Law, Essays in Honour of Roy Goode* (1997); see also "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *University of Western Australia Law Review* 3 at 82-89.

18 *The Law of Tracing* (Clarendon Press, Oxford, 1997).

19 See "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71; *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 (affd [1991] Ch 547); "Restitution and Constructive Trusts" in Cornish W R et al (eds), *Restitution — Past, Present and Future* (Hart, Oxford, 1998), p 203; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717; *Boscawen v Bajwa* [1996] 1 WLR 328; *Trustees of the Property of F C Jones & Sons v Jones* [1997] Ch 159.

20 The House of Lords firmly favours the property analysis. See *Foskett v McKeown* [2001] 1 AC 102, Lord Brown-Wilkinson at 110, Lord Hoffman at 115, Lord Millett at 127. There is no reason to think that the position in Australia is any different. Indeed, the proposition that the principle of unjust enrichment plays a major role in informing equitable doctrines and remedies has been received more cautiously in Australia: see *Roxborough v Rothmans of Pall Mall Australia Pty Ltd* (2001) 76 ALJR 203 at 217-218, [70]-[74], Gummow J. The property analysis has been described as "the transactional approach": "On this approach to tracing, the result of the tracing rules resembles the result of the rules regarding the passing of title under authorised transactions. It identifies surviving enrichment as the traceable proceeds of an earlier enrichment if there is a transactional chain that links the items of property that represent the initial and surviving enrichments" : Evans S, "Rethinking Tracing and the Law of Restitution" (1999) 115 *Law Quarterly Review* 469 at 471. See generally Grantham R and Rickett C, "Tracing and Property Rights: The Categorical Truth" (2000) 63 *Modern Law Review* 905.

21 See above, nn 17, 18 and 20; and see further Burrows A, "Proprietary Restitution — Unmasking Unjust Enrichment" (2001) 117 *Law Quarterly Review* 412. Birks has described this as a "false dichotomy": "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 317. See also Rotherham C, "Tracing and Justice in Bankruptcy" in Rose F (ed), *Restitution and Insolvency* (Mansfield Press, 2000), p 126.

22 See below, paras [2356]-[2358].

Tracing and following

[2307] Tracing is to be distinguished from following,[23] although on occasions the courts have used the latter term as if it were synonymous with the former.[24] In *Foskett v McKeown* [2001] 1 AC 102, Lord Millett said (at 127):

> "The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances."

Central to tracing (as opposed to following) is the concept of substitution.[25] Thus, where the wrongdoer misappropriates the claimant's money by acquiring (for example) a parcel of shares, the claimant may, depending on the circumstances, have the right to *trace* into the proceeds of the claimant's property — the proceeds being the substituted asset, the parcel of shares. Alternatively the claimant may choose to *follow* the original property into the hands of the third party who acquired it, and assert whatever rights are available against that third party.[26] As against the third party, the claimant may, depending on the circumstances, be able to trace into the proceeds of the property which has been followed, if disposed by the third party.[27]

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23 On "following", see the comprehensive analysis in Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 67-119.

24 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, Lord Goff at 573. Compare *Brady v Stapleton* (1952) 88 CLR 322 at 337. The American *Restatement of the Law of Restitution* (American Law Institute, 1937), p 816 and *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, pp 554 head their sections on tracing: "Following Property into its Product", which is a convenient way to describe tracing. See Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 6-10.

25 "Whatever the historical confusion about the *nature* of the tracing process, in practical terms the law of tracing has traditionally been regarded as being about substitutions": Evans S, "Rethinking Tracing and the Law of Restitution" (1999) 115 *Law Quarterly Review* 469 at 471 (emphasis added).

26 Thus, in *Black v S Freedman & Co* (1910) 12 CLR 105 at 110, O'Connor J noted that in a case of theft, where the thief pays the money to a third party, the money "may be followed into that other person's hands", subject to certain qualifications. See below, para [2322].

27 See below, paras [2353]-[2355].

Similarly property may be followed into the hands of a fourth party, and so on.

Tracing and claiming

[2308] In *Foskett v McKeown* [2001] 1 AC 102 Lord Millett also explained the fundamental distinction between tracing and claiming (at 128):

> "Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset. If he held only a security interest in the original asset, he cannot claim more than a security interest in its proceeds. But his claim may also be exposed to potential defences as a result of intervening transactions. Even if the plaintiffs could demonstrate what the bank had done with their money, for example, and could thus identify its traceable proceeds in the hands of the bank, any claim by them to assert ownership of those proceeds would be defeated by the bona fide purchaser defence. The successful completion of a tracing exercise may be preliminary to a personal claim (as in *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717) or a proprietary one, to the enforcement of a legal right (as in *Trustees of the Property of F C Jones & Sons v Jones* [1997] Ch 159) or an equitable one."

As noted above, when speaking of tracing, the authorities have commonly referred to both the process of identification and the claim made by the plaintiff.[28]

Contrasting equitable tracing with the position at common law

[2309] In *Foskett v McKeown* [2001] 1 AC 102 the House of Lords, having drawn the distinction between tracing and claiming, held that in relation to the former, the principles were the same in equity and at common law. Lord Millett, with whom Lord Hoffman relevantly agreed, said (at 128):

28 See above, n 3 and accompanying text.

> "Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough."

Lord Steyn said (at 113):

> "In arguing the merits of the proprietary claim counsel for the purchasers from time to time invoked 'the rules of tracing'. By that expression he was placing reliance on a corpus of supposed rules of law, divided into common law and equitable rules. In truth tracing is a process of identifying assets: it belongs to the realm of evidence. It tells us nothing about legal or equitable rights to the assets traced … ."

Lord Steyn applied (at 113) the following reasoning of Professor Birks:[29]

> "[T]he modern law is equipped with various means of coping with the evidential difficulties which a tracing exercise is bound to encounter. The process of identification thus ceases to be either legal or equitable and becomes, as is fitting, genuinely neutral as to the rights exigible in respect of the assets into which the value in question is traced. The tracing exercise once successfully completed, it can be asked what rights, if any, the plaintiff can, on his particular facts, assert. It is at that point that it becomes relevant to recall that on some facts those rights will be personal, on others proprietary, on some legal, and on others equitable."

On this, Lords Hoffman and Millett were in agreement with Lord Steyn (at 115, 128-129). Lord Browne-Wilkinson left that matter undecided (at 109).

[2310] It is not intended in this chapter to deal with whether in Australia the common law's rules of tracing are the same as equity's. There is, however, force in the proposition that the perceived shortcomings in tracing at common law can be explained largely by the limited remedies available at common law. The common law's limitations have been most evident in relation to claims over mixed funds. Both the common law and equity recognise the right of the true owner of property to follow her or his property into the hands of another person whilst it remains in an identifiable form.[30] In *Parker v R* (1997) 186 CLR

29 Birks P, "The Necessity of a Unitary Law of Tracing" in Cranston R (ed), *Making Commercial Law, Essays in Honour of Roy Goode* (1997).

30 Compare *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 566.

494 at 502-504 Brennan CJ compared tracing at common law and in equity.[31] His Honour first made observations in relation to mixing which are better understood as referring to following, not tracing.[32] The Chief Justice said[33] in relation to the common law that "the basic rule is that stated by the Privy Council in *South Australian Insurance v Randell* (1869) LR 3 PC 101 at 113":

> "In the case of mixture by consent, the identity of the specific property of each who consents is no longer ascertainable, and the mixed property belongs to all in common."

The Chief Justice further said that "a stricter rule is applied if the person having control of the mass of property wrongfully mixes his property with the property of another" (at 501),[34] and cited with approval the following statement of principle in *Indian Oil Corporation v Greenstone Shipping SA* [1988] QB 345 at 370-371:

> "[W]here B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture, any doubt as to that quantity being resolved in favour of A."

The Chief Justice concluded that this principle existed also in equity[35] except that equity "allows the *tracing* of money into identifiable forms into which it changed."[36] This is the language of substitution.

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31 The Chief Justice was in dissent. The majority concluded that the statutory regime in question in that case did not invite application of the principles of tracing discussed by the Chief Justice.

32 See above, para [2307]. See also Matthews P, "The Legal and Moral Limits of Common Law Tracing" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 42-50; Birks P, "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 297-300; Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 67-115; *Foskett v McKeown* [2001] 1 AC 102 at 127.

33 *Parker v R* (1997) 186 CLR 494 at 501.

34 Brennan CJ correctly refrained from describing these rules as forming part of the law of tracing. They concern following, not tracing. Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, 1998), pp 94-96. Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), p 7 discusses the use of the term "tracing" to describe both following and tracing in relation to mixed property: "The source of the confusion is the tendency to assimilate two distinct phenomena: the physical changes to which a thing can be subjected, and the use of that thing to acquire an entirely different thing … For example, a car might have been painted. So long as the change does not entail the conclusion that the original thing no longer exists, it does not prevent following."

35 (1997) 186 CLR 494 at 502, citing *Frith v Cartland* (1865) 2 H & M 417 at 421; 71 ER 525 at 527; see below, paras [2337]-[2338].

36 (1997) 186 CLR 494 at 502 (emphasis added).

[2311] The common law's inability to trace into identifiable forms into which money has changed — at least where there has been mixing — explains in part the limitations of tracing at common law.[37] In *Re Diplock* [1948] Ch 465 at 518, Lord Greene MR said that the common law approached the issue of mixing "in a strictly materialistic way", and that "[i]t could only appreciate what might almost be called the 'physical' identity of one thing with another"; thus the common law "could treat as identifiable with the [claimant's] money other kinds of property acquired by means of it, provided that there was no admixture of other money". Lord Greene MR (at 520) pointed out that the position in equity was quite different:

> "Equity adopted a more metaphysical approach. It found no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds each of which could be regarded as having, for certain purposes, a continued separate existence. Putting it in another way, equity regarded the amalgam as capable, in proper circumstances, of being resolved into its component parts … [I]t was the metaphysical approach of equity coupled with and encouraged by the far-reaching remedy of a declaration of charge that enabled equity to identify money in a mixed fund."

Thus "when the means of ascertainment fail", equity will "impose a charge on the 'indistinguishable mass' ".[38]

[2312] The difference between equity and the common law was succinctly described in *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159, where McPherson ACJ said (at 162-163):

> "In *Taylor v Plumer* (1815) 3 M & S 562, 575; 105 ER 721, 726, Lord Ellenborough CJ was speaking law not equity when he said:
>
> > 'It makes no difference in reason or law into what other form, different from the original, the change may have been made … for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such …'

37 Again, it is necessary to distinguish between tracing and following. For example, the deposit of the claimant's cash in a bank account by a wrongdoer involves substitution of the cash for a chose in action (the debt owed by the bank to the account holder). The cash itself has lost its identity: see Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 7-8. In *Brady v Stapleton* (1952) 88 CLR 322 at 338, Dixon CJ and Fullagar J spoke of "money paid into a bank account, and so losing its identity as money".

38 *Brady v Stapleton* (1952) 88 CLR 322 Dixon CJ and Fullagar J at 337, citing *In Re Hallett's Estate* (1880) 13 Ch D 696 at 717.

> Hence it is said that there is a common law as well as an equitable right to trace or follow property. See *Agip (Africa) Ltd v Jackson*[39]. The precise character and limits of the common law right are uncertain, and may give rise to differences of opinion as in *Banque Belge v Hambrouck* [1921] 1 KB 321. What is clear is that at law the right ceases when the thing, or more often the proceeds of its sale in the form of money, is intermixed with other things or money so as to lose its identity: *Taylor v Plumer* (1815) 3 M & S 562, 575; 105 ER 721, 726. Once that point is reached, the common law, acknowledging that 'money has no earmark', abandons the pursuit to equity. The virtue of the decision in *Re Hallett's Estate* lies in its confirmation that equity could not only pursue the inquiry beyond the point at which the law stopped, but could also give effect to the rights of the beneficiary by imposing a charge on the mixed fund or other property into which the misappropriated property had passed or been transformed. The peculiar advantage of this form of equitable charge is that, being proprietary in nature or effect, it prevails over the claims of trustees in bankruptcy, liquidators, and everyone else except those taking bona fide for value and without notice of the right to trace or follow. It also points up the weakness of the common law form of tracing, which is that it can in the end result only in a form of personal relief; that is, a judgment in money, as for damages for conversion; or for debt (or *indebitatus assumpsit*) for unjust enrichment."[40]

This statement deals with two key issues in the common law of tracing. The reference to the common law's limitations in relation to intermixing is consistent with established principle.[41] However, the proposition that the common law recognises a right to trace into substitute assets is contentious. Although there are dicta in *Brady v Stapleton* (1952) 88 CLR 322, Dixon CJ and Fullagar J at 337 to support this proposition, it has been persuasively argued that *Taylor v Plumer* concerned principles of equity, not the common law.[42] If that is correct, and the

39 [1990] Ch 265, Millett J, affirmed by the Court of Appeal [1991] Ch 547.

40 McPherson ACJ further said that he agreed with the analysis by Cutherbertson D in (1967–1968) 8 *University of Western Australia Law Review* 402.

41 *Brady v Stapleton* (1952) 88 CLR 322, Dixon CJ and Fullagar J at 337, citing *Re Hallett's Estate* (1880) 13 Ch D 696 at 717. See above, para [2311].

42 *Trustee of the Property of F C Jones & Sons (a firm) v Jones* [1997] Ch 159, Millett LJ at 169, Khurshid S and Matthews P, "Tracing Confusion" (1979) 95 *Law Quarterly Review* 78; Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), pp 737-739; Matthews P, "The Legal and Moral Limits of Common Law Tracing" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 50 et seq.; Birks P, "Overview: Tracing, Claiming and Defences" in in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 297-300; Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 168-170.

"exchange product theory"[43] is not recognised at common law, it is difficult to see any role for common law tracing.[44] This issue has not been authoritatively resolved in Australia.[45] Despite the mischaracterisation of *Taylor v Plumer*, modern English authority has firmly supported the "exchange product theory" at common law.[46] Thus, in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, a partner in a law firm misappropriated money from the firm's bank account. The cash was used by the partner at a gambling club. The House of Lords concluded that the gambling club had been unjustly enriched at the expense of the firm (Lord Templeman at at 559, 566, Lord Goff at 578). The firm succeeded against the gambling club in an action for money had and received — a personal, not proprietary claim (at 572). It did so on the basis of a common law tracing claim, and did not advance an equitable tracing claim. Although the firm did not have any proprietary interest in the money in its bank account, it did have a chose in action (the bank's indebtedness to it) and it could trace into the product of the chose in action, the cash. The firm succeeded on the basis of the principle that a "legal owner is entitled to trace his property into its product, provided that the latter is indeed identifiable as the product of his property".[47] Perhaps Birks is correct in concluding that "[i]t is not only too late, but also of too little utility, to press for the elimination of common law claims contingent on tracing",[48] even if the notion of "common law tracing" has yet to be wholeheartedly embraced in Australia.[49]

43 Matthews P, "The Legal and Moral Limits of Common Law Tracing" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 49.

44 This assumes that the rules regarding mixing adverted to by Brennan CJ in *Parker v R* (1997) 186 CLR 494 concern following and not tracing: see above, para [2310]. See Matthews P, "The Legal and Moral Limits of Common Law Tracing" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 42-47; Birks P, "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 298-299.

45 However, in *Brady v Stapleton* (1952) 88 CLR 322 at 377, Dixon CJ and Fullagar J referred to the extract from *Taylor v Plumer* quoted by McPherson ACJ in *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162 and said that it is an "exposition of the common law."

46 *Banque Belge v Hambrook* [1921] 1 KB 321; *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548.

47 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 573; see also *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 563. Compare *Sheehan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 430.

48 "Overview: Tracing, Claiming and Defences", in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 298. See also *Trustees of the Property of F C Jones & Sons v Jones* [1997] Ch 159, Millett LJ at 168-170.

49 In *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203 at 216 [66], Gummow J said: "In *Lipkin Gorman v Karpnale* [1991] 2 AC 548, the plaintiff firm of solicitors sued the defendant gambling club for moneys had and received which represented defalcations by a partner from its trust account; *why no tracing remedy was sought does not appear. Presumably the plaintiff regarded the common law remedy as adequate*." (emphasis added).

[2313] Common law tracing[50] is thus, as McPherson ACJ pointed out,[51] closely related to actions for money had and received[52] and in detinue. If such actions are available to a claimant, it may be unnecessary to invoke equitable principles of tracing.[53] Indeed, there may be cases where tracing in equity will not assist the claimant because no substitute for the claimant's property exists.[54] Both actions for money had and received and for detinue are personal actions for monetary relief. However statute now provides that in an action in detinue, the claimant is entitled to have the property, which was wrongfully detained, returned.[55]

[2314] Tracing at common law is not subject to one limitation which has been imposed on equitable tracing — the requirement of an initial fiduciary relationship.[56] However, as will be discussed below, the courts have diluted the notion of a fiduciary in this context and such requirement has done little to impede the scope for equitable tracing. Further, there is doubt about whether in Australia it can any longer be said that a fiduciary relationship is necessary in equity.[57] If it is not necessary, then a major distinguishing feature between equitable and common law tracing no longer exists.

[2315] In contrast to the common law, equity has developed tracing principles of very wide scope. These principles "were fashioned

50 See generally Matthews P, "The Legal and Moral Limits of Common Law Tracing" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995); Birks P, "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 295-305; S Stoljar, *The Law of Quasi-Contract* (2nd ed, 1989), Chapter 5. Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 93-103; Jackman I, *The Varieties of Restitution* (Federation Press, 1998), pp 132-143.

51 *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No 2)* [1994] 2 Qd R 159 at 162- 163; see above, para [2312].

52 See *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548. In relation to such action, see *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203 at 215-217 ([62]-[68]), Gummow J; Kremer B, "The Action for Money Had and Received" (2001) 17 *Journal of Contract Law* 93.

53 As in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548. In *HPM Industries Pty Ltd v Graham* (unreported, NSW Sup Ct, Eq Div, 17 July 1996) Young J referred to the proposition that where the claimant's problem can be dealt with by the common law action for money had and received, there is no call for equity to intervene. Without deciding the point, Young J did conclude that such an approach "has the beneficial effect that small claims for employees defrauding their employers by diverting money can be dealt with in the Local Court or the District Court at much less expense, but still preserves to [the Supreme Court] equitable remedies where the Common Law remedies are inadequate".

54 Compare *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548.

55 *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175, Giles J at 177; see, for example, *Supreme Court Act* 1970 (NSW), s 93.

56 See below, paras [2321]-[2323].

57 See below, para [2323].

to remedy what was perceived to be the inadequacy of the common law, in particular, its rule that mixing of money 'by a prior recipient' defeats a common law claim."[58] The paradigm of equitable tracing is an action by a beneficiary against a trustee who has misapplied trust assets.[59] But increasingly common is the case of a former legal and beneficial owner who, having been defrauded, seeks to trace her or his property.[60] As one distinguished jurist put it:

> "International fraud is a growth business. Electronic transfer of funds; the widespread use of nominee companies and offshore accounts; the increased sophistication of legitimate financial transactions; and the reluctance of bankers and professional men to inquire into their clients' affairs; all contribute to the ease and speed with which fraudsters can transfer substantial sums from one country to another and conceal their source and the identity of those who control them ... There is a pressing need for a rational, just and comprehensive restitutionary remedy with clear rules which prescribe the circumstances in which the money can be recovered and which identify the persons who can be made liable to repay it."[61]

This makes principled development of the law of tracing even more compelling.

EQUITABLE PROPRIETARY REMEDIES AVAILABLE AFTER SUCCESSFUL TRACING

The equitable lien

[2316] A claim dependant on successful tracing may be for a security interest in the nature of an equitable lien. The equitable lien arises by operation of law, without regard to the intention of the

58 Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), p 93.

59 See above, n 13.

60 See Millett P, "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71.

61 Millett P, "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71. Birks has also emphasised that because commercial fraud has increased both in its complexity and magnitude, it is "imperative for the law to make intelligible and efficient its weapons of restitution": "Trusts in the Recovery of Misapplied Assets: Tracing, Trusts and Restitution", in McKendrick E (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon, Oxford, 1992), p 150.

parties.[62] This feature of the equitable lien distinguishes it from the equitable charge; although the term "equitable lien" is sometimes used interchangeably with "equitable charge"[63] or (as in *Re Hallett*) a "charge"[64], it is preferable that the latter term not be used to describe a security interest that arises by operation of law.

[2317] Gummow J has observed that "[t]he equitable lien has been somewhat of a mysterious creature."[65] Broadly speaking, it has lived in the shadow of its better known cousin, the constructive trust,[66] notwithstanding its prominent role in the context of tracing. The equitable lien was authoritatively considered by the High Court in *Hewett v Court* (1983) 149 CLR 638 at 664, where Deane J observed that "[t]he word 'lien' is used somewhat imprecisely in the phrase 'equitable lien' to describe not a negative right of retention of some legal or equitable interest but what is essentially a positive right to obtain, in certain circumstances, an order for sale of the subject property or for actual payment from the subject fund". A right to an equitable lien (unlike a lien at common law) does not depend on possession; rather, it "may, in general, be enforced in the same way as any other equitable charge, namely, by sale in pursuance of court order or, where the lien is over a fund, by an order for payment thereout".[67] In the context of tracing, where the traced asset is worth less than the amount claimed by the claimant, the claimant will normally elect for an equitable lien.

Restitution of the traceable product itself

[2318] Alternatively, a claimant having successfully traced may elect for an order for the specific restitution of the asset acquired with the misappropriated funds. There is "abundant authority for the proposition that if trust moneys have been exclusively used in the purchase of property the beneficiary may elect to take the property itself".[68] In such circumstances, the claimant's interest

62 *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, Gummow J at 554; see also *Shirlaw v Taylor* (1991) 31 FCR 222; *Worrell v Power & Power* (1993) 46 FCR at 223. The equitable lien, unlike the equitable charge, is not a registrable charge for the purposes of the *Corporations Act* 2001 (Cth) — see s 262(2)(a).

63 Compare *Foskett v McKeown* [2001] 1 AC 102, Lord Millett at 130.

64 (1880) 13 Ch D 696 at 709.

65 "Names and Equitable Liens" (1993) 109 *Law Quarterly Review* 159 at 162.

66 Compare *Giumelli v Giumelli* (1999) 196 CLR 101. Justice Finn has observed that "at last" the equitable lien has been "rediscovered": "Equitable Doctrine and Discretion in Remedies" in Cornish W R et al (eds), *Restitution — Past, Present and Future* (Hart, Oxford, 1998), p 264.

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

68 *Scott v Scott* (1963) 109 CLR 649 at 660.

would "rise or fall in value with the property".[69] Such an election, therefore, would be attractive to a claimant in circumstances where the value of the asset has increased. An equitable lien, by contrast, would not confer on the claimant any benefit arising from an increase in the value of the asset.

[2319] Thus, where the money (or other asset) of a claimant (say, a beneficiary) is misapplied by the wrongdoer (in this example the trustee) and used to purchase property, the beneficiary can elect either to take the property, or to have a security interest — an equitable lien — on the property for the amount of the trust money.[70] In *Re Hallett's Estate* (1880) 13 Ch D 696, Sir George Jessel MR said (at 709):

> "[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."

The term "constructive trust" could, in modern parlance, be used to describe what Sir George Jessel MR referred to above as the right "to take the property".[71] However, the term "constructive trust" is used in "numerous and to some extent disparate senses".[72] In its broader sense, the doctrine of constructive trust, rooted in the notion of unconscionability, covers a field wider than that associated with tracing.[73] The relationship between the constructive trust in the broader sense and the principles of tracing is far from clear,[74] and each appears to have developed independently of the other.[75]

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69 *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584, Bryson J at 590.

70 *Scott v Scott* (1963) 109 CLR 649 at 660-661.

71 Compare *Giumelli v Giumelli* (1999) 196 CLR 101; Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, pp 554ff.

72 *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, Gummow J at 552; see also *Giumelli v Giumelli* (1999) 196 CLR 101 at 112; on constructive trusts generally, see above, Chapter 21: "Constructive Trusts".

73 In *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536 at 552, Gummow J said: "[A] constructive trust may be imposed upon a particular asset or assets not because pre-existing property of the plaintiff has been followed in equity into those assets but because, quite independently of such considerations, it is, within accepted principle, unconscionable for the defendant to assert a beneficial title thereto to the denial of the plaintiff."

74 Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), pp 739-740. See further below, paras [2355]-[2358].

75 See Austin R, "Constructive Trusts" in Finn P (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), pp 214ff.

[2320] An election is available to a claimant where the misappropriated funds are mixed with the wrongdoer's funds and used to acquire an asset.[76] In such circumstances, the claimant has a right to assert a proportionate proprietary ownership in the asset, whether the property be specifically severable property or not, and such right exists even where the asset is money in a mixed bank account.[77] Where the asset has increased in value and remains unrealised, the court might provide that the innocent party's proportion of the gain is secured by a charging order.[78]

PREREQUISITES AND LIMITATIONS

The existence of a fiduciary relationship

[2321] There is a line of authority to the effect that it is "a prerequisite to the operation of the remedy in equity that there must be a fiduciary relationship which calls the equitable jurisdiction into being".[79] The leading authority for this proposition is *Sinclair v Brougham* [1914] AC 398 as interpreted in *Re Diplock* [1948] Ch 465 at 520-521, 532, 540.

The requirement "that there should be an initial fiduciary relationship in order to start the tracing process in equity"[80] has been widely criticised, and indeed it is doubtful whether *Sinclair v Brougham* stands for that proposition at all.[81] A difficulty with this requirement is that to describe someone as a "fiduciary" is not informative without knowing the purposes for which that person is a fiduciary.[82] The question of who should be characterised as a "fiduciary", for the purpose of invoking equitable principles of

76 Compare *Giumelli v Giumelli* (1999) 196 CLR 101 at 119-120, 125.

77 See below, para [2324].

78 *Paul A Davies (Aust.) Pty Ltd v Davies* (1983) 1 NSWLR 440 at 499, citing *Scott v Scott* (1963) 109 CLR 649.

79 *Agip (Africa) Ltd v Jackson* [1991] Ch 547 at 566. See the dissenting judgment of Isaacs J in *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426 at 438.

80 Millett P, "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71 at 75.

81 See Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), pp 741ff; Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 103-104; Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 120-130, 340-347. Compare Birks P, *Introduction to the Law of Restitution* (Clarendon, Oxford, 1985), pp 381ff; *Chase Manhattan Bank NA v Israel-British Bank* [1981] 1 Ch 105 at 119. *Sinclair v Brougham* was overruled in *Westdeutche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 AC 669 but not on this point.

82 Finn P, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), pp 1-2. "To describe someone as a fiduciary, without more, is meaningless": *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98 (PC). See also *Commissioner of Taxation v B & G Plant Hire Pty Ltd* (1994) 12 ACLC 793, Gummow J at 799.

tracing, has never been squarely confronted by the courts. One learned commentator[83] has posed the problem this way:

> "Usually, one asks the question, is X a fiduciary, for the purposes of ascertaining whether he is subject to fiduciary obligations of a particular sort: for example, is a power which he may exercise a fiduciary power? Is he subject to the rules relating to conflict of duty and interest? Which sort of fiduciary is relevant for tracing purposes; and why? The truth must be that, unless there is a clear answer to the question … and the authorities do not suggest that there is … what quality invests a relationship with fiduciary characteristics *for this purpose*, the requirement that there be such a relationship must be devoid of meaning."

It has been suggested that it is sufficient that the person in question — not necessarily the defendant — was one "whose fiduciary position gave him control of [the company's funds] or enabled him to misapply them".[84] This draws a very wide net.

[2322] The case of misappropriation by a thief indicates how awkward and inappropriate the requirement of a fiduciary relationship is. A court will permit a claimant to trace property into the hands of a thief.[85] It would be artificial to describe the thief as being in a fiduciary relationship with the victim. The courts have overcome this by holding that the thief is a constructive trustee. In *Black v S Freedman & Co* (1910) 12 CLR 105 at 110,[86] O'Connor J said that "where money had been stolen, it is trust money in the hands of the thief and he cannot divest it of that character". Thus, "[t]he attribution of a constructive trust to stolen money is well established",[87] even though it is difficult to see how the thief can have any legal interest in stolen property.[88]

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83 Lehane J, "Fiduciaries in a Commercial Context" in Finn P (ed), *Essays in Equity* (Law Book Co, Sydney, 1985), p 109 (original emphasis).

84 *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265, Millett J at 290. In that case, the person who acted in breach of his fiduciary obligations was not the person who received the misappropriated assets. For a criticism of this reasoning, see Smith L, *The Law of Tracing*, (Clarendon Press, Oxford, 1997), p 128. Contrast Lord Millett's approach in *Foskett v McKeown* [2001] 1 AC 102 at 128.

85 *Black v S Freedman & Co* (1910) 12 CLR 105 at 110; *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584 at 589; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 565-566.

86 Griffith CJ (with whom Barton J agreed) preferred to base his decision on a breach of fiduciary obligations by the employee in question. See also *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426; *National Australia Bank Ltd v Rusu* [2001] NSWSC 32, Bryson J; *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1, Callinan J at 63 at [300]; *Cashflow Finance Pty Ltd v Westpac Banking Corporation* [1999] NSWSC 671, Einstein J (at [465]); *Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484 at 487; Millett P, "Tracing the Proceeds of Fraud" (1991) 107 *Law Quarterly Review* 71 at 76.

87 *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584 at 589. Compare *Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484 at 487.

88 *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198 at 219-220. See Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), p 345.

[2323] In practice, the requirement of a fiduciary relationship has seldom given rise to difficulties for claimants. There are two reasons for this. First, in the case of commercial fraud, "the embezzlement of a company's funds almost inevitably involves a breach of fiduciary duty on the part of one of the company's employees or agents" (*Agip (Africa) Ltd v Jackson* [1990] 1 Ch D 265 at 290). Secondly, the notion of "fiduciary" for the purposes of equitable tracing is very broad.[89] Indeed recent cases suggest that equity no longer requires the existence of a fiduciary relationship. In *Foskett v McKeown* [2001] 1 AC 102, Lord Millett, with whom Lord Hoffman relevantly agreed, said (at 128):

> "There is certainly no logical justification for allowing any distinction between them [that is, common law and equitable rules for tracing] to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition for applying equity's tracing rules."

Recent Australian cases have either diluted the requirement of a fiduciary relationship, or have rejected it, even though it has been said that "it still appears to be a prerequisite of the right to trace in equity that there be a fiduciary relationship, for this is what enlivens equitable jurisdiction."[90] In *Menzies v Perkins* [2001] NSWSC 40, Hunter J referred to this statement, and concluded that such prerequisite "is satisfied once it is established that a constructive trust attached to the proceeds of the defendants' fraud." In *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR 14,686 at 14,707, Santow J held that it was unnecessary to establish the existence of a fiduciary relationship in order to permit a tracing claim. Santow J said that Australian courts were not bound by *Re Diplock* [1949] Ch 465, and did "not need to strain to find a fiduciary relationship in the circumstances."[91] Santow J concluded:

89 In *Maguire v Makaronis* (1997) 188 CLR 449 at 463-464, the High Court said: "From various decisions in recent years there appear attempts to throw a fiduciary mantle over commercial and personal relationships and dealings which might not have been thought previously to contain a fiduciary element. In some instances the forensic advantage sought … has been the remedial constructive trust with the edge thereby conferred over unsecured creditors in an insolvent administration of the affairs of a defendant. A notable instance of such an attempt in the end unsuccessful, is the litigation arising from dealings in bullion which was determined by the Privy Council in *In re Goldcorp Exchange Ltd*, [1995] 1 AC 74".

90 Meagher R P and Gummow W M C, *Jacob's Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), p 740.

91 (1996) 7 BPR 14,686 at 14,707, citing his Honour's earlier decision in *Opus Productions Pty Ltd v Popwing Pty Ltd and Kevin Jacobsen Productions* (unreported, NSW Sup St, 28 February 1995); see also *Hubbard v Mason* (unreported, NSW Sup Ct, Santow J, 9 December 1997).

> "The principled assertion of unconscionable conduct, assisted by the remedial constructive test [sic, presumably should be "trust"] and other relief, may thus in the common law world afford an alternative and flexible equitable basis of intervention, one which avoids unjustified resort to fiduciary duty." ((1996) 7 BPR 14,686 at 14,707)

Extinguishment or limitation of the right to trace

Bona fide acquisition for valuable consideration without notice

[2324] The consequence of receiving trust property without consideration was succinctly stated by Holmes J thus:[92]

> "A person to whose hands a trust fund comes by conveyance from the original trustee is chargeable as a trustee in his turn, if he takes it without consideration, whether he has notice of the trust or not. This has been settled for three hundred years, since the time of uses."

The recipient will also hold the property on trust for the claimant if the recipient has taken with notice the claimant's interest. In *Black v S Freedman & Co* (1910) 12 CLR 105 at 110 O'Connor J, after stating that stolen money was held on trust by the thief for the victim,[93] said that the victim could follow the property into the hands of a third party who received the stolen money from the thief. O'Connor J said:

> "If, of course, that other person shows that it has come to him *bona fide* for valuable consideration, and without notice, it may then lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not."[94]

92 *Otis v Otis* 167 Mass 245 at 246 (1897), cited with approval in *United States v 92 Buena Vista Avenue* 507 US 111 (1993), Kennedy J at 143, with whom Rehnquist CJ and White J agreed (dissenting but not on this point).

93 See above, para [2322].

94 This statement was quoted with approval by Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 63, where the authorities are comprehensively collected (footnote 402).

Thus in *Re Diplock* [1948] 1 Ch 465 at 539,[95] Lord Greene MR said: "Where the moneys are handed by way of transfer to a person who takes for value without notice, the claim of the owner of the moneys is extinguished just as all other equitable estates or interests are extinguished by a purchase for value without notice." To take an example, assume the claimant's money is wrongfully disposed by the wrongdoer who uses the money to purchase goods at a department store. Having followed the money into the hands of the third party (the department store), the claimant will be unable to trace successfully as against the third party if the latter successfully relies on the bona fide purchaser defence. In this example, the claimant will, however, be able to trace into the proceeds of the sale in the hands of the wrongdoer, that is, into the goods purchased. It can thus be seen that this defence will normally only be available to a third party into whose hands the property has been successfully followed by the claimant. By its very nature, it is obviously unavailable to the wrongdoer.

[2325] Thus, the right to trace will normally be extinguished if the recipient of trust property has received the property bona fide for valuable consideration.[96] The foregoing principles concern defences to equitable claims. At common law, the doctrine of *nemo potest dare quod non habet* does not recognise a broad bona fide purchase defence.[97] However even the common law recognises an exception where the asset is money "or its equivalent".[98] The applicability to money of this defence at common law is of ancient origin.[99] This principle was

95 Compare *Ilich v R* (1987) 162 CLR 110 at 126.

96 For a comprehensive treatment see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, 1992), pp 250-259; Barker K, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995); Smith L, The *Law of Tracing* (Clarendon Press, Oxford, 1997), pp 286-296; Oakley A J, *Constructive Trusts* (London, Sweet & Maxwell), pp 12-13.

97 *Ilich v R* (1987) 162 CLR 110 at 117-118, 128, 138-139. Compare *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379-380.

98 Birks P, "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 333. Thus, in addition to money, the exception applies to "a range of instruments and securities which are made negotiable either by statute or mercantile usage": Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), p 387. The common law version of the defence has a different origin to the equitable version: see Barker K, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 196.

99 Mann F A, *The Legal Aspect of Money* (5th ed, Clarendon Press, Oxford, 1992), p 9, citing *Higgs v Holiday* Cro Eliz. 746; 78 ER 400, *Miller v Race* (1758) 1 Burr 452; 97 ER 398 and *Wookey v Poole* (1820) 4 B & Ald 1; 106 ER 839, states: "As regards money as a chattel the general rule, 'nemo potest dare quod non habet', was apparently never applied to coins, which always passed by delivery and which could not be specifically recovered from a person who honestly and for valuable consideration had obtained possession." Compare *R v Curtis; Ex parte Attorney-General* [1988] 1 Qd R 546; *Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 563, 572-577.

authoritatively articulated by Lord Mansfield in *Miller v Race* (1758) 1 Burr 452, at 457-458; 97 ER 398 at 401.[100] In *Sinclair v Brougham* [1914] AC 398,[101] Lord Haldane LC said (at 418):

> "In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. It would cause great inconvenience to commerce if in this class of chattel an exception were not made to the general requirement of the law as to title."

Thus, "when money (including notes) passes into circulation the very act of circulation destroys the title of the former owner and creates new title, but only if the person who acquires the money does so in good faith and for value".[102] In *Ilich v R* (1987) 162 CLR 110 at 117-118, Gibbs CJ referred with approval to the following statement by Scrutton LJ in *Banque Belge v Hambrouck* [1921] 1 KB 321 at 329:

> "At common law, a man who had no title himself could give no title to another. Nemo potest dare quod non habet. To this there was an exception in the case of negotiable chattels or securities, the first of which to be recognised were money and bank notes: *Miller v Race*; and if these were received in good faith and for valuable consideration, the transferee got property though the transferor had none. But both good faith and valuable consideration were necessary ..."

Wilson and Dawson JJ said ((1987) 162 CLR 110 at 128):

> "It is an error, as Lord Mansfield pointed out as long ago as 1758 in *Miller v Race* (1758) 1 Burr 452, at p. 457 [97 ER 398, at p 401], to treat money in the form of cash in the same way as other

100 "It has been quaintly said, 'that the reason why money can not be followed is, because it has no ear-mark:' but this is not true. The true reason is, upon account of the currency of it: it can not be recovered after it has passed in currency. So, in case of money stolen, the true owner can not recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but before money has passed in currency, an action may be brought for the money itself."; see *Ilich v R* (1987) 162 CLR 110, Gibbs CJ at 117-118, Wilson and Dawson JJ at 128, Brennan J at 138.

101 Despite the decision being overruled in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, this particular principle still represents the law.

102 *Ilich v R* (1987) 162 CLR 110 Gibbs CJ at 117 (dissenting but not on this point).

> goods. Money in most circumstances cannot be followed, which is to say that property, or ownership, generally passes with possession. 'It has been quaintly said, "that the reason why money can not be followed is, because it has no ear-mark:" but this is not true. The true reason is, upon account of the currency of it: it can not be recovered after it has passed in currency': ibid. Money is, of course capable of being stolen and if it is stolen, property in the notes or coins does not pass to the thief. But if the thief passes the money into currency, which he may do by making payment with it, ownership will pass with possession notwithstanding the thief's lack of title providing the transaction was bona fide and for valuable consideration: *Moss v Hancock* [1899] 2 QB 111; *Banque Belge v Hambrouck* [1921] 1 KB 321; *Clarke v Shee and Johnson* (1774) 1 Cowp 197 [98 ER 1041]. That is because of the doctrine of negotiability — and negotiability was first attributed to chattels in the form of money — which constitutes an exception to the common law rule that a man who has no title himself cannot pass title to another; nemo potest dare quod non habet: *Banque Belge v Hambrouck* [1921] 1 KB 321at p 329."

[2326] One feature of this defence which has been subject of conflicting authority is whether the recipient bears the onus of proof. The weight of authority appears to be that the recipient bears the onus in relation to the defence.[103] According to another line of authority, negating the presence of good faith exchange (or consideration) forms part of the case to be proved by the claimant,[104] that is, that the asset was not so acquired by the recipient.

Impossibility of identifying the claimant's property

[2327] In *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 at 46,[105] Buckley LJ said: "[I]t is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life."[106] This is subject to an important qualification: impossibility of precise

103 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, 1992), pp 257-259 and authorities there cited; Barker K, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 205-211; Birks P, "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), p 334.

104 *Burkinshaw v Nicholls* (1878) 3 App Cas. 1004; *Union Bank of Australia Ltd v Murray-Aynsely* [1898] AC 693 (PC); *National Mutual Life Association Ltd v Walsh* (1987) 8 NSWLR 585 at 591; *Rabo Equipment Finance Ltd v Boutayeh* [2001] NSWSC 517, Bryson J at [11].

105 Quoted with approval in *Bishopsgate Investment Management Ltd (in liquidation) v Homan* [1995] Ch 211 at 221 and *Baker v Official Trustee* (unreported, Fed Ct Full Ct, 3 August 1995).

106 See below, paras [2329]-[2332].

identification, resulting from the mixing by the wrongdoer of funds belonging to the wrongdoer and the claimant, will not preclude tracing.[107] Indeed, "a trustee of a mixed fund bears the onus of distinguishing what is his own".[108] The entire mixed fund "will be treated as trust property, except so far as [the trustee] may be able to distinguish what is his own".[109]

[2328] It follows that the right to trace is lost where the claimant's property has been dissipated. Thus, in *Re Diplock* [1948] 1 Ch 464 at 521, Lord Greene MR said:

> "The equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent upon a dinner, equity, which dealt only in specific relief and not in damages, could do nothing. If the case was one which at common law involved breach of contract the common law could, of course, award damages but specific relief would be out of the question. It is, therefore, a necessary matter for consideration in each case where it is sought to trace money in equity, whether it has such a continued existence, actual or notional, as will enable equity to grant specific relief."

This principle has been manifest in cases involving use of the claimant's money to improve the defendant's land, and cases involving use of the claimant's money to discharge a debt.

Improvement to Property

[2329] Money spent on improving property may, depending on the circumstances, be dissipated. If the money spent on the improvements does not result in an increase in the value of the property, for tracing purposes "the money will have disappeared leaving no monetary trace behind".[110] Where the money spent

107 *Brady v Stapleton* (1952) 88 CLR 322 at 336. Compare *Windsor Mortgage Nominees Pty Ltd (as trustee) v Cardwell* (1979) CLC 40-540; *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd* (1994) 12 ACLC 364 at 379-380.

108 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-562.

109 *Brady v Stapleton* (1952) 88 CLR 322 at 336, quoting Page Wood V-C in *Frith v Cartland* (1865) 2 H & M 417 at 420; 71 ER 525. See too *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 109; *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 341; *Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484 at 489-490; Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, p 609. See also Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), p 255.

110 *Re Diplock* [1948] Ch 465 at 547; see also *Boscawen v Bajwa* [1996] 1 WLR 328 at 335; *George v Biztole Corporation Pty Ltd* (unreported, Vic Sup Ct, Ashley J, 26 February 1996).

on improvement does result in an increase in value, the position is less clear, although it has been suggested that there is no reason in principle why tracing cannot take place.[111] However, an innocent volunteer may be able to rely on the defence that it would be inequitable in such circumstances to allow the claimant to have an equitable lien in the land.[112]

Use of the Claimant's money to discharge a debt

[2330] The use of the claimant's money to discharge a debt generally constitutes an obstacle to the tracing process. This can be illustrated by the payment of the claimant's money into the wrongdoer's bank account.

Where the wrongdoer deposits the claimant's money into a bank account, it loses its identity as money.[113] But this in itself does not prevent tracing, because in substitution for the money, the account holder has a chose in action as against the bank.[114] In *Governor and Company of the Bank of Scotland v A Ltd* [2001] 1 WLR 751 at 763, the English Court of Appeal said:

> "There is a sharp theoretical distinction between property rights and merely personal rights.[115] The distinction between ownership and obligation tends to become blurred in the case of a credit balance on a current account with a bank of undoubted financial standing. The natural tendency to speak of 'money at the bank' is hard to resist, even for counsel who is concerned to expose that as a heresy. The bank has a personal, unsecured obligation to pay its customer, but the benefit of that obligation is rightly regarded as an asset into which trust property may be traced."

In *Foskett v McKeown* [2001] 1 AC at 127-128, Lord Millett said:

> "We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no

111 Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 239-242. Compare Sutton R, "What Should be Done for Mistaken Improvers?" in Finn P (ed), *Essays on Restitution* (Law Book Co, Sydney, 1990), p 278; Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 110-111; *Wickham Developments Ltd v Parker* (unreported, Qld CA, 20 June 1995); *George v Biztole Corporation Pty Ltd* (unreported, Vic Sup Ct, Ashley J, 26 February 1996); *Giumelli v Giumelli* (1999) 196 CLR 101.

112 *Re Diplock* [1948] Ch 465 at 547-548. See paras [2333]-[2335] below.

113 *Brady v Stapleton* (1952) 88 CLR 322, Dixon CJ and Fullagar J at 338.

114 *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 428, 430, citing *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 573-574.

115 See generally Goode R, "Ownership and Obligation in Commercial Transactions" (1987) 108 *Law Quarterly Review* 433.

> money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder. The bank gives value for it, and it is accordingly not usually possible to make the money itself the subject of an adverse claim. Instead a claimant normally sues the account holder rather than the bank and lays claim to the proceeds of the money in his hands. These consist of the debt or part of the debt due to him from the bank. We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked."

It follows that where the account is in credit, the deposited money is substituted by a chose in action, being the customer's right against the bank. The claimant will be able to trace into the proceeds of the claimant's money, namely the chose in action. In contrast, where the money is deposited into an overdrawn account, the right to trace will be lost.[116] This is because where the property is used to discharge a debt there is no substituted asset, nor any identifiable proceed of the misappropriated money.[117] Thus, in *Re Goldcorp Exchange* [1995] 1 AC 74 at 105,[118] the Privy Council held that money paid into an overdrawn account had thereupon ceased to exist, denying the claimants the right to trace.

116 *Barlow Clowes International Ltd (in Liq) v Vaughan* [1992] 4 All ER 22 at 40, 42; *Re Goldcorp Exchange* [1995] 1 AC 74 at 104-105; *Australian Securities Commission v Buckley* (1996) 7 BPR 15,024, Santow J; *Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles* [2001] WASC 201, Owen J at [273]. However, contrast Kearney J's analysis of the Leura land in *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 357-358. Speaking of an investment drawn from a mixed current account, Kearney J said (at 358) that "it is no answer in the case of such a purchase from an overdrawn account for the trustee to rely upon the extensive nature of his overdraft arrangements". The claimant could trace into the investment "whether the infusion of trust moneys increases the credit balance or decreases the overdraft balance in a bank account". See Evans S, "Rethinking Tracing and the Law of Restitution" (1999) 115 *Law Quarterly Review* 469 at 486-487.

117 This is so even if the debt is a secured debt: see Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, p 592; *Re Diplock* [1948] 1 Ch 465 at 549. However, where the claimant's money has been used to discharge a secured debt, the claimant may be subrogated to the rights of the creditor: *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 at 221, Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, p 592. Compare Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 146-152; Smith L, "Tracing into the Payment of a Debt" [1995] *Cambridge Law Journal* 90; Hayton D, "Equity's Identification Rules" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 16-19.

118 Compare *Federal Commissioner of Taxation v Macquarie Health Corp Ltd* (1998) 88 FCR 451 at 498.

[2331] This approach has been the subject of academic criticism.[119] It was the subject of division of opinion in *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 at 216-217. Dillon LJ referred to the situation where an asset was acquired by a wrongdoer with moneys borrowed from an overdrawn or loan account and there was an inference that, when the borrowing was incurred, it was the intention that it should be repaid by misappropriations of the claimant's money. Dillon LJ described this as "backward tracing" (at 216-217). Dillon LJ also referred to the possibility of misappropriated moneys being paid into an overdrawn account in order to reduce the overdraft so as to make finance available to purchase some particular asset. In such a case, it was "at least arguable, depending on the facts" that the claimant ought to be able to trace into the asset. Leggatt LJ disagreed, stating (at 221):

> "[T]here can be no equitable remedy against an asset acquired *before* misappropriation of money takes place, since ex hypothesi it cannot be followed into something which existed and so had been acquired before the money was received and therefore without its aid" (original emphasis).

Leggatt LJ adopted the orthodox approach that it is not possible to trace into an overdrawn bank account. Leggatt LJ's approach is more in conformity with the authorities but it is uncertain whether the broader approach adopted by Dillon LJ will be recognised in Australia.[120]

[2332] In *Moffatt v Crawford* [1924] St R Qd 241 the trustee purchased a piano for himself and agreed to pay for it at a later time. After purchasing the piano he gave it to his wife as a gift. He improperly used trust funds to pay the outstanding amount. The claimant sought to trace into the piano. Lukin J (with whom the Full Court agreed) said (at 246, 248):

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119 Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 146-152; Hayton D, "Equity's Identification Rules" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 17-19; Evans S, "Rethinking Tracing and the Law of Restitution" (1999) 115 *Law Quarterly Review* 469 at 487-489. Compare Rotherham C, *Proprietary Remedies in Context* (Hart, Oxford, 2002), pp 122-125.

120 In *Farrow Finance Co v Farrow Properties Pty Ltd* (1998) 16 ACLC 897, Hanson J said (at 933): "If company A agrees to buy property at a time when it does not have sufficient money to do so, but subsequently that company receives money which has been misapplied by company B, then if company A uses that money to complete the purchase of the property, company B may trace its money into the property". Presumably his Honour reached this conclusion on the assumption that the amount payable on completion did not extinguish a *debt*. See also Oakley A, "Proprietary Claims and their Priority in Insolvency" [1995] *Cambridge Law Journal* 377 at 413-414. Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, 1998), p 113 argue that "in the new world of international fraud" the courts should create new rules and presumptions and that "it would be a mistake to reject the mere possibility of 'backward tracing'".

> "Trust money is not here followed in property in which it has been invested or into which it has been converted. The trust money at the most has been used to pay a past debt that no doubt originally became due in consequence of such purchase, but I do not think the principle of following trust property has been, or could from its nature be extended to property acquired by a past transaction."

This case illustrates the way in which the rule that it is not possible to trace where the money in question is used to discharge a debt is a major obstacle to tracing.[121]

Where tracing would lead to an inequitable result

[2333] There are circumstances recognised by the authorities where tracing is not permitted because it would lead to an inequitable result. Thus, in *Re Diplock* [1948] 1 Ch 465 at 547, Lord Greene MR observed that, where money is spent to improve the value of property, the question is not merely one of location and identification. Even where there appears to have been an increase in the value of the property attributable to the expenditure of misappropriated money, a charge (or, more accurately, an equitable lien) would not be imposed in favour of the claimant, where the defendant is an innocent volunteer.[122]

[2334] Similarly, as pointed out above,[123] the right to trace will be lost if the innocent volunteer uses the money to extinguish a debt. It has been argued that such a case, and the case of improvement to the innocent volunteer's land,[124] ought to be viewed as illustrations of the defence of change of position[125] (though it might more accurately be explained as a case where the property has ceased to exist).[126] The central element of the defence of "change of position" is that "the defendant has acted to his or

121 Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), p 354 states that such an approach means that "the most trivial factual matters would present illogical bars to tracing claims. It would be impossible to trace through any exchange unless payment was made in advance, since if payment is not made in advance, it follows that there is a period of credit". Smith prefers the approach adopted by Dillon LJ in *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 at 216-217 (see above, para [2331]). Compare *Farrow Finance Co v Farrow Properties Pty Ltd* (1998) 16 ACLC 897 at 933.

122 *Re Diplock* [1948] 1 Ch 465 at 548: see above, para [2324].

123 See above, paras [2330]-[2332].

124 See above, note [2329].

125 Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 110-111.

126 Compare *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 105. See also *Re Diplock* [1948] 1 Ch 465 at 546-547.

her detriment *on the faith of the receipt*".[127] "Change of position" has yet to be explicitly recognised as a defence to equitable claims.[128] It is uncertain whether it will come to be recognised as a defence to equitable tracing claims.[129]

[2335] In *Re Goldcorp Exchange* [1995] 1 AC 74 at 108, the Privy Council held that it would be inequitable to impose an equitable lien, consequent to a tracing exercise, upon the company's assets in circumstances where the misappropriated assets had been dissipated but subsequent deposits had been made. The case can be explained on the basis of a sensitivity to the competing interests of unsecured creditors.[130] Alternatively it may reflect the principle in *James Roscoe (Bolton) Ltd v Winder*.[131]

THE RULES OF TRACING INTO A MIXED FUND

[2336] Equity's contribution to tracing has been of particular significance in relation to mixed funds. A number of principles — described as "highly technical and often irrational"[132] — have developed.

Impossibility of Precise Identification because of mixing by the wrongdoer

[2337] The impossibility of precisely identifying the claimant's property, in circumstances where it has been mixed by the wrongdoer with the latter's property, will not defeat an equitable tracing claim. In *Brady v Stapleton* (1952) 88 CLR 322, Dixon CJ and Fullagar J said (at 336):

127 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385 (original emphasis).

128 Compare *Ministry of Health v Simpson* [1951] AC 251; Mason K and Carter J, *Restitution Law in Australia*, (Butterworths, Sydney, 1995), pp 836-850; Nolan R C, "Change of Position" in Birks P (ed), Laundering and Tracing (Clarendon Press, Oxford, 1995), pp 176-185.

129 See *Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 581. At common law, the defence has been recognised in the context of restitutionary claims based on mistaken payment: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. Contrast Birks P, *Introduction to the Law of Restitution* (Clarendon, Oxford, 1985), p 411: "[T]he defence is to a certain degree either unnecessary or built-in, depending on one's point of view ... If the defendant has consumed or dissipated what he received, to that extent it will not be identifiable in his hands and the claim will be diminished." See further Birks P, "Overview: Tracing, Claiming and Defences" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 323-332.

130 See below, paras [2355]-[2358].

131 [1915] 1 Ch 62: see below, para [2342].

> "The view that impossibility of precise identification of trust shares precludes the making of an order for a transfer of shares seems really to amount to something like an inversion of the true position. In the present case its practical effect seems to be to place the burden of identification upon the wrong shoulders. In *Frith v Cartland* (1865) 2 H & M 417, at p 418; [71 ER 525, at 526] Mr Rolt QC said, *arguendo*, 'The trustee who mixes trust money with his own must himself distinguish them'. Mr Rolt's argument was successful, Sir W Page Wood V-C saying: 'If a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own' ((1865) 2 H & M, at p 420 [71 ER, at p 526]). In *Re Hallett's Estate*; *Knatchbull v Hallett* (1879) 13 Ch D 696, at p 719 Jessel MR, after quoting this passage, observed: 'that is, the trust property comes first'."[133]

[2338] Professor Birks has observed that "[t]he underlying idea, in more general terms, is that where a wrongdoer creates an evidential difficulty, that difficulty will be resolved against his interest." He has persuasively argued that this principle was recognised long ago not only in equity, but also at common law.[134] In equity, the same underlying principle is present in cases of the liability of a fiduciary to disgorge profits. Thus, an analogous principle in equity to that referred to in *Brady v Stapleton* is found in *Warman International Limited v Dwyer* (1995) 182 CLR 544,[135] where the High Court said (at 561-562):

> "It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own."

132 Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), p 106.

133 The Court of Appeal of New South Wales has held that this judgment contains "... the authoritative statement by the High Court of what principles were established by *Re Hallett's Estate* and other cases on the subject": *Stephens Travel Service International Pty Ltd (Receivers and Managers Appointed) v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 346. For a recent application of the principle, see *Federal Commissioner of Taxation v Macquarie Health Corp Ltd* (1998) 88 FCR 451, Emmett J at 498.

134 Birks P, "Equity in the Modern Law: an Exercise in Taxonomy" (1996) *Western Australian Law Review* 1 at 87, citing *Lupton v White* (1808) 15 Ves 432 at 436, 439-441; 33 ER 817 Lord Eldon LC at 819, 820-821, and *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 644. Compare *Houghton v Immer (No 155)* (1997) 44 NSWLR 46 Handley JA at 59 (with which Mason P and Beazley JA agreed), referring to *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 644. See also *Henville v Walker* (2001) 75 ALJR 1410 McHugh J at 1435-1436; *Parker v R* (1997) 186 CLR 494 at 501-502.

135 Footnotes omitted. See also *Paul Davies (Aust) Pty Ltd v Davies* [1983] 1 NSWLR 440 at 451.

[2339] The application of this principle, and its limits, is illustrated by *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 341. Kearney J, referring to the statement of principle in *Brady v Stapleton* (1952) 88 CLR 322 at 336,[136] dealt with difficulties in ascertaining the contributions of the claimants and trustees:[137]

> "The trustees' attempts to qualify the principle so stated by reference to the decision in *Scott v Scott* (1963) 109 CLR 649; affirming [1964] VR 300 and to *Paul A Davies (Australia) Ltd (In liq) v Davies* [1983] 1 NSWLR 440 do not meet the force of the plaintiffs' claim, because in those cases the amounts or proportions of contribution by the fiduciary and the beneficiary respectively were known, whereas in the present case the inextricable mixing of estate and personal funds by the trustees, coupled with the lack of adequate accounts, renders unascertainable the respective contributions. Nor do I accept the contention of the trustees that the rules established by the above-mentioned authorities are 'no more than applications of equitable principles to do what is the just and equitable thing in the circumstances'. Further detailed arguments were submitted on this topic by the plaintiffs and the trustees which I acknowledge, but which it is unnecessary to consider. This is because the principles invoked by the plaintiffs do not apply where the mixing is authorised on a defined basis, for example, in a partnership or other business or investment: *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 204."

The withdrawal and dissipation of money from a mixed fund comprising money of the claimant and money of the wrongdoer

[2340] Assume that a wrongdoer mixes her or his money with that of the claimant. Where money is withdrawn from the mixed account and dissipated, the fiduciary's money will be presumed to be withdrawn first. In *In re Hallett's Estate* (1880) 13 Ch D 696 at 719,[138] Sir George Jessel MR said:

136 Quoted above, para [2337].

137 (1991) 34 NSWLR 308 at 341. See also *Maguire v Makaronis* (1997) 188 CLR 449 at 469.

138 Quoting from *Frith v Cartland* (1865) 2 H & M 417 at 421; 71 ER 525. In *Parker v R* (1997) 186 CLR 494 at 502 Brennan CJ referred to this statement and said: "This rule does not depend on the man in charge of the box being a trustee. It is a common law — and, one might add, a common sense — rule by which the law gives effect to the common morality of the community."

> "If a man has £1,000 of his own in a box on one side, and £1,000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own purposes, the Court will not allow him to say that that money was taken from the trust fund. The trust must have its £1,000 so long as a sufficient sum remains in the box."

In *Brady v Stapleton* (1952) 88 CLR 322 at 337-338, Dixon CJ and Fullagar J referred with approval to this proposition and affirmed its application to other fungibles such as shares and bonds. The rationale of the presumption "or, more accurately, the rule"[139] in *In Re Hallett's Estate* is that "wherever an act 'can be done rightfully, [the fiduciary] is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully', so that as to any balance remaining in a mixed account, the fiduciary is taken to have drawn from it and to have dissipated first the fiduciary's own moneys."[140]

Profitable investment of part of the mixed fund and dissipation of the balance

[2341] The rule in *In Re Hallett's Estate* only applies where the withdrawals have actually been dissipated. It will not apply where the fiduciary first invests money profitably and then dissipates the balance of the mixed fund. In such circumstances, the claimant may elect to accept the investment, or to reject it.[141] In *Re Oatway* [1903] 2 Ch 356, a trustee purchased shares with money from a mixed fund, and then dissipated the remaining amount. It was held that the trust had an equitable interest in the shares. Joyce J said (at 360):

> "[W]hen any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains

139 *Maguire v Makaronis* (1997) 188 CLR 449 at 469. Learned Hand J observed in *Primeau v Granfield* (1911) 184 F 480 at 484: "To say that in such a case he will be 'presumed' to intend to take his own money out first is merely a disingenuous way common enough, to avoid laying down a rule upon the matter."

140 *Maguire v Makaronis* (1997) 188 CLR 449 at 469, quoting Sir George Jessel MR in *In re Hallett's Estate* (1880) 13 Ch D 696 at 727. The Master of the Rolls had earlier said : "Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly." Thus, in *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd* (1994) 12 ACLC 364 at 388, Northrop J said: "The companies cannot be heard to say they have wasted the investors' moneys but conserved any assets for their own benefit."

141 *Primeau v Granfield* (1911) 184 F 480, Learned Hand J at 484.

> represents his own money alone, and that what has been spent and can no longer be traced and recovered was the money belonging to the trust".

Less clear are the claimant's rights where neither the value of the investment nor of the balance remaining is sufficient to meet the claimant's claim. Is the claimant entitled to an equitable lien over the two, combined? Authority is scarce on this point. As a matter of principle, there is no reason why the claimant would not be entitled to an equitable lien over both of the remaining funds and the asset purchased with moneys from the mixed funds.[142]

The claimant's interest in the replenishment made by the wrongdoer

[2342] If the mixed fund is dissipated, the claimant has no equitable interest in any subsequent deposits into the mixed account by the wrongdoer, unless the wrongdoer actually intends to restore the misapplied amounts.[143] Thus, in *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62, Sargant J at 69,[144] it was held that the principle in *In re Hallett's Estate* only applies to "such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period". A corollary of this is that, "[i]f the whole intermingled fund is withdrawn at any time, although additions of the wrongdoer's own money are later made, the claimant's interest in the fund is lost".[145]

In *Australian Securities Commission v Buckley* (1996) 7 BPR 15,024[146] Santow J said (at 15,036):

> "While it is true that in *Winder's* case, the account was never reduced to zero, Sargent J held that the charge asserted by the owner of the deposits was limited to the lowest intermediate balance reached by the account before payment of further moneys into the account from sources independent of the depositors. If that lowest balance were zero or less there cannot be anything to trace into."

142 Compare Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), p 746.

143 Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, p 638.

144 See also *Bishopsgate Investment Management Ltd (in liquidation) v Homan* [1995] Ch 211 at 220; *Re Joscelyne* [1963] Tas SR 4 at 21; *Lofts v MacDonald* (1974) 3 ALR 404 at 407; *Federal Commissioner of Taxation v Macquarie Health Corp Ltd* (1999) 88 FCR 451, Emmett J at 498-499.

145 Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, p 636.

146 See also *Sutherland (in the matter of Scutts)* [1999] FCA 147, Sackville J at [59]-[63].

The foregoing principle was applied by the Privy Council in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, where the company unlawfully misappropriated the claimant's bullion by mixing it with the company's own bullion; it then withdrew bullion from the mixed fund, and later purchased more bullion which was added to the mixed fund without the intention of restoring the claimant's bullion. The Privy Council held that "the bullion belonging to the Walker & Hall claimants which became held by the company's receivers consisted of bullion equal to the lowest balance of metal held by the company at any time" (at 108).

This principle — the "lowest intermediate balance rule"[147] or "lowest balance rule"[148] — is thus firmly established in authority. It has been criticised,[149] but there is force in the contention that "there is no reason for subjecting other property of the wrongdoer to the claimant's claim any more than to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant".[150]

The claimant's entitlement to gains arising from investment of the mixed fund

[2343] It has been said that in *In re Hallett's Estate* (1880) 13 Ch D 696 at 709 Sir George Jessel MR adopted the view that, if property is purchased with mixed funds (that is, of the claimant and the defaulting fiduciary), the claimant is entitled to an equitable lien but not to a proportionate interest in the property.[151] The latter would of course be advantageous to the claimant. Sir George Jessel MR's comments were *obiter* and, in this respect, equivocal. Indeed, in *Primeau v Granfield* (1911) 184 F 480, Learned Hand J said that no such view could be attributed to Sir George Jessel MR, and that there was "no reason ... to press the fiction of a presumed intent to a conclusion which is out of harmony with

147 Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, 1998), pp 107-108, 115.

148 Dobbs D, *The Law of Remedies* (2nd ed, 1993), pp 22-23.

149 Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), p 746.

150 Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, p 640. Compare *Australian & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 at 678.

151 For example, Meagher R P and Gummow W M C, *Jacobs' Law of Trusts in Australia* (6th ed, Butterworths, Sydney, 1997), p 747; Oakley A, "Proprietary Claims and their Priority in Insolvency" [1995] *Cambridge Law Journal* 377 at 414.

the rights of a beneficiary in the analogous case where there has been no mingling of the funds" (at 485).[152]

There is judicial support for the proposition that, in such circumstances, the claimant can elect to take proportionate ownership of the asset in question.[153] The rationale of not limiting the claimant's rights to an equitable lien was compellingly stated by Learned Hand J:[154]

> "[T]here can be no excuse for such a rule. There is no reason why, by adding his own funds to the beneficiary's, the trustee should change the beneficiary's rights in the investment, provided there is no doubt what was the proportion of ownership in the funds actually invested … Why the estate should suffer all the risk and give the trustee the profit if he wins is beyond comprehension" (*Primeau v Granfield* (1911) 184 F 480 at 482).

In *Scott v Scott* (1962) 109 CLR 649 at 661,[155] it was conceded before the High Court that the claimant may elect, where the property is purchased with mixed funds and where the property is "specifically severable", to "take such part thereof as bears the same proportion to the whole as the misapplied trust moneys bore to the purchase price." Examples of "specifically severable" property are bonds and a parcel of shares (at 661).[156] McTiernan, Taylor and Owen JJ said:[157]

> "[W]e cannot fail to observe that the Courts of the United States have carried the matter to its logical conclusion. In effect, they have held that where trust moneys are mixed with moneys of the trustee and the mixed fund is used in acquiring other

152 A similar view to Learned Hand J's is discernible in *Hagan v Waterhouse* (1991) 34 NSWLR 308, Kearney J at 356, and in *Re Tilley's Will Trusts* [1967] Ch 1179 at 1189.

153 *Hagan v Waterhouse* (1991) 34 NSWLR 308, Kearney J at 355. This was conceded to be so in *Re Tilley's Will Trusts* [1967] Ch 1179 at 1189, *Paul A Davies (Australia) Pty Ltd v* Davies [1983] 1 NSWLR 440 at 455 and, in relation to "specifically severable" property, in *Scott v Scott* (1964) 109 CLR 649.

154 Contrast Oakley A, "Proprietary Claims and their Priority in Insolvency" [1995] *Cambridge Law Journal* 377 at 415.

155 See also *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331 at 346-347.

156 Relying on *Brady v Stapleton* (1952) 88 CLR 322, where Dixon CJ and Fullagar J said (at 339): "The real distinction which equity draws is between the case where it is, and the case where it is not, practicable to give effect to the rights of the *cestui que trust* by appropriating to him a specific severable part of the available property." In *Scott v Scott* (at 661), the High Court gave other examples of specifically severable property (livestock, bales of wool), adding that "difficulties might arise where the severance could not be made at a point precisely commensurate with the amount of trust moneys misapplied".

157 (1962) 109 CLR 649 at 664, referring to, inter alia, "the interesting judgment of Learned Hand J in *Primeau v Granfield*".

> property which is not 'specifically severable' the beneficiaries are, nevertheless, entitled to claim a proportionate interest in the property."

In *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 355, Kearney J observed that "the High Court was clearly inclined to approve of the United States decisions".[158] Kearney J applied the principle in the tracing of misapplied funds into non-specifically severable property (at 355-356).

[2344] There may be circumstances in which the claimant is entitled to the entire property acquired with the mixed funds. One such circumstance, discussed above,[159] is where the wrongdoer is unable to distinguish which part of the mixed fund was attributable to her or him. A circumstance in which the claimant may be entitled to a proportion of the property greater than the claimant's proportionate interest in the mixed funds was discussed by Bryson J in *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584. In referring to an investment made with mixed funds, resulting in the acquisition of non-specifically severable property, his Honour said (at 597):

> "If such an investment can be or ... actually has been converted into money by sale, the process of applying apportionment to the proceeds of sale appears attractive and has come to be regarded as conventional. In my opinion the convention may not always be justified; it would not be justified unless the same profit as his proportionate share could have been made by the trustee without using the trust money. There would be many cases where apportionment of the profits or advantages arising on sale of an unauthorised investment in the same proportion as the original contributions would be just ..."

Where the claimant's property is indirectly used by the wrongdoer to acquire other property

[2345] In *Paul A Davies (Australia) Pty Ltd (In liq) v Davies* [1983] 1 NSWLR 440,[160] two directors of the claimant entered into a contract for the purchase of property. The purchase price came

158 A view not shared by Bryson J in *Australian Postal Commission v Lutak* (1991) 21 NSWLR 584 at 595.

159 See above, para [2337].

160 See also *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 354, 365; *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584.

from an unauthorised loan by the claimant together with an advance from a bank secured by first mortgage on the property. After referring to the principle that a claimant will ordinarily be entitled to a proportionate interest in property acquired by a fiduciary with mixed funds, Moffitt P held that, in some cases, the claimant will be entitled to the whole asset:

> "I think a distinction should be drawn and the principle [of apportionment] not applied where the fiduciary does not provide his own money, but, having used trust money to provide the deposit and/or part of the purchase money so as to acquire an equitable interest in the property provides the balance by a mortgage loan on the security of the property. This is the view expressed by *Scott on Trusts* 3rd ed (1967) vol 5 at 3618. The provision of this money itself depends on the gain flowing from the breach of trust." ([1983] 1 NSWLR 440 at 448)

Hutley and Mahoney JJA reached the same conclusion. The characterisation of the advance from the bank as a contribution from the claimant was made notwithstanding that the directors, by personal covenant, undertook to repay it.[161]

[2346] *Paul A Davies* is often cited as an authority on tracing.[162] However, strictly speaking, only Mahoney JA considered the application of "the tracing principle" and did so without reaching a conclusive view ([1983] 1 NSWLR 440 at 445-456). The ratio of *Paul A Davies* is concerned with what Mahoney JA described as the "profit principle"[163] as expressed in *Boardman v Phipps* [1967] 2 AC 46.[164] *Paul A Davies*, like *Scott v Scott* (1963) 109 CLR 649, reveal that both tracing and disgorgement as a result of the profit principle can be "deployed concurrently"[165] in certain factual situations.

[2347] If the principle in *Paul A Davies* does form part of the law of tracing, it is difficult to reconcile it with orthodox tracing principles. Insofar as the property the subject of the claim was

161 In *Paul A Davies,* the Court of Appeal also referred to the principle enunciated in *Boardman v Phipps* [1967] 2 AC 46 to the effect that a defendant who, "contrary to his fiduciary duty makes, and therefore must account for, an unauthorised profit may be entitled to remuneration upon the taking of accounts upon a scale appropriate to his work skill and entrepreneurial efforts": [1983] 1 NSWLR 440, Mahoney JA at 460. See also Moffitt P at 448; Hutley JA at 451. On remuneration of fiduciaries who are found to be in breach of duty, see above, para [2109].

162 See, for example, *Jacob's Law of Trusts in Australia* (6th ed 1997), p 747; compare *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 365, *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584.

163 [1983] 1 NSWLR 440 at 445-456

164 See generally above, Chapter 10: "Fiduciary Obligations".

165 Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), p 20.

acquired with borrowed funds, it was not strictly speaking the proceeds of the claimant's misapplied funds. However, there is a compelling case for permitting the claimant to trace in such circumstances, for otherwise "[i]t would be impossible to trace through the very simple money laundering scheme in which misappropriated value is used as collateral for a loan, and the rogue absconds with the borrowed funds".[166] The limited scope of *Paul A Davies* should also be noted. It is limited to circumstances where the wrongdoer acquires property by using (in whole or in part) moneys borrowed with the claimant's misappropriated property as security. The law does not recognise a broader principle that the claimant can trace wherever the claimant's property has been used, however indirectly, to acquire the asset the subject of the claim.[167]

Withdrawals from a mixed fund attributable to two or more beneficiaries

The Rule in Clayton's Case

[2348] In *Devaynes v Noble (Clayton's Case)* (1816) 1 Mer 572; 35 ER 781, Sir William Grant MR explained what has been described as "the ordinary rule of appropriation of debits against credits (and vice versa) in a single running account between banker and customer",[168] in these terms:

> "Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the

166 Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), p 354, who continues: "The good faith lender having executed on its security, it cannot be said that the funds acquired by the rogue are the traceable proceeds of the misappropriated money, unless we can see execution on the collateral as payment of the debt with the misappropriated money, and unless we can trace through the payment of that debt."

167 See above, paras [2327], [2330]-[2332].

168 *Australia & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 at 676. As to the nature of "running accounts", see *Air Services Australia v Ferrier* (1996) 185 CLR 483 at 504.

> balance at the head, instead of the foot, of it." ((1816) 1 Mer 572 at 608-609; 35 ER 781 at 793)

In the banking context, the Rule in *Clayton's Case* thus determines *which* debts owed by the bank to the customer have been paid off.[169] The case "was authority for the principle that, when sums are mixed in a bank account as a result of a series of deposits, withdrawals are treated as withdrawing the money in the same order as the money was deposited".[170] In other words, the "rule presumes that payments made in reduction of a debt are intended to be applied consecutively in discharge of the items making up the debt".[171] It is not an invariable rule: "[T]he circumstances of a case may afford ground for inferring that transactions of the parties were not so intended to come under this general rule."[172]

The application of the Rule in Clayton's Case to wrongfully mixed funds attributable to two or more innocent claimants

[2349] In *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22 at 43, Leggatt LJ observed that "[d]uring the 175 years since the rule in *Clayton's Case* was devised neither its acclaim nor its application has been universal". It is a matter of considerable contention whether the rule should be adopted to determine the rights, inter se, of innocent contributors to a wrongfully mixed fund in a bank account. Assume, for example, that the trustee wrongfully deposits $100 belonging to beneficiary A into a bank account, then $100 belonging to beneficiary B; and then dissipates $100. The application of the Rule in *Clayton's Case* would result in A bearing the loss entirely … the rationale is that, A's $100 being the "first in", it is also deemed to be "first out". By contrast a rateable apportioning of the loss would mean that the loss would result in both A and B losing $50 each.

As Dillon LJ pointed out in *Barlow Clowes* at 28, *Clayton's Case* "was not a case of tracing at all, but a case as to the appropriation of payments". Yet there is judicial support for the application of the Rule in *Clayton's Case* to determining the inter se interests of

169 *Re Ontario Securities Commission & Graymac Credit Corp* (1986) 30 DLR (4th) 1 at 13.

170 *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22, Woolf LJ at 35.

171 *Sibbles v Highfern Pty Ltd* (1987) 62 ALJR 55 at 57.

172 *Cory Bros & Co Ltd v Owners of the Turkish Steamship "Mecca"* [1897] AC 286, Lord Halsbury LC at 290. See also *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22.

innocent claimants in a tracing action. Perhaps the most notable authority in this regard is *Re Hallett's Estate*[173] itself. In *Barlow Clowes*,[174] it was submitted that *Clayton's Case* applied in resolving the rights of a banker and its customer to the funds in a bank account, but that it did not apply to the conflicting claims of beneficial interests in an account. This proposition was rejected by the Court of Appeal.[175] The position has long been, in England at least, that *Clayton's Case* applies where the claimant's funds have been wrongfully mixed in an active, unbroken, bank account.[176] In *Re Diplock* [1948] Ch 465 at 553-554, Lord Greene MR said:

> "It might be suggested that the corollary of treating two claimants on a mixed fund as interested rateably should be that withdrawals out of the fund ought to be attributed rateably to the interests of both claimants. But in the case of an active banking account this would lead to the greatest difficulty and complication in practice and might in many cases raise questions incapable of solution. What then is to be done? In our opinion, the same rule as that applies in *Clayton's case* should be applied. This is really a rule of convenience based on so-called presumed intention. It has been applied in the case of two beneficiaries whose trust money has been paid into a mixed banking account from which drawings were subsequently made ..."

However in *Barlow Clowes* [1992] 4 All ER, at 39 (original emphasis),[177] Woolf LJ said:

> "[I]t is settled law that the rule in *Clayton's Case can* be applied to determine the extent to which, as between each other, equally innocent claimants are entitled in equity to moneys which have been paid into a bank account and then subject to the movements within that account. However, it does not, having regard to the passages from the judgments in the other authorities cited, follow that the rule has always to be applied for this purpose. In a number of different circumstances the rule has not been applied. The rule need only be applied when it is convenient to do so and when its application can be said to do broad justice having regard to the nature of the competing claims".

173 (1880) 13 Ch D 696, Fry J at 699-670, relying on *Pennell v Deffell* (1853) 4 DM & G 372.

174 Where the authorities are reviewed. See also *Re Arimu Holdings Ltd* [1989] 3 NZLR 487.

175 [1992] 4 All ER 22 at 33, 39, 44.

176 Lord Goff and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 108-109.

177 See too Dillon LJ at 29, 33; Leggatt LJ at 44.

Thus, the Rule in *Clayton's Case* is "sensibly not applied when the cost of applying it is likely to exhaust the fund available for the beneficiaries" (Woolf LJ at 39). Further, "[a] theme running through many of the authorities is that the rule is inapplicable because of the presumed intention of the parties to the account in which the moneys were intermingled" (at 41).[178] It will only apply where there is wrongful mixing of different sums of money in a single running bank account. It will not apply where the claimants intend that their money will be mixed in a single fund, as in the case of a collective investment scheme (Woolf LJ at 41; Leggatt LJ at 45).

[2350] The application of the Rule in *Clayton's Case* to equitable tracing has been the subject of severe criticism. In *Re Walter J Schmidt & Co; Ex parte Feuerbach* (1923) 298 F 314 at 316,[179] Learned Hand J said:

> "The Rule in *Clayton's Case* is to allocate the payments upon an account. Some rule had to be adopted, and though any presumption of intent was a fiction, priority in time was the most natural basis of allocation. It has no relevancy whatever to a case like this. Here two people are jointly interested in a fund held for them by a common trustee. There is no reason in law or justice why his depredations upon the fund should not be borne equally between them. To throw all the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary, and is equally a fiction as the Rule in *Claytons Case*, supra. When the law adopts a fiction, it is, or at least it should be, for some purpose of justice. To adopt it here is to apportion a common misfortune through a test which has no relation whatever to the justice of the case".

In *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (Woolf LJ at 35-36; Leggatt LJ at 44), the majority of the Court of Appeal expressed sympathy with Learned Hand J's sentiments, but held that the court was bound by previous authority not to disregard the Rule in *Clayton's Case*. Courts in Canada[180] and New Zealand[181] have not regarded themselves as so constrained; and in *Re Shoreline Currencies (Australia) Pty Ltd and the Companies Code*,[182] Kearney J said:

178 See, for example, *Re Hallett's Estate* (1880) 13 Ch D 696 at 728, 738; *Cory Bros & Co Ltd v Owners of the Turkish Steamship "Mecca"* [1897] AC 286.

179 However, Learned Hand J concluded that he was bound by authority to adopt the first in, first out approach.

180 *Re Ontario Securities Commission & Graymac Credit Corp* (1986) 30 DLR (4th) 1.

181 *Re Registered Securities Ltd* [1991] 1 NZLR 545.

182 (Unreported, Supreme Court of New South Wales, 14 October 1988), quoted by Kearney J in *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 358-359.

> "However, the application of this rule as between beneficiaries of a mixed fund of various trust sums has been roundly condemned in *Scott on Trusts*, 3rd ed (1967) vol 5 at 3641, and has also been criticised in Hanbury and Maudsley, *Modern Equity*, 11th ed (1981) at 660 and in *Jacobs' Law of Trusts in Australia*, 5th ed (1986) at 698. Indeed it is convincingly demonstrated in the articles 'Tracing and the Rule in Clayton's Case' by D A McConville (1963) 79 *Law Quarterly Review* 388 and 'Re Diplock ... a Reappraisal' by P F P Higgins (1963-1964) 6 UWALR 428 that such application of Clayton's Case is not only inconsistent with principle but also with the express decision of the House of Lords in *Sinclair v Brougham* [1914] AC 398."

In *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 358, Kearney J said:

> "I endorse the emphatic pronouncement in *Jacobs' Law of Trusts* ... that: ... '*Clayton's* case regulates the state of account between banker and customer, and has nothing to say as to the relationship of trustee and beneficiary'."

This approach was approved by the New South Wales Court of Appeal in *Keefe v Law Society of NSW* (1998) 44 NSWLR 451 at 461, where Priestley JA (with whom Sheller and Powell JJA agreed) said:

> "His decision should, in my opinion, be approved by this Court. (The application of the rateable approach can itself be subject to complication depending on the timing of deposits to and wrongful withdrawals from a trust account in which the funds of different beneficiaries are held, as was pointed out by Learned Hand J in *Re Walter J Schmidt & Co; Ex parte Feuerbach* 298 F 314 (1923). That does not however detract from the soundness of its application in straightforward situations)".

The pari passu method

[2351] The rule in *Clayton's Case* has had to compete with what has been called the "pari passu ex post facto" solution,[183] according to which depletion in the mixed fund is shared equally amongst claimants. Thus, in the case of misapplied investments, "[t]his involves establishing the total quantum of the assets available and sharing them on a proportionate basis among all the investors who could be said to have contributed to the acquisition of those assets, ignoring the dates on which they made their investment" (Woolf LJ at 36).

183 *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, Woolf LJ at 36.

This approach has the overwhelming support of commentators and has received increasing support in the courts.[184] In *Re British Red Cross Balkan Fund* [1914] 2 Ch 419, one of the earliest cases to limit the application of the Rule in *Clayton's Case*, Astbury J held that the balance of the mixed fund belonged to contributors on a pari passu basis. Astbury J (at 421) said of the Rule in *Clayton's Case*:

> "It is a mere rule of evidence and not an invariable rule of law, and the circumstances of any particular case may or may not afford ground for inferring that the transactions of the parties were not intended to come under the general rule. In the present case the rule is obviously inapplicable."

Why this was so is not readily apparent. This and other cases in which the Rule in *Clayton's Case* has not been applied have been explained as cases in which the presumed intention of the parties was that there be a rateable distribution.[185] However, a better explanation of these cases is that the courts are reluctant to adopt an inequitable rule which ought to have no role in equitable tracing.

The "rolling charge" approach

[2352] In *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22 at 27, 33, 35, the Court of Appeal considered the application of a third possible basis of distribution amongst claimants, referred to as the "rolling charge" or "North American" method. Dillon LJ (at 27-28) described it thus:

> "This method goes on the basis that where funds of several depositors, or sources, have been blended in one account, each debit to the account, unless unequivocally attributable to the moneys of one depositor or source (eg as if an investment was purchased for one), should be attributed to all the depositors so as to reduce all their deposits pro rata, instead of being attributed, as under *Clayton's Case*, to the earliest deposits in point of time. The reasoning is that if there is an account which has been fed only with trust moneys deposited by a number of individuals, and the account holder misapplies a sum of the account for his own purposes, and that sum is lost, it is fair that the loss should be borne by all the depositors pro rata, rather than that the whole loss should fall first on the depositor who made the earliest deposit in point of time."

184 *Keefe v Law Society of New South* Wales (1998) 44 NSWLR 451 at 461. See above, para [2350].

185 See *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, Woolf LJ at 39-41.

Woolf LJ said that this method "should produce the most just result", but that on the facts of that case it was not appropriate because "the costs involved would be out of all proportion" to the sum in question (at 35). Dillon LJ also commented on the practical problems associated with applying this method. He said (at 28):[186]

> "The complexities of this method would, however, in a case where there are as many depositors as in the present case and even with the benefits of modern computer technology be so great, and the cost would be so high, that no one has sought to urge the court to adopt it, and I would reject it as impracticable in the present case."

In *Australian Securities Commission v Buckley* (1996) 7 BPR 15,024, Santow J held that on the facts before the court, the North American rolling charge method ought to apply (at least to one category of creditors in the case). Santow J concluded that on the facts before him, such method would be "clearly practicable to compute". Further, such method "is generally recognised as fairer than any other in those circumstances".

Tracing into the hands of third parties

[2353] Assume that a claimant's property is disposed by the wrongdoer to a third party. It can trace into any proceeds of the disposition in the wrongdoer's hand. Alternatively the claimant may elect to follow the property into the hands of the third party.[187] The third party may have disposed of the property. The claimant will be able to trace into those proceeds unless the third party can satisfy one of the established defences.[188] Such a third party can rely on the defence of bona fide purchase for value[189] and, perhaps, change of position.[190]

Acute difficulties arise where the innocent third party is a volunteer who has mixed her or his own property with that of

186 See Hayton D, "Equity's Identification Rules" in Birks P (ed), *Laundering and Tracing* (Clarendon Press, Oxford, 1995), pp 13-16.

187 *Foskett v McKeown* [2001] 1 AC 102 at 127; see above, para. [2307]. See, for example, *Adstead Pty Ltd v Liddan Pty Ltd* (1997) 15 ACLC 1687 at 1715.

188 See, for example, *Black v S Freedman & Co* (1910) 12 CLR 105.

189 See above, paras [2324]-[2326].

190 See above, para [2334].

the claimant. In *Re Diplock* [1948] Ch 465,[191] the Court of Appeal considered this issue in circumstances where an executor distributed the residuary estate to innocent third parties, being charities; the distribution was mistakenly made, as it was later held that the will was void. The Court of Appeal said (at 539):

> "[I]f the volunteer mixes the money with money of his own, or receives it mixed from the fiduciary agent, he must admit the claim of the true owner, but is not precluded from setting up his own claim in respect of the moneys of his own which have been contributed to the mixed fund. The result is that they share pari passu. It would be inequitable for the volunteer to claim priority for the reason that he is a volunteer: it would be equally inequitable for the true owner of the money to claim priority over the volunteer for the reason that the volunteer is innocent and cannot be said to act unconscionably if he claims equal treatment for himself. The mutual recognition of one another's rights is what equity insists upon as a condition of giving relief."

The Court of Appeal considered the position of a number of bequests and the following principles emerged:

- Where the claimant and volunteer have contributed money to the acquisition of a "mixed asset", each has a charge over the asset (at 546-548).
- Semble, the claimant and the volunteer will share rateably in any increase in the value of the asset and will share any loss attributable to a decrease in value rateably (at 539, 546, 557).
- Where the claimant's money is used to alter and improve a pre-existing asset of the claimant, the claimant is left with no tracing remedy (at 547).
- Where a volunteer mixes the volunteer's money with the claimant's, and subsequently withdraws an amount equal to the claimant's, the volunteer will be deemed to have "unmixed" the said amount: "[S]urely it would be unconscionable for the volunteer who, for his own purposes, has earmarked the trust money to assert that what he has earmarked is not trust money but money which he is entitled to keep as his own." (at 552)
- Where the claimant's money is mixed with the volunteer's money in a current bank account, the Rule in *Clayton's Case* will apply (at 554).[192]

191 This case is not only an authority on tracing. The Court of Appeal also held that the third party volunteers, who received distributions mistakenly made, were subject to a *personal* liability to make restitution to those who should have received the distributions. The House of Lords upheld this on appeal: *Ministry of Health v Simpson* [1951] AC 251. The in personam claim has a major limitation — the claimant must first exhaust her or his remedies against the wrongdoing executor or administrator.

192 Contrast above, paras [2348]-[2350].

In the light of more recent authority, the last of these propositions would no longer be tenable.[193]

[2354] A claimant is not required to sue the fiduciary prior to initiating a tracing action against the innocent volunteer. A proposition to the contrary is discernible in *Re Diplock* [1948] Ch 465 at 503. However, in *Hagan v Waterhouse* (1991) 34 NSWLR 308, at 370,[194] Kearney J held that tracing claims are not "subject to prior personal claims being made against the trustee". In this sense a tracing claim is to be contrasted with a claim in personam.

TRACING AND PRIORITIES

[2355] A live issue concerning equitable tracing is the extent to which the courts ought to take into account the interests of unsecured creditors of the wrongdoer, who are in effect innocent third parties.[195] The debate concerning the extent to which the claimant ought to be entitled to a proprietary remedy, thereby obtaining priority over unsecured creditors, is not restricted to tracing. As Mason CJ stated extrajudicially,[196] the problem is a general one and "has gained an extra dimension now that unconscionable conduct/unjust enrichment can generate a remedial constructive trust". In the context of constructive trusts, Gummow J has spoken (extrajudicially) of the difficulty of drawing a line between property and obligation and between personal and proprietary remedies, stating:[197]

> "[M]any learned commentators ... have questioned why successful plaintiffs ... should gain priority over general creditors. The traditional answer of equity, recently affirmed by the Privy Council in *Space Investments Limited v Canadian Imperial Bank of Commerce Trusts Co (Bahamas) Limited* (1986) 1 WLR 1072 at 1074 ... has been that an antecedent fiduciary relationship involves a reposition of trust and confidence which is not placed by general creditors in the party with whom they have dealt at their own risk. That may be sufficient to explain past decisions to the prejudice of the general body of creditors. But where there is no fiduciary duty should general creditors be further deferred

193 See *Keefe v Law Society of NSW* (1998) 44 NSWLR 451.

194 Citing *Re Diplock* [1948] Ch 465 and *Re J Leslie Engineers Co Ltd* [1976] 1 WLR 292.

195 See the excellent analysis by Oakley A, "Proprietary Claims and their Priority in Insolvency" [1995] *Cambridge Law Journal* 377.

196 Mason A, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238 at 253.

197 Book Review (1991) 107 *Law Quarterly Review* 507 at 509. See also *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-114.

> to parties who have bestowed a benefit under a unilateral mistake or some form of compulsion?"

In *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536 at 556,[198] Gummow J said that "[w]here the beneficiary of the constructive trust dealt with the constructive trustee as a fiduciary and the general creditors did not do so, the case for preferring the fiduciary claimant has been seen as more readily apparent". However as Gummow J points out,[199] in Australia, following *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, a breach of a fiduciary duty will not necessarily give rise to a successful *proprietary* claim by the claimant.

[2356] In *Space Investments Ltd v Canadian Imperial Bank of Commerce Trusts Co (Bahamas) Ltd* [1986] 1 WLR 1072 Lord Templeman said that, where a bank trustee uses trust moneys for the purposes of the bank, and it is impossible to trace the beneficiaries' money to any particular asset belonging to the trustee bank, "equity allows the beneficiaries ... to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank" (at 1074). Speaking of the priority thus enjoyed by the claimant beneficiaries over the claims of customers and unsecured creditors, Lord Templeman said (at 1074):

> "This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full."

This statement contains assumptions about the risk taking of creditors as compared to investors in trusts which may no longer be necessarily justified.[200] More significantly, the approach in *Space Investments* departs from the orthodox transactional approach to tracing exemplified by the recent decision of the House of Lords in *Foskett v McKeown*.[201]

198 See also *Australian Securities Commission v Melbourne Asset Management Nominees* (1994) 12 ACLC 364 at 382-383.

199 (1987) 16 FCR 536 at 555-556. See also *Southern Cross Pty Ltd v Ewing* (1988) 91 FLR 271 at 281.

200 In *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 517, Finn J said of the commercial risk taking of a company director compared to the restraint expected of trustees (as discussed in *Daniels v Anderson* (1995) 37 NSWLR 438 at 494): "[U]nderlying the distinction today is, probably, not merely an historical assumption about the separate purposes of companies and of trusts, but also a generalisation about the different risks that persons who invest their assets in companies on the one hand and in trusts on the other are considered likely to have assumed."

201 See above, paras [2301]-[2306], [2327]. The "transitional" approach is sometimes referred to as the "exchange-product" or "form to form" approach: see generally Rotherham C, *Proprietary Remedies in Context* (Hart, Oxford, 2002), pp 110-126.

[2357] *Space Investments* represents a high-water mark for the rights of tracing claimants. It is unlikely that such an approach will be followed in Australia.[202] In *Re Goldcorp Exchange* [1995] 1 AC 74,[203] the Privy Council declined to agree with Lord Templeman's comments, and in *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211,[204] the Court of Appeal distinguished the comments as being applicable to bank trustees only. However in *Re Goldcorp Exchange* [1995] 1 AC 74 at 110 the Privy Council foreshadowed reconsideration of the relationship between the right to trace and the interests of unsecured creditors.[205]

[2358] Another alternative to the orthodox tracing rules is provided by the "swollen asset" theory. It provides that if the claimant's money has been used by the wrongdoer to discharge the wrongdoer's debt, the claimant may be entitled to a proprietary interest in the wrongdoer's general assets.[206] The "swollen asset" theory does not form part of the law of tracing[207] as that term is

202 For a useful discussion of the applicability of the principle in *Space Investments* see *Sutherland (in the matter of Scutts)* [1999] FCA 147, Sackville J at [49]-[69].

203 Writing extrajudicially, Justice Finn has said: "[H]aving rediscovered at last the equitable lien, and having been reminded that risk assumption and risk allocation are essential instruments in apportioning losses [see *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072], we nonetheless seem to wish to take flight from the opportunity now presented to develop an intelligible jurisprudence on how properly to settle competition between the creditors of a person on whom there are distinct classes (or types) of claimant — a jurisprudence in which the resultant priority can be fixed by the remedial use of the lien and not by the ultimately artificial process of discerning or rejecting the existence of an equitable estate in the claimant. For my own part, I would respectfully suggest that the decision of the Privy Council in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 is an emblem of that flight." (Finn P, "Equitable Doctrine and Discretion in Remedies" in W R Cornish et al (eds), *Restitution — Past, Present and Future* (Hart, Oxford, 1998), p 264).

204 Leave to appeal to the House of Lords was refused: [1995] 1 WLR 31.

205 For analyses of the principles and policy issues involved, see *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, Gummow J at 552-556; Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), pp 234ff; Fratcher W (ed), *Scott on Trusts* (4th ed, Little, Brown & Co, Boston, 1989), Vol V, pp 651ff; Goode R, "Property and Unjust Enrichment" in Burrows A (ed), *Essays on the Law of Restitution* (Clarendon, Oxford, 1991); Goode R, "The Recovery of a Director's Improper Gains: Proprietary Remedies for Infringement of Non-Proprietary Rights" in McKendrick E (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon, Oxford, 1992), p 137; Rotherham C, *Proprietary Remedies in Context* (Hart, Oxford, 2002), Ch 4.

206 Dobbs D, *The Law of Remedies* (2nd ed, 1993), p 15.

207 Compare Glover J, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995), p 240. Variants of the swollen asset theory may however import aspects of the law of tracing: see Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 270-274, 310-320. It has been suggested that although tracing has traditionally been regarded as being concerned with substitution (the "transactional approach"), the "restitutionary" approach requires more attention. On this premise, one can speak of "[t]he swollen assets theory of tracing": Evans S, "Rethinking Tracing and the Law of Restitution" (1999) 115 *Law Quarterly Review* 469 at 471-472, 492. See also Rotherham C, "Tracing and Justice in Bankruptcy" in Rose F (ed), *Restitution and Insolvency* (Mansfield Press, 2000), pp 124-126. However, the transactional approach is firmly established by the authorities: see above, paras [2301]-[2306], [2327].

used in this chapter.[208] The high point of the swollen asset theory was in the United States during the Depression, when it was adopted in a number of influential decisions.[209] It has subsequently been rejected in the United States[210] and does not form part of the law in Australia.[211] Its fundamental weakness is that it confers priority over unsecured creditors of whom it can also be said that their funds have at some time swollen the wrongdoer's assets.[212] Further, it can be very difficult to apply in practice.[213]

208 See above, [2301]-[2302].

209 Oesterle D A, "Deficencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306" (1983) 68 *Cornell Law Review* 172 at 189.

210 See, for example, *Restatement of the Law of Restitution* (American Law Institute, 1937), p 866 which states (215): "(1) Except as stated in Subsection (2), where a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a constructive trust or lien upon any part of the wrongdoer's property. (2) Where a broker wrongfully disposes of the securities of a customer, the customer is entitled to claim in substitution therefor securities of the same issue owned by the broker."

211 *Australian Securities Commission v Buckley* (1996) 7 BPR 15,024, Santow J.

212 Thus, Dobbs D, *The Law of Remedies* (2nd ed, 1993), p 15 states: "If the swollen assets approach only operated to redress a wrong to the plaintiff, that approach would be accepted without dispute. But the effect of imposing a trust or lien is to give the plaintiff a priority over creditors as to the property in question. A priority over other creditors can be justified if the property can be identified as a product of the plaintiff's funds. But if specific property cannot be identified as having been produced by use of the plaintiff's monies, there is no basis for giving the plaintiff a preference over all other creditors, whose funds at one time or another have likewise swollen the defendant's assets. The general rule that requires tracing of the plaintiff's funds into identifiable property, then, seems correct."

213 Smith L, *The Law of Tracing* (Clarendon Press, Oxford, 1997), pp 315-320.

CHAPTER TWENTY-FOUR

DECLARATIONS

Jennifer Stuckey-Clarke and Fiona R Burns

INTRODUCTION

[2401] A declaration is an order made by a court which declares with finality the nature of the legal rights and obligations of the parties in a dispute before it. Whilst it declares legal rights and obligations, it is not a coercive executory judgment which can be enforced by official action against a defendant. It also differs from "constitutive-investitive" or "divestive" judgments which create rights, and interlocutory or procedural judgments which regulate proceedings pending the determination of the rights and liabilities of the parties.[1]

The declaration has proved to be a useful and flexible order for a variety of reasons. Proceedings are often speedy and less expensive than litigation where other remedies are sought. The litigation may be limited to a single issue, thereby minimising protracted proceedings. A declaration may be negative in substance. For example, a court may simply order that a contract or obligation has not been breached. A declaration may also be ordered where there is no other relief available or such other relief is inappropriate or inadequate.[2]

1 The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [1.02]-[1.03]; Young P W, *Declaratory Orders* (2nd ed, Butterworths, 1984), para [201].

2 For a helpful discussion see The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [1.08]-[1.12]; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1933]-[1934]. Note the effectiveness of declarations in taxation matters: Chappell A, "The Use of Declarations in Taxation Disputes" (1990) 2 *The CCH Journal of Australian Taxation* 20; and where prerogative writs are inadequate in public law matters: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Gaudron, Gummow and Kirby JJ at 257; *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135, Gaudron J at 157-158.

Legal historians have opined that the development of the declaratory order in modern times evidences a more enlightened and less coercive legal system.[3] The history of this contemporary remedy is complex and not the subject of detailed treatment here.[4] However, there were two historical developments which have had a profound effect upon the modern declaration. First, although the declaratory judgment was well recognised in legal history, it was only after 1850 that it grew in importance.[5] Traditionally, equity could always grant declarations as relief ancillary to principal relief. However, "naked" or mere declarations could not be granted. In the 19th century Lord Brougham advocated the adoption of the practice of the courts of Scotland where declarations were made without the need for consequential relief.[6] In a series of legislative initiatives commencing with the *Chancery Act* of 1850 and culminating in the *Judicature Acts* of 1873 and 1875, the courts in the United Kingdom were given the power to make binding declarations whether or not consequential relief could be or was claimed.[7] Secondly, the historical distinction between declarations granted in the original jurisdiction (where the litigation was between private parties) and the supervisory jurisdiction (where the litigation was between the Crown and a subject)[8] is still reflected in current law.[9] Where a declaration is sought in relation to a public matter (the supervisory jurisdiction), questions of standing remain problematic.[10]

3 See for example Sunderland E R, "A Modern Evolution in Remedial Rights — The Declaratory Judgment" (1917) 16 *Michigan Law Review* 69 at 70.

4 For a comprehensive historical treatment, see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1901]-[1914]; The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), chapter 2; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 433-436.

5 The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), para [1.04].

6 The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), para [2.05].

7 For a comprehensive historical treatment, see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1901]-[1906].

8 The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [2.26]-[2.33]; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1906] and [1916].

9 In relation to declarations and injunctions as public law remedies see Mason, Sir Anthony, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World (1994) 110 *The Law Quarterly Review* 238 at 238; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Gaudron, Gummow and Kirby JJ at 257-260; McHugh J at 275; and ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), paras [104]-[132].

10 See below, para [2409].

Although the historical origins of the remedy are in Chancery, the modern declaratory remedy is the creation of statute. It is in no way a purely equitable remedy.[11] Nonetheless, it is a remedy regularly sought in proceedings in equity. For example, where issues arise as to the existence, nature and extent of equitable estates or interests in property, real or personal, or as to whether certain conduct gives rise to an equitable estoppel, or as to the rights, interests, liabilities or duties of any person in respect of a partnership, trust or fiduciary relationship, an application for appropriate declarations may form part of the relief sought.

JURISDICTION

[2402] Contemporary Australian courts exercise a broad jurisdiction with respect to the making of declaratory orders.[12] A series of legislative measures stemming from the reforms in the 19th century have established that all courts have a general declaratory jurisdiction irrespective of whether other relief is being sought[13] and irrespective of the nature of the legal rights which form the subject matter of the order[14] (with some specific exceptions in relation to certain statutorily-created rights). The remedy is available generally and as principal relief.

A Broad Contemporary Jurisdiction

[2403] The broad scope of the contemporary jurisdiction to grant declarations was endorsed by the High Court in *Forster v Jododex*

11 Although it is beyond the scope of this discussion, it is important to note that an arbitrator under a contract may be given power to exercise the same discretionary remedies (including declaratory relief) as courts in order to resolve the disputes between contractual parties: see *Government Insurance Office v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 and Henderson B, "*Cufone v Cruse*" (2000) 12 *Australian Construction Law Bulletin* 55.

12 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 435-436; *Clyne v Deputy Commissioner of Taxation* [1983] 1 NSWLR 110*; Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271.

13 *High Court Rules* (Cth), O 26 r 19; *Federal Court of Australia Act* 1976 (Cth), s 21; *Supreme Court Rules* (ACT), O 29 r 5; *Supreme Court Act* 1970 (NSW), s 75; *Supreme Court Act* 1979 (NT), s 18; *Supreme Court Act* 1995 (Qld), s 128; *Supreme Court Act* 1935 (SA), s 31; *Supreme Court Rules* 2000 (Tas) Rule 103; *Supreme Court Act* 1986 (Vic), s 36; *Supreme Court Act* 1935 (WA), s 25(6). Note also judicial statements in this regard: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, Mason CJ, Dawson, Toohey and Gaudron JJ at 581-582*; Telstra Corporation Ltd v Australian Telecommunications Authority* (1995) 133 ALR 417, Lockhart J at 424-425; *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663, Lockhart J at 671 (with whom Spender and Cooper JJ agreed).

14 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1915]-[1916]. Where a right is created by statute and a specific means of enforcement is provided, it may be that no declaration can be granted: see below, para [2411].

Australia Pty Ltd (1972) 127 CLR 421.[15] In that case, the appellant had applied for an authority under the *Mining Act* 1906 (NSW) to enter lands owned by the respondent. The respondent sought a declaration that such an authority could not be granted to the appellant because the respondent already held a valid mining exploration licence. The matter was before the mining warden for determination at the time the declaration was sought. At first instance, the declaration was granted. When the jurisdiction to make such a declaration was challenged, the High Court confirmed the jurisdiction.[16] The judgment of Gibbs J (as he then was) dealt with the nature and scope of the declaratory order in Australia. His Honour reviewed the various legislative reforms which created the general declaratory jurisdiction, and approved the view of Mason JA in *Salmar Holdings Pty Ltd v Hornsby Shire Council* [1971] 1 NSWLR 192, that the "jurisdictional limitations on the power to grant declaratory relief are, therefore, no more extensive than the limitations applicable to the power to grant declaratory relief exercisable by a court under a judicature system" (at 202). Gibbs J concluded that the "jurisdiction to make a declaration is a very wide one"[17] and considered that only by express ouster could Parliament exclude the courts' declaratory jurisdiction. Only Walsh J in dissent considered that courts should decline to exercise their declaratory jurisdiction where Parliament has appointed a specialised tribunal to determine the matters in dispute.[18] As a result of *Forster's* case the breadth of the contemporary jurisdiction was confirmed.

The wide contemporary jurisdiction to award declaratory relief has had several consequences. Following the decision in *Forster*, courts have held that jurisdiction to grant declaratory relief is excluded only by "express language or by necessary implication from the words of the statute, where the words are clear."[19]

15 See also for example *Sankey v Whitlam* (1978) 142 CLR 1; *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Slattery v Public Service Board* [1983] 3 NSWLR 41; *Gorman v Fitzpatrick* (1983) 4 NSWLR 286; *Garema Mackay Pty Ltd v Proserpine Shire Council* [1984] 2 Qd R 32; *Anderson v Attorney-General* (1987) 10 NSWLR 198; *Fire & All Risks Insurance Co Ltd v Nominal Defendant* [1988] 1 Qd R 113; *Waterhouse v Gilmore* (1988) 12 NSWLR 270; *Attorney-General v Brisbane City Council* [1988] 1 Qd R 346; *Totalisator Administration Board of Queensland Commissioner of Taxation* (1988) 88 FLR 217; *Linter Textiles (Australia) Ltd v Citibank Ltd* (1989) 97 FLR 362; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, Mason CJ, Dawson, Toohey and Gaudron JJ at 581-582.

16 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 435-436 with whom Stephen J at 448 and Mason J at 450 agreed. McTiernan J at 426 agreed with Mason J.

17 Gibbs J at 435.

18 Walsh J at 427.

19 *Telstra Corporation Ltd v Australian Telecommunications Authority* (1995) 133 ALR 417, Lockhart J at 426 citing *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 435-436; *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643, Dawson J at 652; *Philips Electonics NV v Remington Products Australia Pty Ltd* (1998) AIPC ¶ 91-393, Lehane J at 37,104.

Courts may be able to rely on a broader provision to supplement limited powers granted under specific legislation. In *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, the Full Federal Court examined the extent of its general jurisdiction. In that case, a contravention of s 52 of the *Trade Practices Act* 1974 (Cth) had been established on the facts, but the Court had previously held that no injunction could be granted (*Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1). However, the Full Court held that, although s 163A of the *Trade Practices Act* 1974 (Cth) did not empower the court to make declarations with respect to contraventions of s 52, it nevertheless had power under s 21 of the *Federal Court of Australia Act* 1976 (Cth) to grant declaratory relief in the public interest and, in the circumstances of the case before it, to show its disapproval of the conduct which had contravened the *Trade Practices Act* 1974 (Cth).[20]

It has also been held that the provision of a statute setting out a particular procedure for determining an issue in relation to which a declaration has been sought, does not automatically or necessarily lead to the conclusion that a declaration will be refused. In *Philips Electronics NV v Remington Products Australia Pty Ltd* (1998) AIPC ¶ 92-393[21] the applicants argued that the *Trade Marks Act* 1995 (Cth) set down an exclusive procedure for the application and registration of trade marks. Therefore, an order could not be obtained declaring a particular trade mark unregistrable. Lehane J held that the existence of such a procedure did not mean that a declaration would automatically be refused. Rather, the existence of the scheme would be an important consideration for the exercise of the Court's discretion to make a declaratory order (Lehane J at 37,106).

Since declarations can now be granted in relation to any legal dispute, they may be sought in a variety of contexts, including cases involving criminal liability. Whilst it is not likely that a court will make a declaration as to the guilt or innocence of a party in criminal proceedings (as this is better determined in the criminal courts), it may make a declaration concerning civil rights of a defendant and the conduct of the criminal

20 *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, Sheppard J at 101; Foster J at 106; Hill J at 108-112. See also Corones S, "Restrictive Trade Practices" (1994) 22 *Australian Business Law Review* 221 at 225-228.

21 Note also the decision in *Ancart Pty Ltd v Snowy River Council* (1995) 39 NSWLR 78.

proceedings.[22] In *Sankey v Whitlam* (1978) 142 CLR 1, the High Court confirmed that courts had jurisdiction to make declaratory orders in relation to criminal proceedings, but that this jurisdiction should be sparingly used (Gibbs ACJ at 20-27 (with whom Stephen, Mason and Aickin JJ agreed)).[23] The Court declared that certain documents which were subpoenaed in criminal proceedings were not protected by Crown privilege. In *Director of Public Prosecutions v His Honour Judge G D Lewis* [1997] 1 VR 386 the Victorian Director of Prosecutions successfully sought declaratory relief against a County Court judge who had ordered a permanent stay of indecent assault charges because of their alleged ambiguity and concerns about the use of evidence. In this case the Court of Appeal felt compelled to make a declaratory order because the stay of proceedings was based on the erroneous application of principles of law (Tadgell JA (with whom Ormiston and Clarke JJA agreed) at 402-403).

The Nature of the Broad Jurisdiction and Discretionary Factors

[2404] There appear to be two interpretations concerning the relationship of a court's jurisdiction to make declaratory orders and the discretion which the court may exercise in determining whether to grant declaratory relief. The first and predominant interpretation is that courts have a broad contemporary jurisdiction. In most cases courts have an initial jurisdiction to make a declaratory order, and a court will exercise its discretion in determining whether a declaration will be granted in a particular case.[24]

22 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1920] and the cases cited therein. See also *Bacon v Rose* [1972] 2 NSWLR 793; *P & C Cantarella Pty Ltd v Egg Marketing Board for the State of New South Wales* [1973] 2 NSWLR 366. For example, declarations have been made concerning the conduct of committal proceedings: *Willesee v Willesee* [1974] 2 NSWLR 275 and wrongful custody: *Haley v Commissioner of Corrective Services* [1975] 1 NSWLR 118. For a comparison between English and Australian approached to committal proceedings see Mason, His Honour Sir Anthony, "Declarations, Injunctions and Constructive Trusts: Divergent Developments in England and Australia" (1980) 11 *University of Queensland Law Journal* 121 at 123-124. Declarations have also been ordered in relation to public bodies investigating matters which could lead to criminal prosecution: see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125. In *Maksimovic v Walsh* [1983] 2 NSWLR 674 (discussed by Starke J G QC, "Practice Note" (1984) 58 *Australian Law Journal* 674) Clarke J held that a person had standing to seek a declaration in the nature of a prohibition that a coroner had no jurisdiction to suggest that an indictable offence had been committed and name the person against whom the charge should be brought.

23 See also *Director of Public Prosecutions v His Honour Judge Lewis* [1997] 1 VR 386, Tadgell JA at 402 (with whom Ormiston and Charles JJA agreed).

24 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 435; *Salmar Holdings Pty Ltd v Hornsby Shire Council* [1971] 1 NSWLR 192, Mason JA at 201; *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43, Street CJ at 51-52

Therefore, "what is often loosely referred to as matters of jurisdiction really are not so at all but merely situations where a court, having jurisdiction in the matter, refuses to exercise it."[25] In *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corp* [1977] 1 NSWLR 43, Street CJ neatly encapsulated this view when he stated (at 50-51):[26]

> "It is not without importance, moreover, that, in the High Court, there is express recognition of the undesirability of embarking upon judicial expositions generalizing upon the difficult question of the scope of the discretion. It is of particular importance to note that a discretionary refusal to make a declaration in any given case is an exercise, albeit negatively, of the declaratory jurisdiction. Factors and considerations leading to a discretionary refusal are an unsafe guide to marking out a jurisdictional boundary line. Cases in which it is said that one or another element will result in a situation in which the jurisdiction *should, or should not*, be exercised are not to be treated as establishing that such an element will result in a situation in which the jurisdiction *can, or cannot*, be exercised. The very width of the scope of discretionary considerations confirms the extent of the jurisdictional field as well as the difficulty and inadvisability of attempting to do what the legislature has not done, that is to particularize the jurisdictional limit" (original emphasis).

Accordingly, the various well established discretionary factors do not limit or curtail the jurisdictional authority of the court to make a declaratory order.

The second approach, which has less support, has been to suggest that what have been considered to be discretionary factors may not only guide a judge as to whether to exercise discretion in favour of the applicant, but also effectively delimit the power of the court to make a declaratory order. A recent example of a more restrictive approach to jurisdiction can be found in the judgment of Ormiston JA (with whom Tadgell JA agreed) in *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liquidation)* [1997] 2 VR 256 where the view that courts had an unlimited jurisdiction to grant declaration

25 Young P W, *Declaratory Orders* (2nd ed, Butterworths, 1984), para [401]; note also *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136, Lord Diplock at 1155.

26 See also *Salmar Holdings Pty Ltd v Hornsby Shire Council* [1971] 1 NSWLR 192, Mason JA at 201, citing *Ibeneweka v Egbuna* [1964] 1 WLR 219, Viscount Radcliffe (for the Privy Council) at 225; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, Mason CJ, Dawson, Toohey and Gaudron JJ at 581-582; *CE Heath Casualty & General Insurance v Pyramid Building Society (in liq)* [1997] 2 VR 256, Phillips JA at 284.

(subject to statute) was not approved. In that case, the respondent argued that declaratory relief could not be rejected for want of jurisdiction and that denial of relief was dependent entirely on jurisdictional factors (Ormiston JA at 258-259). Ormiston JA expressed concern that such an interpretation would lead to complex and inconvenient proceedings which could not be terminated even though a party's claim was "hopeless" (at 259). He held that whether characterised in terms of jurisdiction in the strict sense, there were certain kinds of cases which courts should not permit to proceed. These situations were where there was no real controversy between the parties, where the case was abstract or hypothetical, where the plaintiff has no proper interest in the resolution of the dispute or where there was no defendant who has an interest to oppose the claim for a declaration (Ormiston JA at 260). His Honour also contended that the broad power identified by Gibbs J in *Forster v Jododex* (1972) 127 CLR 421 at 435-436 was limited to a case defining the "rights" of two parties.[27] Moreover, in the subsequent case *University of New South Wales v Moorhouse* (1975) 133 CLR 1, Gibbs J (at 9-10) made it clear that the power to order a declaration was not unlimited and that discretion could not be exercised where the question was a mere hypothetical one.[28]

In most cases, it will not be of any great consequence whether the factor upon which the court relied to deny relief is characterised as jurisdictional or discretionary. However, it has been pointed out that it will have practical consequences where there is an appeal because the issues governing the exercise of discretion differ from considerations whether there is an initial jurisdiction to exercise power (*Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43, Hutley JA at 61).

Limitations to the Broad Jurisdiction

[2405] Although the courts have recognised that there is a broad jurisdiction to order declaratory relief, such jurisdiction will not be available where by express language or by necessary statutory implication the court's jurisdiction is ousted.[29] For example, it has been held that a declaration was not appropriate alternative

27 *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liquidation)* [1997] 2 VR 256, Ormiston JA at 261.

28 *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liquidation)* [1997] 2 VR 256, Ormiston JA at 261-262.

29 *Telstra Corporation Ltd v Australian Telecommunications Authority* (1995) 133 ALR 417 at 426; *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643, Dawson J at 652; *Philips Electonics NV v Remington Products Australia Pty Ltd* (1998) AIPC ¶ 91-393 at 37,104.

relief where a privative clause excluded prerogatory relief (except where there was jurisdictional error) and the court found that there was no basis for prerogative relief.[30] In *Minister for Immigration and Ethnic Affairs v Guo* [1997] 191 CLR 559 the High Court held that the Full Federal Court should not have made a declaration because, *inter alia*, the Court purported to determine a matter which under the *Migration Act* 1958 (Cth), the Minister for Immigration and the Refugee Review Tribunal were solely empowered to decide (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 578-579; Kirby J at 599-600).

Although the High Court has jurisdiction to make declaratory orders, the question must be a justiciable matter over which the Court has jurisdiction[31] and which seeks "some immediate right, duty or liability to be established by the determination of the court."[32] In *Croome v The State of Tasmania* (1997) 191 CLR 119 it was held that an application for a declaration as to whether State legislation was inconsistent with s 109 of the Constitution was a "matter" over which the Court had jurisdiction. In contrast, in *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677 Kirby J confirmed that the Court may not direct the executive by declaratory order as to how to act in the conduct of Australia's international relations because it is not a justiciable matter over which the Court has constitutional power (Kirby J at 693).

DISCRETION

The Nature of Discretion

[2406] In the absence of clear factors which limit a court's jurisdiction to order a declaration such as statutory ouster, a court will exercise its discretion in determining whether a declaration will be granted in a particular case. In *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 Gibbs J (at 438) approved the statement of Viscount Radcliffe in the Privy Council decision of *Ibeneweka v Egbuna* [1964] 1 WLR 219:

> "After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration

30 *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation; Alston v Court of Coal Mines Regulation* (1997) 42 NSWLR 351, Powell JA (with whom Meagher JA agreed) at 387-388.

31 *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, Kirby J at 689.

32 *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, Kirby J at 689 quoting *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265. For a consideration of this issue see ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), paras [74]-[79].

> should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration" (Viscount Radcliffe (for the Privy Council) at 225).

Nevertheless it is possible to discern various factors which inform the discretionary exercise of the declaratory jurisdiction. In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, the High Court confirmed that the discretionary power to order a declaration was limited by "the boundaries of judicial power" and that:[33]

> "... declaratory relief must be directed to the determination of legal controversies and not answering abstract or hypothetical questions.[34] The person seeking relief must have a 'real interest'[35] and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that (have) not occurred and might never happen'[36] or if 'the Court's declaration will produce no foreseeable consequences for the parties'.[37]"

Another factor may be the existence of an alternative remedy or tribunal.[38]

SIGNIFICANT DISCRETIONARY FACTORS

Abstract, theoretical and hypothetical issues

[2407] Declarations will not be granted in relation to abstract, theoretical or hypothetical questions in respect of which there is

33 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, Mason CJ, Dawson, Toohey and Gaudron JJ at 582. For another earlier statement summarising these important discretionary factors see *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, Lord Dunedin at 448.

34 The Court cited *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

35 The Court cited *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 437; *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, Lord Dunedin at 448.

36 The Court cited *University of New South Wales v Moorhouse* (175) 133 CLR 1, Gibbs J at 10.

37 The Court cited *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180, Mason J at 188; Aickin J at 189. Note also (1978) 18 ALR 55, Mason J at 69; Aickin J at 71.

38 *Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271, Reynolds JA (for the Court of Appeal) at 272.

no dispute relating to any particular factual situation. Accordingly, courts will not make declaratory orders if to do so would amount to a court giving an advisory opinion.[39] For example, a declaration as to the right to terminate an agreement is an advisory opinion and will be set aside where there has been no election to terminate (*Sanderson Computers Pty Ltd v Urica Library Systems BV* (1998) 44 NSWLR 73).[40]

In *Egan v Willis* [1998] 195 CLR 424 the High Court considered whether the Supreme Court of New South Wales was able to declare that the Legislative Council's resolutions that the appellant was guilty of contempt were invalid and his removal from the chamber into the street constituted trespass. The New South Wales Court of Appeal had decided the case on the merits rather than whether discretion in favour of the appellant was exercisable. Gaudron, Gummow and Hayne JJ held that as a matter of discretion, a declaratory order should not have been made in this case because there must be a real and justiciable question:

> "Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law[41] but they should not be entertained in the abstract and apart from a justiciable controversy. Declaratory relief should be directed to the determination of legal controversies concerning rights, liabilities and interests of a kind which are protected in or enforced by the courts.[42] This is so even though in the area of public law the ground of equitable intervention has not been limited to the protection of any particular proprietary or legal entitlement of the plaintiff."[43]

In *University of New South Wales v Moorhouse* (1975) 133 CLR 1, the plaintiff alleged that the university had authorised a private

39 In relation to advisory opinions and federal constitutional issues note *Australian Boot Trade Employees' Federation v Commonwealth* (1954) 90 CLR 24; *Commonwealth v Queensland* (1987) 62 ALJR 1.

40 Note also *Servcorp (Aust) Pty Ltd v Abgarus Pty Ltd; Abgarus Pty Ltd v Moufarrige* (1995) 38 NSWLR 281.

41 Gaudron, Gummow and Hayne JJ referred to an application for habeas corpus as in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; 92 CLR 171 (PC).

42 Gaudron, Gummow and Hayne JJ cited *Croome v Tasmania* (1997) 191 CLR 132-133; *Mustasa v Attorney-General* [1980] QB 114 at 123.

43 *Egan v Willis* [1998] 195 CLR 424, Gaudron, Gummow and Hayne JJ, at 438-439 citing *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 256-259, 280-284. McHugh J, at 480, set aside the declaration on the basis that in the absence of a statutory requirement, the Supreme Court had no jurisdiction to make a declaration that a resolution of a House of Parliament is invalid. He also held that the declaration of trespass which the Court made was imprecise, served no purpose and did not affect the parties' legal rights.

individual, who was not an employee of the university, to infringe the plaintiff's copyright. The issue was whether the university, by providing in its library a photocopier upon which the infringing copies were made, had authorised the infringement under s 36 of the *Copyright Act* 1968 (Cth). The High Court held that the university had, by its indifference to the purposes for which its photocopiers were used, impliedly authorised the infringement, but it refused to make the university the subject of any general declaration on the copyright owner's behalf to prevent such infringements in the future. At first instance,[44] Hutley JA found that it had not been proven that the university had infringed the plaintiff's copyright, but granted a declaration that the university had authorised the breaches of copyright that had occurred. However, the High Court held that the declaration was wrongly made because it was based upon assumed and not proven facts. The trial judge had found no infringement proven and the declaration he granted "rested purely on the basis of hypothesis" (*University of New South Wales v Moorhouse* (1975) 133 CLR 1, Gibbs J at 10). Declarations of right could not be granted if such declarations amounted to conclusions of fact from an assumed and not proven state of facts.

Declarations may be made in relation to future rights and liabilities as these are real rights and liabilities, not hypothetical ones.[45] However, in order to guard against giving advisory opinions, such questions about further interests are not determined unless parties:

> "are hampered in their practical affairs in some significant respect by the uncertainty or some other positive ground exists for an anticipatory decree or order"[46] (*Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, Dixon CJ at 400-401).

For example, in *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297, the High Court upheld a declaration regarding the procedure which the respondent, a duty-free retailer, might safely adopt in conveying duty-free goods purchased elsewhere to customers at their point of departure for

44 *Moorhouse v University of New South Wales* (1974) 23 FLR 112 (SC NSW).

45 *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394; *Bond v Sulan* (1990) 26 FCR 580. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1922].

46 See also *Moorhouse v University of New South Wales* (1974) 23 FLR 112, Hutley JA at 128 (SC NSW); *University of New South Wales v Moorhouse* (1975) 133 CLR 1, Jacobs J at 24; *Ku-ring-gai Municipal Council v Suburban Centres Pty Ltd* [1971] 2 NSWLR 35; *Dinari Ltd v Hancock Prospecting Pty Ltd* [1972] 2 NSWLR 385.

overseas without infringing the provisions of the *Customs Act* 1901 (Cth). In that case, there was a dispute between the parties regarding the requirements of the Act. The declaration concerning future conduct resolved that dispute. As Barwick CJ said (at 305):[47]

> "Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction."

Utility

[2408] A court will only exercise its declaratory jurisdiction if it would have some immediate and determinative effect upon a dispute, actual or potential, between the parties. A court will decline to exercise its discretion, if the declaratory order will be of little practical value[48] and will produce no foreseeable consequences for the parties.[49] Sometimes this issue will be linked to whether a declaration deals with abstract, theoretical and hypothetical questions.

The value which may result from the issue of the order may not be pecuniary, but must benefit the party concerned.[50] In *Mikaelian v Commonwealth Scientific and Industrial Research Organisation* (1999) 163 ALR 172, the applicant alleged that he had suffered damage due to the respondents' breach of s 52 of the *Trade Practices Act* and sought declaratory relief accordingly. The Court held that the respondents had breached the provision, but that the applicant had suffered no damage from the breach. The Court found that it was not appropriate to make a declaratory order because, even taking into account the public interest, it was unlikely that the order would have a practical value and effect (Hill J at 190-191).

In order to have utility, the declaration must be clear and precise. Accordingly, a court may decline to order a declaration the terms

47 See also *Moorhouse v University of New South Wales* (1974) 23 FLR 112 (SC NSW), Hutley JA at 127-128.

48 See for example *The Dairy Farmers Co-operative Milk Company Ltd v Commonwealth* (1946) 73 CLR 381; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1924].

49 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 AJLR 180, Mason J at 188 and Aickin J at 189; *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663, Lockhart J (with whom Spender and Cooper JJ agreed) at 670.

50 Young P W, *Declaratory Orders* (2nd ed, Butterworths, 1984), para [704].

of which cannot be clearly and precisely framed (*Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122, Young J at 136).[51]

Locus Standi

[2409] A party seeking declaratory relief must have a real interest in or connection with the dispute, that is the party must show locus standi.[52] Therefore, a declaration will not be granted where the issue does not affect the legal rights of the parties or where it will not resolve any dispute between parties.[53]

In this regard, a distinction needs to be made between private law rights (such as rights under a contract) and public law rights (such as raising the constitutional validity of legislation or excessive use of power by public authorities).[54] Generally, it has been more difficult for a private litigant to prove locus standi to argue public law rights. In any circumstance where a public right is infringed, the Attorney-General may bring proceedings to protect that right *ex officio* (of his own motion) or *ex relatione* (at the instigation of a private person, the "relator" to whom the Attorney-General grants a fiat authorising the action to proceed).[55]

Where a private plaintiff seeks to bring proceedings for a declaration in relation to a public law right without joining the Attorney-General, it will be necessary to consider whether a private right has been also affected, thereby giving the person standing,[56] or whether specific legislation governing the matter entitles the private plaintiff to bring proceedings. Sometimes, the legislation will be so widely framed that it will have expanded the concept of locus standi.[57] In the event that the plaintiff

51 Note also The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), para [8.11].

52 *The CCH Macquarie Dictionary of Law* (2nd ed, CCH, Sydney, 1993), p 105, defines it as "the right, founded on a legally recognised interest in the matter in dispute, to initiate legal proceedings in one's own name."

53 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 437-438; *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663, Lockhart J (with whom Spender and Cooper JJ agreed) at 670.

54 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985) para [42],

55 The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [5.42]-[5.58]; *Ramsay v Aberfoyle Manufacturing Co (Aust) Pty Ltd* (1935) 54 CLR 230; *Cooney v Council of the Muncipality of Kur-Ring-Gai* (1963) 114 CLR 582; ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra 1985) paras 104-116.

56 *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114; ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), para [3.3] and Table 3.1.

57 See Weir M, "The Planning and Environment Court (Qld): Declarations and Restraining Orders — Jurisdiction and Discretion" (1996) 16 *The Queensland Lawyer and Reports* 50.

cannot rely on a connected private right or a wide legislative mandate, the applicable test with respect to locus standi for injunctions and declarations was expressed by Buckley J in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114:

> "... where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

The interpretation and application of this test to declaratory orders has been a controversial issue.[58] However, in Australia, it remains the crucial test determining the courts' exercise of discretion.[59] This is despite the recognition that the test had unusual foundations[60] and that it has resulted in "an unsatisfactory weighing of the scales in favour of defendant public bodies."[61] It has been reformulated to emphasise that a plaintiff must have a "special interest" in the action.[62] Therefore it has required "a special interest in the subject matter of the action"[63] or "a sufficient material interest in the subject matter."[64] It is sufficient to show that the party was "specially affected" [65] rather than the party is "uniquely affected."[66] As it has evolved, the "special interest" test has been more flexibly interpreted.[67]

The test was considered by the High Court in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493. In that case, the plaintiff was an organisation committed to environmental conservation. It sought declarations that certain governmental decisions concerning a proposal by a company to

58 See *Gouriet v Union of Post Office Workers* [1978] AC 435; The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [5.29]-[5.38]. As to the incompatibility of some of the English approaches generally in Australian law see *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Gaudron, Gummow and Kirby JJ at 261-262.

59 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Transurban City Link Ltd v Allan* (2000) 168 ALR 687.

60 See for example, *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, Gibbs CJ, Mason, Murphy and Brennan JJ at 680; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Gaudron, Gummow and Kirby JJ at 264-266.

61 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Gaudron, Gummow and Kirby JJ at 261.

62 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985) para [122].

63 *Australian Conservation Foundation Inc v Commonwealth* (1988) 146 CLR 493, Gibbs J at 527.

64 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Gaudron, Gummow and Kirby JJ at 267.

65 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, Brennan J at 74.

66 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, Brennan J at 74.

67 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra 1985), para [125]; ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), para [3.3] and Table 3.1.

establish a tourist resort and associated exchange control transactions were invalid. The High Court agreed with the judge at first instance that the plaintiff had no standing. Gibbs J considered that the test was not satisfied by a plaintiff who could merely show a strongly held belief or concern in relation to the subject matter of the dispute:[68]

> "[A]n interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless."

However, Mason J expressed the view that actual or apprehended injury to a plaintiff's social or political interests might be sufficient in some future case to give a plaintiff standing (at 547):

> "Depending on the nature of the relief which he seeks, a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests[69] ... and perhaps to his social or political interests. Beyond making this general observation, I consider that there is nothing to be gained from discussing in the abstract the broad range of interests which may serve to support a locus standi."

This approach proved decisive in the High Court decision in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27. In that case, Aboriginal plaintiffs sought to prevent the defendant from interfering with Aboriginal relics and from contravening the relevant Victorian legislation. The majority of the High Court (Aickin J dissenting) held that the plaintiffs had standing. In doing so, they recognised that standing might be granted where a plaintiff could show actual or apprehended injury to her or his particular social interests, where those interests were not shared by the general public at large. Gibbs CJ (at 36-37) observed that:

68 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, Gibbs J at 530-531; see also, Stephen J at 539.

69 Mason J referred here to *New South Wales Fish Authority v Phillips* [1970] 1 NSWR 725.

> "[T]he appellants have an interest in the subject matter of the present action which is greater than that of other members of the public ... They claim that the relics are of cultural and spiritual importance to them ... The present is not a case in which a plaintiff sues in an attempt to give effect to his beliefs or opinions on a matter which does not affect him personally except in so far as he holds beliefs or opinions about it. The appellants claim not only that their relics have a cultural and spiritual significance, but that they are custodians of them according to the laws and customs of their people, and that they actually use them."[70]

So too a commercial or financial interest of a substantial and material nature would be sufficient to constitute a special interest. In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, certain individuals named in a report tabled before the Queensland Parliament by the respondent, which gave no notice to the persons so named of the existence or contents of the report, sought a declaration that the lack of notice amounted to a failure to observe procedural fairness. The High Court granted the declarations sought. The Court accepted that the plaintiffs had a real interest to justify seeking the declaration because such a failure damaged their business reputations.[71]

In *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247[72] the appellants derived their powers from the *Aboriginal Land Rights Act* 1983 (NSW) and proposed to set up a contributory funeral benefit fund catering for all Aboriginal persons in the State. The two respondents operated a contributory funeral benefit fund business and a contributory life insurance business respectively for members of the Aboriginal community in New South Wales. The respondents had sought an order restraining the proposed actions of the appellants on the basis that the appellants would be acting beyond their statutory powers. The appellants argued that the respondents lacked standing to bring the action. The High Court confirmed the decision of the New South Wales Court of Appeal and held that the respondents did have standing to seek injunctive relief. The Court held that the respondents had a real interest in the applicant observing its statutory mandate. As the parties would be operating in the same limited

70 See also Stephen J at 41-42 and Brennan J at 73, 75-78. Compare *Robinson v South East Queensland Indigenous Regional Council of the Aboriginal and Torres Strait Islander Commission* (1996) 140 ALR 641.

71 See also *Boots Company (Australia) Pty Ltd v SmithKline Beecham Healthcare Pty Ltd* (1996) 137 ALR 383.

72 Note also *Transurban City Link Ltd v Allan* (2000) 168 ALR 687.

commercial market "it was highly probable that, if not restrained from commencing and concluding their activities, the appellants would cause severe detriment to the business of the respondents" (Gaudron, Gummow and Kirby JJ at 267-268).[73] The Court distinguished questions of substantial commercial interests from cases where commercial interests are affected by decisions under statutory provisions where commercial considerations were irrelevant to the statutory scheme (Gaudron, Gummow and Kirby JJ at 266; McHugh J at 283).[74] Although the High Court considered the availability of injunctive relief, its approach and reasoning are equally applicable to the necessary standing for declaratory relief in a commercial context.

An applicant will also have standing to challenge legislation where there is a possibility that proceedings pursuant to that legislation will be instituted against that person. In *Croome v The State of Tasmania* (1997) 191 CLR 119 the plaintiffs brought an action against Tasmania for declarations that certain provisions of the *Criminal Code* (Tas) were inconsistent with s 4 (1) of the *Human Rights (Sexual Conduct) Act* 1994 (Cth). The State conceded that the plaintiffs had standing to bring proceedings in the High Court. Nevertheless, the Court found that in any event the plaintiffs had standing, not because they intended to act in contravention of the State legislation, but because they had engaged in conduct which breached the legislation and which rendered them liable for prosecution, conviction and punishment under State law. The fact that the State Director of Public Prosecutions did not propose to take action, did not affect that liability (Brennan CJ, Dawson J and Toohey J at 127-128; Gaudron, McHugh and Gummow JJ at 137-138).

[2410] There have been proposals for changing the test for standing in litigation concerning public law rights generally.[75] In 1985 the Australian Law Reform Commission proposed that the common law and equitable rules in relation to locus standi be abolished and recommended a single and uniform test for standing to sue for a variety of remedies including declaratory relief.[76] Every

73 Note also the comments of McHugh J at 283 and Hayne J at 284.

74 Cases which dealt with statutory schemes where commercial interests were not considered relevant include: *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250; and *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1985) 60 FCR 85.

75 For a consideration of overseas developments see ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), paras [3.18]-[3.24].

76 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra 1985), para [267]. The recommended test would not apply to *Trade Practices Act* 1974 (Cth), s 80 or *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13.

person would have standing to commence and maintain proceedings in matters which the Commonwealth had jurisdiction unless the court determined that the person was "merely meddling" in the matter.[77] The fact that the person had no proprietary, financial or special interest in the matter would not prevent proceedings being undertaken. Unless the court was presented with arguments to the contrary, it would be assumed that the plaintiff did have standing to sue.[78]

In 1996 the Commission revisited the issue, commenting that overall there had been few changes in response to the earlier report. It confirmed its recommendation that the law should be changed in favour of a system of open standing and should apply to proceedings relating to the federal Constitution, federal legislation, against the Commonwealth or a person acting on its behalf.[79] The Commission contended that the "special interest" test was too narrow, uncertain, subjective, inconsistent and complex.[80] The Commission rejected the "merely meddling" test on the basis that it was neither clear nor helpful.[81] It recommended that any person would be able to commence and maintain public law proceedings unless the relevant legislation provided otherwise or the proceedings would unreasonably interfere with the ability of the person having a private interest in the matter to deal with it differently or not at all.[82] Reforms to the law of standing would apply, inter alia to proceedings for an injunction or declaration where the Attorney-General could have commenced the proceedings in her or his own name or where rights, duties or powers created by or under an enactment were in dispute.[83]

The traditional approach to declaratory (and injunctive) relief in public law litigation is that the Attorney-General is best suited to decide whether the enforcement of public law serves the public

77 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra 1985), paras [252]-[253] and [259].

78 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra 1985), para [259].

79 However the new standing test would not apply to criminal or family law proceedings or to tribunals: ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra 1985), p 7.

80 ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), paras [4.9]-[4.12].

81 ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), paras [5.18]-[5.20].

82 ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), paras [5.24]-[5.25].

83 ALRC Report No 78 *Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, Canberra, 1996), paras [5.15]-[5.16].

interest.[84] Therefore it is unnecessary to broaden the standing rules for the enforcement of public law rights. It has also been suggested that decision-makers remain accountable at a political level.[85] Both reports of the Australian Law Reform Commission reflect the view that it is no longer necessary for the Attorney-General to be primarily responsible for actions for declaratory and injunctive relief in public law proceedings. The Commission found generally that the "enforcement of 'public rights' by or with the consent of the Attorney-General is spasmodic and patchy due to political and bureaucratic tendencies and attitudes."[86] It was also contended that government plaintiffs cannot always adequately represent the public interest.[87]

At present the recommendations of the Australian Law Reform Commission in relation to declaratory (and injunctive) relief remain unimplemented.[88] However, the recommendations deserve serious consideration. It is submitted that by broadening the concept of standing to facilitate the role of private plaintiffs to obtain declaratory relief (not only at federal but State level) would ensure that the legal system is rigorous and open. It is unlikely that federal and State Attorneys-General are able to intervene in every dispute which has a public law aspect due to financial and political reasons. Yet the test of "special interest" discussed above[89] may be a deterrent to public-spirited citizens. Declaratory relief is particularly suited to a broader concept of standing along the lines suggested by the Commission as it has a limited function. A court merely declares the law and neither creates rights nor makes a coercive executory judgment. Nevertheless a declaration obtained by a private plaintiff, who would not satisfy the orthodox "special interest" test, may helpfully state what the law is and presage future trends.

It has been suggested that the reluctance of courts to exercise declaratory discretion in favour of a person unless that person

84 See for example *Gouriet v Union of Post Office Workers* [1978] AC 435, Lord Wilberforce at 482. For a discussion of the role of the Attorney-General see ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), paras [155]-[185].

85 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, Hayne J at 285.

86 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), para [167]. This approach was reaffirmed in ALRC Report No 78 *Beyond the Door-keeper: Standing to sue for public remedies* (AGPS, Canberra, 1996), para [2.36].

87 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), paras [157]-[159]; ALRC Report No 78 *Beyond the Door-keeper: Standing to sue for public remedies* (AGPS, Canberra, 1996), para [2.36].

88 It appears that the current Federal Government will not be taking any further action towards implementing some or all of the recommendations in relation to declaratory and injunctive relief.

89 Above, para [2409].

involved has an interest, conforms to the view that courts decide real controversies and not hypothetical questions.[90] It is probable that in a large number of cases there will be a nexus between the standing of a plaintiff and the real issue before the court. However, the Commission has argued generally that questions of standing remain separate from hypothetical questions.[91] A person may have a special interest in a matter but may ask what is deemed to be a hypothetical question. Alternatively, a party may raise a real matter, although it is arguable that the party has no standing. For example, X may bring an action to compel the performance of A's duty to B. The fact that X (rather than A or B) brought the action does not make the issue of A's responsibilities to B a hypothetical question. Therefore, the Commission concluded that the requirement that the matter is not hypothetical or abstract would remain the law, notwithstanding the proposed changes to the standing rules.[92]

The Existence of an Alternative Tribunal to deal with the matter

[2411] The existence of an alternative tribunal, while not of itself sufficient to indicate the legislature's clear intention to deprive the court of declaratory jurisdiction,[93] may be a factor which a court will take into account in determining whether to exercise its discretion in favour of making a declaratory order.[94] In *Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271, Reynolds JA said that it "is a principle of statutory construction that a superior court of law will not be deprived of jurisdiction

90 Dal Pont G E and Chalmers D R C, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), p 944 citing *Robinson v Western Australian Museum* (1977) 138 CLR 283, Mason J at 327.

91 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), para 29. Note also the opinion of the Commission that there is no constitutional requirement for a plaintiff to have a stake in the litigation even if the only relief is sought is declaratory in nature: ALRC Report No 78 *Beyond the Door-keeper: Standing to sue for public remedies* (AGPS, Canberra, 1996), paras [4.45]-[4.47].

92 ALRC Report No 27 *Standing in Public Interest Litigation* (AGPS, Canberra, 1985), para [29].

93 See *Sutherland Shire Council v Leyendekkers* [1970] 1 NSWLR 356, Street CJ at 361; *Salmar Holdings Pty Ltd v Hornsby Shire Council* [1971] 1 NSWLR 192; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J at 436-437; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [1911]-1913].

94 *Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271, Reynolds JA (for the Court of Appeal) at 272; *Burwood Municipal Council v Sydney Legacy Appeals Fund* (1980) 39 LGRA 299 (SC NSW); *Sydney Legacy Appeals Fund v Tanna* (1980) 48 LGRA 98 (CA NSW); *Blank v Beroya Pty Ltd* (1967) 92 WN (NSW) 24; *Land v Clyne* (1968) 92 WN (NSW) 134; *Liverpool & London & Globe Insurance Co Ltd v J W Deaves Pty Ltd* [1971] 2 NSWLR 131; *Young v Public Service Board* [1982] 2 NSWLR 456.

except by express words or necessary implication ... The provision of another tribunal would not of itself ordinarily be sufficient to do so" (Reynolds JA (for the Court of Appeal) at 272).[95]

Conclusion of the Dispute between the parties

[2412] Whilst a declaration may not be granted if it would not finally conclude the dispute between the parties, like the other discretionary factors, this issue need not be determinative (*Integrated Lighting & Ceilings Pty Ltd v Philips Electrical Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 693, Hope J at 702). However, the fact that the declaration will not finalise the particular dispute will be a strong reason for the refusal of the court to make a declaratory order. For example, in *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286, the form of proceedings did not make it clear whether the declaration was sought preliminary to a claim for specific performance or to a request that matters in dispute be determined by the court, so the declaration was refused. The court referred to s 63 of the *Supreme Court Act* 1970 (NSW), which enjoins the court to "grant ... all such remedies as any party may appear to be entitled to ... so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided". The Court emphasised that in this case a declaration would be useless because the parties had not agreed on its consequences, and therefore it ought not to be granted. It was considered that:[96]

> "Unless the parties are agreed on the consequences which flow from a declaration that such a contract has or has not been validly rescinded it is generally undesirable that a court should so declare without any orders for consequential relief."

95 Note also *Ancart Pty Ltd v Snowy River Council* (1995) 39 NSWLR 78. An example of where power to make a declaratory order is ousted expressly or by implication ousted is evident in s 9 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), which specifically circumscribes the granting of declaratory relief other than in accordance with its special procedures: note *Clyne v Deputy Commissioner of Taxation* [1983] 1 NSWLR 110; Campbell E, "Cross-vesting of Jurisdiction in Administrative Law Matters" (1990) 16 *Monash Law Review* 1 at 4-6. In contrast, the *Trade Practices Act* 1974 (Cth), s 163A, provides specifically for the granting of declaratory orders subject to some specifically stated limitations: see *Re Tooth & Co Ltd* (1978) 31 FLR 314; *Polgardy v Australian Guarantee Corp Ltd* (1981) 52 FLR 240. For a helpful comparison of English and Australian approaches see Mason, Sir Anthony, "Declarations, Injunctions and Constructive Trusts: Divergent Developments in England and Australia (1980) 11 *University of Queensland Law Journal* 121 at 122-123.

96 *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286, Barwick CJ and Jacobs J at 307. The plaintiff sought a declaration that contract for sale of land had not been validly rescinded by defendant.

The High Court approved that approach in *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments) Pty Ltd* (1976) 133 CLR 671.[97] However in other cases, sufficient reasons for granting a declaration without consequential relief may well exist (*Trans Realties Pty Ltd v Grbac* [1975] 1 NSWLR 170, Mahoney JA at 181-185).[98]

FINAL OR INTERIM RELIEF

[2413] In England, a declaratory order is final and courts do not have the jurisdiction to make interim declarations,[99] notwithstanding judicial views that such a limitation is a "serious procedural defect."[100] It has been contended that judges ought to be able to make an interim declaration, reserving a right to re-examine the issue after the substantive hearing.[101] However, the refusal to grant interim declarations has been justified on the basis that courts definitively declare legal rights and that where the Crown is involved, its decisions ought to stand until set aside.[102] The Australian position is less clear, as there appears to have been cases where courts have ordered interim declaratory relief.[103]

97 See also *Carter v Hanson* (1979) 46 LGRA 321 (CA NSW); *McNally v Waitzer* [1981] 1 NSWLR 294; *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117; *McCann v Stark* (1981) 2 BPR 9375 (SC NSW); *Mayer v Vitale* (1981) 2 BPR 9162 (SC NSW); *Ciavarella v Balmer* (1983) 153 CLR 438; *Sindel v Georgiou* (1984) 154 CLR 661; *Woodcock v Parlby Investments Pty Ltd* (1988) 5 BCL 110 (SC NSW); *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623; *Cawood v Infraworth Pty Ltd* [1990] 2 Qd R 114; *Louinder v Leis* (1982) 149 CLR 509.

98 See also Hodgson D H, "Practice Note: Declaration of Right" (1975) 49 *Australian Law Journal* 546; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, Hill J at 108.

99 *International General Electric Co of New York v Commissioners Customs and Excise* [1962] Ch 784; *R v IRC; ex parte Rossminster* [1980] AC 952; The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [3.088]-[3.098]; Young P W, *Declaratory Orders* (2nd ed, Butterworths, 1984), para [2403]; cf the position in Scotland concerning the action of declarator: The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), para [8.15].

100 *R v IRC; ex parte Rossminster* [1980] AC 952, Lord Diplock at 1014; note also the views of Lord Denning in the same case at 976. There have been some strong arguments in favour of interim declarations: see The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [3.096]-[3.097]; and LAW COM No 226, *Administrative Law: Judicial Review and Statutory Appeals* (HMSO, London, 1994), paras [6.21]-[6.22]; Zamir I, "The Declaratory Judgment Revisited" (1977) *Current Legal Problems* 43 at 51-52.

101 LAW COM No 226, *Administrative Law: Judicial Review and Statutory Appeals* (HMSO, London, 1994), para [6.21].

102 The Rt Hon The Lord Woolf and Woolf J, *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993), paras [3.096]-[3.097].

103 *Trintor Building Consultants Pty Ltd v Hilton* [1983] 1 NSWLR 259; *MacLeod v Minister Administering the Lands Resumption Act 1957* [1991] Tas R 106. Note Young P W, *Declaratory Orders* (2nd ed, Butterworths, 1984), para [2403].

However, it is likely that interim relief would be refused unless it proved very useful in the particular circumstances.[104]

DEFENCES

[2414] Equitable defences are generally not available to a defendant against whom declaratory relief is sought. It has been stated that it "cannot be successfully contended that a suit which asks merely for a declaration of a legal right is a suit for equitable relief",[105] a view approved by the High Court in *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, Dixon CJ at 452-454.[106] Therefore, the traditional equitable defences such as laches or "unclean hands" are not available against an applicant for declaratory relief. In the light of the wide scope of declaratory discretion however, it is open to courts to take into account such conduct when deciding whether to make a declaratory order. In contrast, where a person seeks a declaration of an equitable right or interest, or concerning an equitable right or interest, then traditional equitable principles and defences will apply.[107]

104 Note the comments of Young P W, *Declaratory Orders* (2nd ed, Butterworths, 1984), para [2403]; and Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1931].

105 *Handover v Langman* (1929) 29 SR (NSW) 435, Harvey CJ at 448.

106 See also *Zucchiatti v Ferrara* (1976) 1 BPR 9199, Needham J at 9207 (SC NSW). This view is also supported by other authors: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [1929]; Young P W, *Declaratory Orders* (2nd ed, Butterworths, Sydney, 1984), para [608].

107 For a helpful discussion see Young P W, *Declaratory Orders* (2nd ed, Butterworths, Sydney, 1984), para [609].

CHAPTER TWENTY-FIVE

RESCISSION

Louis Proksch

INTRODUCTION

Definition

[2501] Rescission in equity is a remedy[1] that enables transactions to be set aside where they are affected at their outset by some vitiating element.[2] The result is that both parties[3] to the transaction are put back into the position they would have been in had the transaction never occurred.[4] It has been said that the transaction is treated as non-existent,[5] but words to this effect cannot be taken literally, to mean that there never was a transaction.[6] In particular, an arbitrator appointed under a sufficiently widely drawn arbitration clause will not deprive himself or herself of jurisdiction by deciding that a contract has been rescinded,[7] and an exclusive jurisdiction clause may continue to operate notwithstanding that one party rescinds.[8]

1 Rescission may also be achieved by agreement between the parties: see *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, Young J at 377. Such rescission is not remedial, but at least some of the principles governing rescission as a remedy apply to rescission by agreement.

2 A claim to rescission is a right of action, but is not itself a chose in action or part of a chose in action. Consequently it is not capable of assignment separately from the property affected by the transaction that is sought to be rescinded: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffman (Lords Goff of Chieveley, Hope of Craighead and Clyde concurring) at 916.

3 For simplicity, it is assumed throughout that any transaction has two parties only. The same principles apply if more than two parties are involved.

4 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1278; *A H McDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506, Rich, Starke and Dixon JJ at 512. The requirement of restitution or restoration of the parties is a basic assumption of all cases dealing with the remedy of rescission.

5 In *Newbigging v Adam* (1886) 34 Ch D 582, Bowen LJ at 592 (CA) said of a contract avoided for fraud, "when it is set aside it is treated both at law and in equity as non-existing".

6 See *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559, Giles CJ Comm D at 563.

7 *Ferris v Plaister* (1994) 34 NSWLR 474 (CA).

8 *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559 (Giles CJ Comm D).

The remedy of rescission operates retrospectively,[9] and affects the transaction from the outset. Effectively, rescission relieves both parties of any obligations yet to be performed under the transaction, and reverses anything done pursuant to the transaction but prior to rescission. In a contractual context, this reversal distinguishes rescission from termination of a contract for breach. Reversal is also a condition of the availability of the remedy. The party seeking rescission, and hence to be restored to her or his pre-transaction position, must also be in a position to restore the other party to her or his pre-transaction position. Restoration of both parties is central to the remedy of rescission.

[2502] Rescission is available in circumstances in which it would be unconscionable for a party to retain the benefit of the transaction, with regard to the circumstances in which it arose. Substantive grounds for relief include mistake, misrepresentation, duress, undue influence and unconscionable dealing.[10] Rescission may also be an appropriate remedy for breach of fiduciary duty. In most cases, the unconscionability of allowing the transaction to stand is best countered by rescission.[11] However, the court in its equitable jurisdiction also has power to mould relief in order to do practical justice between the parties, for example by imposing conditions on one or both of the parties (see below, paras [2516]-[2517]).

The principles of the remedy remain the same, regardless of the substantive grounds on which it is claimed. However, since rescission is a discretionary remedy, the particular circumstances of each case are relevant.[12] Doctrines relating generally to relief in equity, such as "unclean hands" and "delay", apply equally to rescission (see below, para [2520]). Relief may also be affected by doctrines such as "election",[13] "estoppel"[14] and "waiver".[15]

9 The remedy of rescission should be carefully distinguished from the situation, sometimes also called "rescission", brought about when a contract is terminated after breach.

10 The phrase "unconscionable dealing" is here used in a narrow sense, to denote a specific ground for rescission: see above, Chapter 5: "Unconscientious Dealing".

11 The phrase "unconscionability" is used here in a broad sense to denote a unifying principle for equitable intervention where any one of the specific grounds for rescission is made out.

12 Courts are more willing, by grant of appropriate orders, to achieve the equivalent of restoration in cases of fraud than in cases where there has been no fraud: see *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 223-224. By contrast, where the personal conduct of the defendant has been unimpeachable, the court may be the more willing to mould relief so as to avoid undue hardship to the defendant: see *Cheese v Thomas* [1994] 1 WLR 129, Sir Donald Nicholls V-C at 138 (CA).

13 See *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, for a generalised treatment of the doctrine of election.

14 See below, para [2520].

15 See below, para [2520].

Rescission at common law and in equity

[2503] At common law, rescission was difficult to obtain and limited in scope. Historically, the common law courts developed a limited concept of rescission of transactions for fraud and for certain kinds of mistake, misrepresentation[16] and duress. The substantive grounds permitting rescission were not easily satisfied, and the common law concept produced satisfactory results only in those cases where precise restoration was possible for both parties.[17] At common law, rescission was in effect a gateway to other relief. First, it provided a defence to an action by the other party. Further, in contracts for disposal of personalty, it revested title, thereby allowing an action in conversion or detinue to recover the property itself, or its value.[18] By terminating the transaction, it also created the possibility of an action to recover money[19] for a consideration which totally failed,[20] or had been made to fail through rescission.[21]

[2504] Significant development of the remedy of rescission occurred within the courts of equity. Equity supplemented the common law concept both remedially and substantially. The impact of equity was twofold. First, courts of equity were able to make suitable orders[22] to achieve restoration, or the equivalent of restoration, for both parties in circumstances where the common law courts could not. Even in cases where the transaction had been partly executed so that recovery at common law on the basis of total failure of consideration was not possible, courts of

16 *Kennedy v Panama, New Zealand, & Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, Blackburn J at 587.

17 See *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1278-1279, for an early statement of the contrast between common law and the emerging equitable jurisdiction in setting aside contracts for innocent misrepresentation. See also *Sibley v Grosvenor* (1916) 12 CLR 469, Griffith CJ at 474-475.

18 In *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420, the drawer of a cheque crossed and marked "not negotiable — A/c payee only" recovered its value in conversion, after rescission as against the payee, from a bank which had collected the cheque for the indorsee, who had practiced a fraud on both the drawer and the payee.

19 Because money is a fungible, precise restoration was achieved by return of an equivalent sum to that paid, not necessarily the same coin or notes.

20 See *Kettlewell v Refuge Assurance Co* [1908] 1 KB 545, Lord Alverstone CJ and Sir Gorell Barnes P (CA) (affd without giving reasons in *Refuge Assurance Co v Kettlewell* [1909] AC 243). In this context, partial failure indicates there was benefit received by the rescinding party that was not capable of restoration: see *Clarke v Dickson* (1858) El Bl & El 148; 120 ER 463.

21 For example, if a seller of goods has been induced by fraud, then the buyer has a voidable title only, so that avoidance revests title in the seller. Likewise a buyer induced by fraud may rescind, thereby revesting title in the seller, and claim return of the price as money had and received upon a total failure of consideration. In contracts of sale of goods, price is paid for title, not possession: see *Rowland v Divall* [1923] 2 KB 500 (CA).

22 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1278-1279.

equity were able to nullify the part performance by ordering compensation.[23] Secondly, equity extended the reach of the common law grounds for rescission[24] and created others.[25] Its doctrines of rescission have now effectively supplanted those of the common law.

A potential overlap of common law remedies with rescission in equity arises where a misrepresentation, made in the course of negotiation for a contract, becomes incorporated as a term of the contract when made. The better view is that the equitable remedy of rescission is not superseded by the common law remedies for breach of a term, whether the misrepresentation is fraudulent[26] or not.[27] In some jurisdictions, legislation confirms this point.[28]

Application to sale of goods

[2505] The availability of the equitable remedy of rescission for contracts for the sale of goods is subject to dispute. The difficulty arises from a provision of the Sale of Goods legislation in all Australian jurisdictions, to the effect that "the rules of the common law" relating to the effect of fraud, misrepresentation, duress, or coercion, mistake or other invalidating cause shall continue to apply to contracts for the sale of goods.[29] It has been

23 Where there was fraudulent misrepresentation equity exercised a concurrent jurisdiction — *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HC), the Court at 111 n 27 citing Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), pp 656-658.

24 For example, in equity, non-fraudulent misrepresentation did not need to satisfy the test of *Kennedy v Panama, New Zealand, & Australian Royal Mail Co Ltd* (1867) LR 2 QB 580. See also *Redgrave v Hurd* (1881) 20 Ch D 1, Lord Jessel MR at 12-13 (CA).

25 For example, rescission became available for transactions tainted by undue influence. Where there was innocent or negligent misrepresentation, equity exercised an auxiliary jurisdiction_*Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HC), the Court at 111 n 27 citing Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), pp 656-658. Both at common law and in equity, however, there must be some recognised ground for rescission: *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, Young J at 381.

26 *Alati v Kruger* (1955) 94 CLR 216; *Kramer v McMahon* [1970] 1 NSWR 194.

27 *Academy of Health & Fitness Pty Ltd v Power* [1973] VR 254, Crockett J at 264-266; *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30, Holland J at 36. But see *Pennsylvania Shipping Co v Cie Nationale de Navigation* [1936] 2 All ER 1167, which has not been followed in Australia.

28 *Law Reform (Misrepresentation) Act* 1977 (ACT), s 3; *Sale of Goods Act* 1923 (NSW), s 4(2A); *Misrepresentation Act* 1971 (SA), s 6; *Goods Act* 1958 (Vic), s 100(2) (consumer sales of goods); and s 111(2) (consumer leases of goods). See also s 102(3) (representations and warranties by a dealer or other third party in consumer sales of goods and services); s 112(3) (representations and warranties by a dealer or other third party in consumer leases of goods).

29 *Sale of Goods Act* 1954 (ACT), s 62(1); *Sale of Goods Act* 1923 (NSW), s 4(2); *Sale of Goods Act* 1972 (NT), s 4(2); *Sale of Goods Act* 1896 (Qld), s 61(2); *Sale of Goods Act* 1895 (SA), s 59(2); *Sale of Goods Act* 1896 (Tas), s 5(2); *Goods Act* 1958 (Vic), s 4(2); *Sale of Goods Act* 1895 (WA), s 59(2).

held in Victoria that the equitable remedy of rescission for non-fraudulent misrepresentation never applied to contracts for the sale of goods prior to the passing of the Sale of Goods legislation,[30] and that the legislation codified that position by preserving the common law rules to the exclusion of the equity rules.[31] These decisions relate specifically to rescission in equity for non-fraudulent misrepresentation. However, the reasoning could be extended in that, although the respective Sale of Goods provisions apply only to contracts, and not to all transactions involving goods (for example, gifts), they do apply to all grounds of invalidation. It would follow from this that a contract for the sale of goods could be rescinded, for instance, for duress, only if the narrow common law doctrine were satisfied.[32] It is difficult to accept that the Sale of Goods provisions are intended to, or do in law, exclude all equitable doctrines relating to invalidating cause[33] from contracts for the sale of goods, or permit their continued application only so far as they had actually been applied by the time the legislation was enacted.

In some jurisdictions, the Sale of Goods legislation has been amended to ensure that the equity rules for misrepresentation are able to be applied in contracts for the sale of goods.[34] Where there has been no amendment, the trend of case law in Australia has been to apply the equitable rules, on the basis that the phrase "the rules of the common law" in the Sale of Goods legislation refers to the whole non-statutory law, and not to the common law rules as distinct from the equity rules.[35] On this

30 *Picturesque Atlas Publishing Co Ltd v Philipson* (1890) 16 VLR 675, as interpreted in *Watt v Westhoven* [1933] VLR 458, Lowe J at 465-466, Gavan Duffy J at 468 (FC). For further discussion of these cases, see above, para [618].

31 *Watt v Westhoven* [1933] VLR 458, Mann ACJ at 462, Lowe J at 465-466, Gavan Duffy J at 467-468 (FC). See also *Riddiford v Warren* (1901) 20 NZLR 572 (CA).

32 For the common law doctrine of duress, as applied to a contract concerning shares, see *Barton v Armstrong* (1973) 2 NSWLR 598 (CA), and *Barton v Armstrong* [1976] AC 104 (PC) (reversing the Court of Appeal decision).

33 It is clear that not all equitable doctrines whatsoever are excluded: see *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] NZLR 538 (CA), distinguishing on this basis the earlier decision in *Riddiford v Warren* (1901) 20 NZLR 572 (CA).

34 *Sale of Goods Act* 1954 (ACT), s 62(1A) (although it is unclear whether the desired effect has been achieved); *Sale of Goods Act* 1923 (NSW), s 4(2A); *Goods Act* 1958 (Vic), s 100(1) (misrepresentation in consumer sales); s 111(1) (misrepresentation in consumer leases). See also above, para [622].

35 See *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381 (decided before amendment to the *Sale of Goods Act* 1923 (NSW)); *Graham v Freer* (1980) 35 SASR 424, where the issue is fully canvassed. See also *Shuman v Cooper Pedy Tours Pty Ltd* [1994] ACL Rep 110 (SA) 4 (opalised fossil wood represented to be a brachiosaurus rib). In England, the equity rules for misrepresentation have been applied without demur to contracts for the sale of goods: *Goldsmith v Rodger* [1962] Ll L R 249; *Leaf v International Galleries* [1950] 2 KB 86; *Long v Lloyd* [1958] 1 WLR 753. However, this was after some struggle with the interaction between the equity rules permitting rescission, and statutory provisions which restrict a buyer's ability to reject goods and recover the price: *Leaf v International Galleries* [1950] 2 KB 86; *Long v Lloyd* [1958] 1 WLR 753.

reasoning, the equitable remedy of rescission for invalidating cause is as available in contracts for the sale of goods as for all other kinds of contract.

With respect specifically to rescission for non-fraudulent misrepresentation, further difficulties can arise concerning the interaction of the remedy of rescission with statutory provisions[36] which limit the right of a buyer to reject goods for breach of contract and refuse to pay, or to recover pre-payments of, the price.[37] Difficulties are, first, where the misrepresentation is incorporated into the contract as a term, whether the equitable remedy of rescission is superseded,[38] and, secondly, whether the right to rescind survives loss of the right to reject the goods.[39] On this latter point, case law in Australia holds that the right to rescind does survive[40] and, in some jurisdictions, legislation now confirms the law in this sense.[41]

ELEMENTS OF RESCISSION

An act of rescission

[2506] Rescission is always the act of the party rescinding.[42] Consequently, rescission can be entirely a self-help remedy, as

36 *Sale of Goods Act* 1954 (ACT), s 16(4); *Sale of Goods Act* 1923 (NSW), s 16(3); *Sale of Goods Act* 1972 (NT), s 16(4); *Sale of Goods Act* 1896 (Qld), s 16(3); *Sale of Goods Act* 1895 (SA), s 11(3); *Sale of Goods Act* 1896 (Tas), s 16(3); *Goods Act* 1958 (Vic), s 16(3); and also s 99(1) (consumer sales); *Sale of Goods Act* 1895 (WA), s 11(1).

37 Rejection has much the same practical effect as rescission, but is a termination of the contract for breach rather than a reversal of the transaction. The buyer retains a right to sue for damages for the breach.

38 On this point, see above, para [2504].

39 The proposition that the equitable remedy does not survive loss of the "higher" or more "potent" common law remedy stems from the judgment of Branson J in *Pennsylvania Shipping Co v Cie Nationale de Navigation* [1936] 2 All ER 1167. See also *Leaf v International Galleries* [1950] 2 KB 86, Denning LJ at 90-91; as quoted in *Long v Lloyd* [1958] 1 WLR 753, Pearce LJ (for the Court) at 759.

40 *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381; *Shuman v Cooper Pedy Tours Pty Ltd* [1994] ACL Rep 110 (SA) 4.

41 *Sale of Goods Act* 1923 (NSW), s 38(2); *Goods Act* 1958 (Vic), ss 100(1) (sale of goods), 111(1) (lease of goods).

42 *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, Lord Atkinson at 781; *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 224; citing *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64, Lord Hatherley LC at 73; *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, Young J at 377-378. See also *Ivanof v Phillip M Levy Pty Ltd* [1971] VR 167, McInerney J at 170; *Academy of Health & Fitness Pty Ltd v Power* [1973] VR 254, Crockett J at 259 (both citing *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 224).

where reliance is placed on rescission as a defence to a claim for specific performance of a wholly executory contract. In other cases, the act of rescission by a party creates grounds for a form of restitutionary relief. Thus, rescission may put an end to obligations of the innocent party, or revest property that has passed pursuant to the transaction, entitling the innocent party to recover money paid upon a total failure of consideration.[43] Even where property does not revest at law, the effect of rescission may be that one party holds property on constructive trust for the other party.[44] Where the transaction consists only of the payment of money, for instance under duress, rescission of the transaction is implicit in pursuit of an action for return of the money. In all these instances, rescission both dates from, and takes effect at, the time of the act of the party in electing to rescind.

[2507] Assistance by the court may be required to achieve restoration of the original position of both parties. In this situation, rescission cannot be wholly a self-help remedy. Thus, title to land may need to be retransferred, a lease cancelled, accounts taken and monetary adjustments made on return of a business, allowances made for deterioration or improvements,[45] or an indemnity ordered against future liabilities.[46] In cases of this nature, the function of the court is "to adjudicate on the validity of a purported disaffirmance … and, if it is valid, to give effect to it" (*Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 224). Nevertheless, the validity of the act of rescission depends on the ability to restore, and, until the court has lent its aid, there will be no restoration, and hence no rescission (*Kramer v McMahon* [1970] 1 NSWR 194, Helsham J at 207). As a corollary, where there is a need to obtain an order for rescission, as where the effectiveness of the alleged rescission is in dispute or the interests of third parties are involved, the process of restoration requires an order for rescission (*Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, the Court (Ipp, Owen and McKechnie JJ) at 217).

43 See *Coastal Estates Pty Ltd v Melevende* [1965] VR 433 (FC). Where goods have passed from the innocent party pursuant to the transaction, revesting will enable that party to assert title in an action for detinue or conversion: see *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420 (apparently decided on common law principles: Giles J at 433).

44 See *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, Brennan J at 387-388 as referred to in *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, the Court (Ipp, Owen and McKechnie JJ) at 212-213. In both these cases the ground for rescission was breach of fiduciary duty, but in both the contracts (of loan) were held not to have been avoided.

45 See below, paras [2510]-[2511].

46 See below, para [2515].

[2508] Since rescission requires a definite act of the rescinding party, the transaction remains in existence until there is an act of rescission.[47] The transaction is not a nullity, but merely voidable (see *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, the Court (Ipp, Owen and McKechnie JJ) at 214). The act of rescission must be clear and unequivocal,[48] being the manifestation of an election[49] between the alternative courses of affirmation or rescission. Rescission may be by verbal or written notice, by conduct, including commencement of proceedings,[50] or by way of a defence to an action brought by the other party (*Academy of Health & Fitness Pty Ltd v Power* [1973] VR 254, Crockett J at 259-263). Once made, it is irrevocable (*Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, Young J at 378). Ordinarily, the election to rescind must be communicated to the other party[51] and takes effect from that time.[52] However, in particular circumstances[53] conduct without communication[54]

47 Rescission may not take effect from that act if the intervention of a court is required to effect restoration: see above, para [2507].

48 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 646 (case of termination of a contract pursuant to a clause).

49 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 641, 646, Mason J at 655.

50 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 222 (affirming the view of Townley J at first instance: *Alati v Kruger* [1956] St R Qd 306). The issue (and presumably service) of the writ sufficed even though the plaintiff claimed in the alternative, and as a fall-back position, the inconsistent remedy of damages for breach of contract. See also *Westpac Banking Corp v Markovic* (1985) 82 FLR 7, Zelling J at 10 (SC SA); *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, Young J at 378; *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227, Cooper J at 288. The statement of claim must, however, show with sufficient clarity that the claimant is avoiding the transaction: *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, the Court (Ipp, Owen and McKechnie JJ) at 215. Mere issue of the writ, without service, may not suffice: see *Ivanof v Phillip M Levy Pty Ltd* [1971] VR 167, McInerney J at 169-170.

51 In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Mason J at 655-656 describes communication as "essential" in the interests of certainty and of fairness between the parties. A private decision without communication does not constitute election: see *Scarf v Jardine* (1882) 7 App Cas 345, Lord Blackburn at 361.

52 *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, Lord Atkinson at 781 (the "expression" of election terminates the transaction). Election to rescind is effective to prevent affirmation thereafter, but whether the remedy of rescission is immediately obtained in full measure depends on whether court assistance is needed to effect restoration: see above, para [2507].

53 Often, the party against whom rescission is sought has committed a fraud and seeks to avoid contact: see *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (QB and CA); referred to with apparent approval in *Ivanof v Phillip M Levy Pty Ltd* [1971] VR 167, McInerney J at 169.

54 In *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (QB and CA), the conduct consisted of informing the police and the Automobile Association. Denning MR (at first instance) at 531, and Davies LJ (for the Court of Appeal) at 558 quoted Lord Hatherley LC's opinion in *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64 at 74, that it suffices to assert an intention to rescind "in the plainest and most open manner competent". An acceptable alternative form of conduct would be to repossess goods: see *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, Sellers LJ at 551 (QB and CA). The *Goods Act* 1958 (Vic), s 101(2) provides an exclusive statement of circumstances, including conduct, in which a purported rescission will have effect.

may suffice at least for election.[55] Conduct has been held effective to prevent an innocent party thereafter acquiring in the subject matter of a contract for sale of goods, induced by fraud, a sufficient interest to bar rescission.[56] Whether conduct not communicated to the other party should have this effect on third party interests is debatable.

Restoration to pre-contractual position

[2509] Complete restoration of the pretransaction position is usually the objective of a party seeking the remedy of rescission. The entire transaction must be undone — rescission cannot be obtained of only one of a series of linked transactions.[57] Recovery of property transferred, money paid or benefits conferred may be achieved through rescission. The act of rescission may itself cause property to revest in the innocent party.[58] Alternatively, court action may be required (see above, para [2507]). An innocent party who restores property is entitled to compensation for permanent improvements effected that have increased the sale value of the property,[59] but

55 *Ivanof v Phillip M Levy Pty Ltd* [1971] VR 167, McInerney J at 169. The acceptance of the decision in *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (QB and CA) may be confined to this point.

56 *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (QB and CA). For interests of third parties operating as a bar to rescission, see below, para [2521].

57 *A H McDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506, Rich, Starke and Dixon JJ at 512-513. The "entire transaction" in that case consisted of a series of arrangements, one replacing another, pertaining to the acquisitions and exploitation of certain patent rights. See also *Greater Pacific Union Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, where the "entire transaction" consisted of a sale of shares, and "put and call" options. By contrast see *Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* (1992) 30 NSWLR 185, where justice could be achieved by setting aside, on terms, only the first of a series of round robin loans, and *Ribchenkov v Suncorp-Metway Ltd* (2000) 175 ALR 651, where a mortgage was not rescinded as to the initial advance, but it was "unconscionable to permit the bank to seek to enforce remedies in respect of the two further advances", notwithstanding that the mortgage secured "all moneys": see Stephen J at 666.

58 See the suggested plea in *Clough v London & North Western Railway Co* (1871) LR 7 Ex 26, Mellor J (for the Court) at 32 (Ex Ch). See also *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420, Giles J at 432-433. An act of rescission, which would not of its own force revest legal title, might nevertheless be effective to revest equitable title as from the time of the act: see *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 224; *Kramer v McMahon* [1970] 1 NSWR 194, Helsham J at 206; *Ivanof v Phillip M Levy Pty Ltd* [1971] VR 167, McInerney J at 171. If rescission is effective, the property will be regarded as having been held on a constructive trust from the beginning: *Greater Pacific Union Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, McLelland AJA (Priestley and Meagher JJA agreeing) at 153; *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559, Giles CJ Comm D at 564.

59 *Brown v Smitt* (1924) 34 CLR 160, Knox CJ, Gavan Duffy and Starke JJ at 165; *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 16-17; *Balfour v Hollandia Ravensthorpe NL* (1978) 18 SASR 240, Mitchell J at 248 (SC) (affd by the Full Court). In all three cases, further inquiry was needed into the amount to be awarded. The measure is increase in sale value, not amount expended: see *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 17; *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 391.

which have not altered its character[60] or are mere matters of personal taste. Rescission may also involve the setting aside of a conveyance or lease,[61] or cancellation of a contract (*O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (CA)). Recovery by the innocent party of profits from a transaction made by the other party may be a necessary part of rescission.[62]

[2510] A party seeking rescission must restore the other party[63] substantially to the pretransaction position. Sometimes an offer to restore may be sufficient,[64] but, where court action is necessary, orders will be made to restore both parties. In addition to returning property and money, the innocent party may be required to compensate for (or have taken into account) improvements to property received back from,[65] and deterioration of property returned to,[66] the other party, as well as rent or hire for the interim use of premises[67] or goods (*Mihaljevic v Eiffel Tower Motors Pty Ltd* [1973] VR 545, Gillard J at 568-569). It follows that "restoration" of services can be made by payment of reasonable remuneration (*O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (CA)). Credit for stock sold[68] and profits made[69] in the course of running a business must be given when control of the business is returned.

60 The doctrine "would not justify improving the vendor out of his estate, as is the phrase in the books": see *Brown v Smitt* (1924) 34 CLR 160, Knox CJ, Gavan Duffy and Starke JJ at 165.

61 *Cooper v Phibbs* (1867) LR 2 HL 149; *Solle v Butcher* [1950] 1 KB 671 (CA).

62 *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (CA), Dunn LJ at 458, Fox LJ at 466, Waller LJ at 471. Possibly the "profits" to be restored are only those gained at the expense of the innocent party, and not those gained at the expense of a third party: *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, Mason P (Priestley JA agreeing) at 370.

63 It may be that equity would not require restoration to a third party of collateral benefits obtained from that party: *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, Mason P at 370, referring to the taxation benefits of a horse breeding venture, and comparing the equitable remedy with the "remedial smorgasbord offered by s 87" of the *Trade Practices Act* 1974 (Cth).

64 A party who has received money but has not yet performed her or his obligations may rescind without court intervention if prepared to repay. Nevertheless, any attempt to retain the money would probably constitute affirmation: see *Clough v London & North Western Railway Co* (1871) LR 7 Ex 26, Mellor J (for the Court) at 37 (Ex Ch).

65 *Cooper v Phibbs* (1867) LR 2 HL 149; *Stepney v Biddulph* (1865) 12 LT 176 (Ch); *Brown v Smitt* (1924) 34 CLR 160, Isaacs and Rich JJ at 170-172. The position may be different if the other party had been fraudulent: see *Berridge v Public Trustee* (1914) 33 NZLR 865 (SC).

66 *Balfour v Hollandia Ravensthorpe NL* (1978) 18 SASR 240 (SC and FC). In this context allowance is made only for deterioration for which the rescinding party is responsible, not for deterioration in value resulting from a fall in property values. See also *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 387-389 on the effect of a decline in the market for chattels.

67 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 222; *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 18; *Balfour v Hollandia Ravensthorpe NL* (1978) 18 SASR 240, Mitchell J at 248; *Koutsonicolis v Principe (No 2)* (1987) 48 SASR 328 (amount payable was reduced because of the defective state of the premises, and because after rescission, the parties rescinding remained virtually as caretakers).

68 *Alati v Kruger* (1955) 94 CLR 216.

69 *Kramer v McMahon* [1970] 1 NSWR 194, Helsham J at 210.

[2511] An inability to make restoration may result in the innocent party being denied relief.[70] While only substantial restoration is required,[71] a situation can arise where rescission is denied because property transferred has been destroyed, consumed[72] or abandoned. Rescission may also be denied where one party must repay money to effect restoration, but cannot.[73] Where there is fraud[74] or moral turpitude (such as some instances of the exercise of undue influence),[75] courts are more willing to make monetary adjustments[76] in order to achieve substantial restoration and hence grant rescission, than in situations where there is no fraud.[77] The reason may be that, where property has been transferred but consumed, return of the price subject to deduction of the value of the property would strongly resemble an award of the primary measure of damages in respect of a transaction that was induced by fraud, but has been affirmed.[78] Such a remedy is not available under the general law where the tort of deceit is not made out, and hence should not be achieved indirectly in the guise of rescission.

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70 *A H McDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506; *Gans v Riley* (1913) 15 CLR 731; *Sargent v Campbell* [1972-73] ALR 708 (HC); *Holder v Holder* [1968] Ch 353; *Drozd v Vaskas* [1960] SASR 88.

71 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1278-9; *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 223-224; *Brown v Smitt* (1924) 34 CLR 160; *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 386-387. The court seeks to achieve "practical restitution and justice": *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HC), the Court at 111.

72 Money paid which has been irretrievably spent for the purpose for which it was given may be irrecoverable: *Allcard v Skinner* (1887) 36 Ch D 145, Cotton LJ at 170-171 (CA); *Quek v Beggs* (1990) 5 BPR 97-405, McLelland J at 11,779 (SC NSW), even though the defendant may indirectly have some benefit therefrom. But see *Diprose v Louth (No 2)* (1990) 54 SASR 450 (FC); affd as *Louth v Diprose* (1992) 175 CLR 621, where a gift of money was made by payment of the purchase price of land conveyed to the defendant. The relief granted was transfer of the land to the plaintiff: Deane J at 638-639, Toohey J at 643. But see *Diprose v Louth (No 2)* (1990) 54 SASR 450 (FC) for suggestions of Jacobs ACJ (at 453-454) and Legoe J (at 456, 475) as to whether an order for repayment of money (repayment being secured on the land) was not the more appropriate form of relief. See also *Cheese v Thomas* [1994] 1 WLR 129 (contribution of money to purchase a house — proportion of proceeds returned, the house having been sold).

73 *Greater Pacific Union Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143. An offer to allow proof in a winding up, where it is known that the creditors will not get more than 50 cents in the dollar, is not sufficient: McLelland AJA (Priestley and Meagher JJA agreeing) at 151, quoting Cole J in the court below.

74 See *Koutsonicolis v Principe (No 2)* (1987) 48 SASR 328, White J at 330-331; citing *Spence v Crawford* [1939] 3 All ER 271, Lord Wright at 288-289 (HL).

75 See *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (CA). Rescission for undue influence does not always connote moral turpitude: *Cheese v Thomas* [1994] 1 WLR 129 (CA).

76 For use of monetary adjustments to achieve substantial restoration, see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1278.

77 See *A H McDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506 (in the absence of fraud, rescission was denied).

78 For the primary measure (price less value of property received and retained) see *Holmes v Jones* (1907) 4 CLR 1692. Consequential losses may also be claimed: see *Gould v Vaggelas* (1984) 157 CLR 215.

Where a party seeking rescission is not responsible for the inability to restore, relief may not necessarily be barred.[79] Such circumstances include where property deteriorates[80] or disappears[81] through its own inherent vice, an outsider intervenes to assert a property right,[82] or the other party fails to take control of the property after being informed of the innocent party's election to rescind.[83] In all these situations, the party seeking rescission has not acted unconscientiously.[84] Particularly in cases of fraud, notice of rescission tends to shift the risk of deterioration to the other party,[85] but the rescinding party must still act conscientiously.[86] The position may be put in positive terms: in order to retain a right of rescission, the innocent party must, even after electing to rescind, take reasonable steps to preserve the property.[87]

[2512] While observations in the High Court and Privy Council suggest that restoration of both parties is a necessary condition for the remedy,[88] it is possible that the innocent party might seek and

79 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 225; *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700, Fisher, Gummow and Lee JJ at 714-715 (FC Fed Ct); *Balfour v Hollandia Ravensthorpe NL* (1978) 18 SASR 240, Mitchell J at 247-248 (SC); Bray CJ at 254-255 (FC). But see (in considering the grant of a remedy under s 87 of the *Trade Practices Act* 1974 (Cth), where the court is less restricted than under the general law) *Henjo Investments Pty Ltd v Collins-Marriackville Pty Ltd (No 1)* (1988) 39 FCR 546, Lockhart J at 561-566 (FC), especially at 564-565.

80 See *Balfour v Hollandia Ravensthorpe NL* (1978) 18 SASR 240 (SC and FC).

81 See *Adam v Newbigging* (1888) 13 App Cas 308 (property restored was worthless); *Alati v Kruger* (1955) 94 CLR 216 (business had discontinued).

82 *Alati v Kruger* (1955) 94 CLR 216; *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 (FC Fed Ct) (landlord repossessed premises); *Kramer v McMahon* [1970] 1 NSWR 194 (mortgagee repossessed).

83 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 225-226; *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700, Fisher, Gummow and Lee JJ at 714 (FC Fed Ct).

84 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 225. See also *Kramer v McMahon* [1970] 1 NSWR 194, Helsham J at 209.

85 In these circumstances, the other party ought to accept rescission and take back the property: see *Kramer v McMahon* [1970] 1 NSWR 194, Helsham J at 209.

86 Ability to restore is tested as at the time the writ was issued, but "the remedy will be denied if a purchaser seeking the order acts unconscientiously during the pendancy of the action". *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 (HC), Brennan, Deane, Gaudron and McHugh JJ at 586. The matter in that case was remitted for determination of the question whether the remedy should be granted.

87 *Alati v Kruger* (1955) 94 CLR 216, Fullagar J at 228; *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 16. In *Drozd v Vaskas* [1960] SASR 88, purchasers of a business appeared to have abandoned it immediately after purporting to rescind, apparently without warning. Rescission was denied.

88 See *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, Dixon CJ at 451-453 (McTiernan J agreeing). In *Urquhart v MacPherson* (1878) 3 App Cas 831 (on appeal from the Supreme Court of Victoria), the Privy Council said at 838 that rescission is "subject to the condition that the other party … can be remitted to his former state". The appellant could not avoid the effect of a non-severable clause in a deed of dissolution of partnership unless both parties could be remitted to their prior states. This was not possible.

obtain relief from future obligations only,[89] or partial restoration only in return for full restoration of the other party,[90] or even less than substantial restoration.[91] Where both parties contribute to a transaction that results in a loss, practical justice may in some circumstances[92] require that the loss be shared, rather than that it fall entirely on the defendant.[93]

[2513] The court may not require full restoration where partial rescission[94] would suffice to remove the unconscionability that originally infected the transaction.[95] The court must first decide whether the vitiating factor is such as to warrant the intervention of equity. Any requirement of a causal link between conduct of the defendant, and the conduct of the plaintiff in entering the transaction, is an issue for the law governing the substantive ground of relief.[96] Once it is shown that equitable intervention is warranted, normally full restoration of both sides to their original positions is both a condition of[97] and the effect of the remedy.[98] The conduct giving rise to the remedy may

89 For instance, an innocent party might resist an action for specific performance of a contract for sale of land, without necessarily counterclaiming for return of a deposit.

90 Where both money and goods had passed under the transaction, the innocent party might seek return of the money only.

91 There seems no reason why an innocent party should not accept the return of damaged goods without seeking compensation.

92 It may be relevant that the personal conduct of the defendant has not been impeached: *Cheese v Thomas* [1994] 1 WLR 129, Sir Donald Nicholls V-C at 134 and 138 (CA) (undue influence presumed, but defendant had not acted "in a morally reprehensible way" in inducing the contract. Whether the same could be said of his resisting a claim to rescind a transaction "manifestly disadvantageous" to the plaintiff may be debatable).

93 *Cheese v Thomas* [1994] 1 WLR 129 (CA) (proceeds of house sold at a loss split between the parties in proportion to their contributions to the purchase price).

94 To the extent that English law denies the possibility of partial rescission or rescission on terms (*TSB Bank Plc v Camfield* [1995] 1 WLR 430 (CA), Nourse LJ at 435-437, but see also *Midland Bank Plc v Greene* [1994] 2 FLR 827; *Dunbar Bank plc v Nadeem* [1997] 2 All ER 253 (Robert Englehart QC)) it diverges from Australian law: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HC), the Court at 115, n 46.

95 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Deane J at 481; *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 493 _ "the equity may be satisfied by setting aside some but not all of these instruments or some but not all of the provisions thereof" [footnote omitted].

96 With misrepresentation, for instance, reliance and inducement must be established as part of showing an entitlement to relief. By contrast, breach of the fiduciary duty to avoid conflicts of interest immediately generates the equity to a decree of rescission of a transaction in which interests conflict, unless the breach itself has been avoided by obtaining a fully informed consent: see *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 467, who regarded the decision of the Privy Council in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 as not directly relevant to this point. Contrast Kirby J, who regarded the Privy Council decision as relevant.

97 See [2511].

98 Restoration "may either be seen as an aspect of the achievement of the equitable objective of restitutio in integrum or as the inevitable application of the discretion to provide (or withhold) relief, importing notions of equal justice, as between the parties" [references omitted]: *Maguire v Makaronis* (1997) 188 CLR 449, Kirby J at 496.

however affect the extent of relief.[99] Thus the court may be satisfied that, without the vitiating element, a party would nevertheless have entered the same transaction, but with a more limited liability.[100] In such cases[101] the court may allow the transaction to remain on foot, but limited to the extent that the party would have been willing to enter it,[102] and with further orders[103] to create this effect.[104] Further, where precise restoration as required by the common law[105] is not possible, in the pursuit of practical justice "equity will have regard to what would have happened in the absence of the vitiating circumstances" that made the transaction voidable (*Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227, Cooper J at 286). This may result in the parties being left in the position that has actually resulted, but with part of the transaction being unenforceable.[106]

99 *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 472.

100 *Barclays Bank Plc v O'Brien* [1993] QB 109 (CA), affirmed without reference to the limited extent of relief in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HC); 184 CLR 102; *Australia and New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638 (CA).

101 Often the vitiating factor is misrepresentation as to the extent of liability, and there is evidence that the defendant would have entered a limited transaction. In *Barclays Bank plc v O'Brien* [1993] QB (CA) (affirmed [1994] 1 AC 180) the defendant signed what she believed to be a guarantee limited to £60,000 "because she was persuaded it was the right thing to do" (Scott LJ at 142); in *Vadasz Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 the defendant was willing to guarantee payment for future supplies, and indirectly gained the benefit of the further credit extended to the debtor company, of which he was a director; and in *Australia & New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638 "the defendant was found willing enough to risk her house to secure the borrowing for $20,000, but not for anything more": Phillips JA at 641. In this case there were other vitiating elements additional to misrepresentation. Compare *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and *Alderton v Prudential Assurance Co Ltd* (1993) 41 FCR 435, where the evidence was that, but for unconscionable dealing, the guarantee would never have been given.

102 *Barclays Bank plc v O'Brien* [1993] QB 109, affirmed without reference to the limited extent of relief in *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (guarantee of past and future indebtedness set aside as to past indebtedness only); *Australia and New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638 (CA) (mortgage to remain enforceable, but to a limited extent only).

103 For further orders see [2516]-[2517].

104 In *Australia and New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638 (CA) a mortgage represented to secure a maximum of $20,000 was in terms unlimited, and was appropriately stamped to secure the sum of $200,000 ultimately demanded. The mortgage was left to stand as a security for $20,000 plus $5,000 awarded by the court to the mortgagee for damages in the nature of interest, plus costs payable under the court order, but "unless the plaintiff by counsel gives an undertaking in lieu of the injunction, the plaintiff should at the same time be enjoined from enforcing the mortgage" (Phillips JA at 645) for any more than those amounts.

105 See [2503].

106 See *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227. The parties were left to such rights as they might have had against each other arising from the transaction, except for a provision (obtained by economic duress) whereby one party released the other from claims in respect of a former transaction.

FORMS OF RELIEF

Cumulative relief

[2514] Rescission may be obtained cumulatively with other compatible remedies. For instance, a contract procured by misrepresentation may be rescinded, and damages also obtained for the tort of deceit[107] or negligence,[108] if the requirements of the tort were also satisfied in the making of the statement that induced the contract. Rescission is not superseded by the availability of some other remedy; it is not precluded by the fact that a statement may be both a term of a contract and a non-fraudulent[109] or fraudulently induced[110] misrepresentation. Remedies such as rescission of a contract and damages for breach of that contract are incompatible, and cannot be obtained simultaneously.[111]

Indemnity

[2515] An indemnity may be granted to the rescinding party,[112] as part of the process of rescission, in respect of obligations created by[113] the transaction. The purpose of the indemnity is to relieve the rescinding party from the burdens assumed by entering the contract. If the burden has been discharged, there must be compensation. Thus, a purchaser may be compensated for necessary repairs made,[114] and for rates and taxes paid

107 See *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 222, for a discussion of the availability of different remedies.

108 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA).

109 *Redgrave v Hurd* (1881) 20 Ch D 1. In Australia, see *Academy of Health & Fitness Pty Ltd v Power* [1973] VR 254, Crockett J at 264-267 (concerning a term that was a "mere warranty"); *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30, Holland J at 36 (not distinguishing between terms that are conditions and those that are warranties). For legislative provisions confirming this point, see above, para [2505].

110 *Alati v Kruger* (1955) 94 CLR 216; *Kramer v McMahon* [1970] 1 NSWR 194, Helsham J at 204.

111 Rescission of a contract places both parties in the position as if the contract had never existed; damages for breach of contract places one party, as far as money can do so, in the position as if the contract had been performed: see *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, Parke B at 855 (Ex Ch).

112 *Rawlins v Wickham* (1858) 3 De G & J 304; 44 ER 1285; *Newbigging v Adam* (1886) 34 Ch D 582 (CA); *Whittington v Seale-Hayne* (1900) 82 LT 49 (Ch); *Curwen v Yan Yean Land Co Ltd* (1891) 17 VLR 745, Higinbotham CJ at 752, A'Beckett J at 754 (FC).

113 *Newbigging v Adam* (1886) 34 Ch D 582, Bowen LJ at 592-593, 594 (CA). This formulation is preferable to the wider statement of Cotton LJ at 589, which was also supported by Fry LJ at 596: see *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 392-393.

114 *Brown v Smitt* (1924) 34 CLR 160; *Whittington v Seale-Hayne* (1900) 82 LT 49 (Ch).

(*Whittington v Seale-Hayne* (1900) 82 LT 49 (Ch)). The indemnity extends to interest on money paid pursuant to a contractual obligation, including in appropriate cases compound interest (*JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 392-393). The indemnity also extends to liabilities not yet discharged.[115] Payments of money pursuant to an indemnity should be distinguished from damages,[116] which are recoverable in conjunction with rescission only if there is also liability in tort.[117]

Other terms

[2516] The court has power to impose terms as part of the "price" of obtaining equitable relief by way of rescission, "regardless of whether the relief stems from misrepresentation, mistake, duress or unconscionable dealing".[118] Sometimes, terms must be imposed to complete the restitutionary effect of rescission, and to supplement the more limited monetary claims that would arise in restitution if the transaction were simply declared to have been avoided. Where a loan is rescinded, in addition to payment of principal,[119] provision may need to be made for an appropriate rate of interest,[120] or for other

115 *Newbigging v Adam* (1886) 34 Ch D 582 (CA) (plaintiff acquired share in partnership and was entitled on rescission to indemnification against liability for partnership debts incurred after contract, but before rescission); affd without deciding on the issue of indemnity in *Adam v Newbigging* (1888) 13 App Cas 308.

116 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 222; *Newbigging v Adam* (1886) 34 Ch D 582, Bowen LJ at 592-593 (CA). See *Whittington v Seale-Hayne* (1900) 82 LT 49 (Ch); *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 (FC Fed Ct) (losses derived from carrying on business). Conveyancing costs and stamp duty on the transaction are recoverable, if at all, by way of damages: see *Alati v Kruger* (1955) 94 CLR 216; *Kramer v Duggan* (1955) 55 SR (NSW) 385, McLelland J at 388. But see *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 (FC), where Jordan CJ at 192 appeared to regard return of "expenses incurred in effecting the purchase" as part of the rescission process.

117 *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 222; *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 17. Where available, the damages remedy tends to supplant the indemnity: see *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700, Fisher, Gummow and Lee JJ at 711 (FC Fed Ct); *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, Jordan CJ at 192 (FC).

118 *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1994) 62 SASR 150 (FC SA), Olsson J (Mohr and Nyland JJ concurring) at 156. This case was affirmed on appeal: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HC).

119 The fact that the plaintiff might find this difficult does not prevent imposition of the condition: *Maguire v Makaronis* (1997) 188 CLR 449 (HC).

120 See *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 433, Thomas J at 460; *Maguire v Makaronis* (1997) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 475-477, also Kirby J at 499; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffman (Lords Goff of Chieveley, Hope of Craighead and Clyde concurring) at 916.

adjustment.[121] In two English cases,[122] for instance, a contract entered into by mistake was set aside with ancillary orders that permitted a fresh contract to be made on more appropriate terms.

[2517] In imposing terms, the court seeks to satisfy the equity that has arisen from the conduct giving rise to relief.[123] Increasing recognition in the High Court of Australia of the power to "frame" or "mould" relief[124] has brought about a sea-change in the remedy.[125] In some circumstances the equity may be satisfied by setting aside some but not all of the instruments in which the transaction is embodied, or some but not all of the provisions thereof.[126] The relief granted may produce a result not exactly representing what either side would have wished (*Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 494). Additional factual inquiries may be necessary, and leave to give evidence may be appropriate.[127] An appellate court may

121 In *Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* (1992) 30 NSWLR 185, a sum of money had been lent and on-lent in a round robin of transactions designed to "clean up" the balance sheets of the plaintiff and associated companies. Cole J (at 194) held the first loan (by Spedley to Greater Pacific) to have been void from the outset, but rather than leave the parties to monetary claims in restitution, he released Greater Pacific from the loan, on condition that Greater Pacific assign its rights, derived from on-lending, back to Spedley. See also (in the context of illegality) discussion of the imposition of terms as "part of the title of the plaintiff to equitable relief" in *Farrow Mortgage Services Pty Ltd (in liq) v Edgar* (1993) 114 ALR 1, the Full Court of the Federal Court at 18-19.

122 *Solle v Butcher* [1950] 1 KB 671 (CA); *Grist v Bailey* [1967] Ch 532, Goff J (both cases of contracts voidable for mistake).

123 *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 493. See also the similar language used by members of the Court to describe the relief given to address the "equity" raised in cases of equitable estoppel: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Mason CJ and Wilson J at 404, Brennan J at 416-417, 419, 427, Gaudron J at 460; *Commonwealth v Verwayen* (1990) 170 CLR 394, Mason CJ at 411-412, 413, Brennan J at 428-429, Deane J at 442, Dawson J at 454, Toohey J at 475-476, Gaudron J at 487, McHugh J at 500-501.

124 *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 494.

125 The progress from *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 (restoration substantially to the status quo, but relief may be denied) through *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (partial rescission, for the purpose of doing what is practically just) and *Maguire v Makaronis* (1996) 188 CLR 449 (relief conditional on returning the fruits of the transaction) to *Bridgewater v Leahy* (1998) 194 CLR 457 (order set aside on terms) has been rapid.

126 *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 493, citing *Maguire v Makaronis* (1996) 188 CLR 449 and *Willis v Barron* [1902] AC 271 at 272-273. *Morris v Barron* [1900] 2 Ch 121, affd [1902] AC 271 was also cited in *Maguire v Makaronis* (1996) 188 CLR 449, Brennan CJ, Gaudron, McHugh and Gummow JJ at 475. In *Morris v Barron* [1900] 2 Ch 121, affd [1902] AC 271 the relief sought was to set aside one of the two things effected by a deed amending a settlement, the other having already been reversed by a subsequent amending deed.

127 *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 494.

need to allow for return of the matter to the court of first instance for these matters to be pursued.[128]

BARS TO RELIEF

Affirmation

[2518] The right to rescind will be lost by affirmation.[129] The exercise of an election[130] to continue with the transaction[131] is inconsistent with the right to rescind[132] and, once made, is irrevocable, or "final"[133] in respect of the particular ground for rescission.[134] A separate ground may later be used to support an act of rescission[135] if not too closely connected with the first.[136]

128 *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 494. In that case a deed of forgiveness of debt, given in connection with a transfer of property, was declared to be of no effect as to an amount to be determined by a Judge of the Supreme Court of Queensland in accordance with the reasons for judgment of the High Court. As to the matters to be taken into account, see *Bridgewater v Leahy* (1998) 194 CLR 457, Gaudron, Gummow and Kirby JJ at 494-497. The objective was to return to a deceased estate such amount as would have been granted to the widow and daughters of the deceased seeking provision for their maintenance and support under Pt 4 of the *Succession Act* 1981 (Qld), in diminution of a testamentary option intended to benefit a nephew of the deceased.

129 Strictly analysed, "affirmation" may not be a legal category in its own right, but rather the term covers situations governed by the legal theories of election and estoppel: *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, Priestley JA at 304 (also perhaps Handley JA at 306).

130 The doctrine of election occurs in other areas of law, and the principles by which it is governed do not differ any more than is required by the particular context.

131 The remedy of rescission lies in the hands of one party only, and there is no obligation to elect to rescind.

132 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 641, Mason J at 655. Election to continue with a principal contract may not prevent rescission of another contract collateral to it: *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227 (Cooper J).

133 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Mason J at 656; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, Mason, Brennan, Deane and Dawson JJ at 633; citing *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, Rich, Dixon and Evatt JJ at 733; *Wendt v Bruce* (1931) 45 CLR 245, Gavan Duffy CJ and Starke J at 253; *Clough v London & North Western Railway Co* (1871) LR 7 Ex 26, Mellor J (for the Court) at 34 (Ex Ch).

134 The onus of showing affirmation is on the party denying rescission: *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227, Cooper J at 279.

135 *Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603, Rich ACJ, Dixon and McTiernan JJ at 616-617; *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC); *Re London & Provincial Electric Lighting & Power Generating Co Ltd; Ex parte Hale* (1886) 55 LT 670 (Ch). See also *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 14-15. There is some suggestion that the proposition in the text applies where the innocent party is by conduct taken to have affirmed, but possibly not where there is an actual decision to affirm with knowledge of the right to disaffirm: *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 390-391 quoting *Elder's Trustee & Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603, Rich ACJ, Dixon and McTiernan JJ at 616-617.

136 *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court) at 15. There is no separate ground to rescind for misrepresentation, if a representation, known to have been false, is discovered to have been made fraudulently.

Whatever the ground, the essence of election is that "the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice".[137] Election has two requirements, which are knowledge and action (*Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 642). Action without relevant knowledge may estop or prevent a party from rescinding,[138] but is not a true election. An electing party must have full knowledge[139] of the facts giving rise to the right to elect,[140] and be otherwise able to exercise a free and informed choice. Any undue influence[141] or duress[142] that procured the transaction must have been removed, and any weakness of which unconscientious advantage was taken must have been countered by advice and assistance. There is some dispute regarding whether a rescinding party must also know of the legal right to rescind before being held to have elected.[143] Authority suggests that such knowledge will be imputed to a party where the right to elect is derived from a contractual provision.[144] However, that rule does not apply where the right to rescind derives from fraud in its broad equitable sense.[145]

137 Spencer Bower G, *The Law Relating to Estoppel by Representation* (3rd ed, revd by Turner A K, Butterworths, London, 1977), p 313, as quoted in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, Deane, Toohey, Gaudron and McHugh JJ at 41, 42.

138 See below, para [2519].

139 Mere suspicion is not enough: see *Rawlins v Wickham* (1858) 3 De G & J 304; 44 ER 1285. The means of knowing or partial knowledge is not sufficient knowledge, particularly if the position is still under investigation by the party who later seeks to rescind: see *Re Hoffman; Ex parte Worrell v Schilling* (1989) 85 ALR 145, Pincus J at 149-150 (Fed Ct); *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420, Giles J at 435; *Drozd v Vaskas* [1960] SASR 88, Reed J at 96; *Waters Motors Pty Ltd v Cratchley* (1963) 80 WN (NSW) 1165, Else-Mitchell J at 1176. Knowledge of circumstances "from which the decisive fact was a clear if not a necessary inference" will suffice: *Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603, Rich ACJ, Dixon and McTiernan JJ at 617, even though there is not "full and complete conscious knowledge": *Uremovic v Pei* (1986) 4 BPR 97248, Hodgson J at 9152 (SC NSW).

140 *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, Mason, Brennan, Deane and Dawson JJ at 634; citing *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 642, Mason J at 658; *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 385.

141 *Allcard v Skinner* (1887) 36 Ch D 145 (Ch and CA).

142 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, Mocatta J at 720; *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227, Cooper J at 279.

143 Debate extends to whether there is (or should be) a single rule for election in all circumstances in which it arises.

144 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 646; cited with approval in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, Deane, Toohey, Gaudron and McHugh JJ at 38-39.

145 The equitable concept of fraud includes the wrongful use of influence, or the unconscionable misuse of a position of advantage. See above, paras [2506]-[2512]. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), Ch 12.

[2519] An election to affirm requires some action by the party exercising the right to elect. Where there is knowledge both of the relevant facts and of the right to rescind, election may be manifested by express unequivocal words[146] or by unequivocal conduct.[147] Unequivocal conduct is that which is "consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other".[148]

Examples of unequivocal conduct include payment of calls and receipt of dividends by a purchaser of shares,[149] requirements by a purchaser of land that defects of title be rectified,[150] acceptance by a purchaser of goods of proposals for correction of defects,[151] and continued use of goods purchased (*Long v Lloyd* [1958] 2 All ER 402 (CA)).

Affirmation may be regarded as having taken place through conduct (unequivocal conduct in the sense described above), where the party seeking to rescind had knowledge of the relevant facts, but not of the right of election. A combination of conduct and proven knowledge of facts leads in many cases to an inference of fact that the party seeking to rescind had previous knowledge of the right to do so.[152] Even without such an inference of fact, conduct without relevant knowledge may estop a party from denying that there was an election to rescind, if the other party has relied on the representation implicit in the conduct. Where the conduct is not only unequivocal, but is also adverse to the interests of the other party, rescission will be denied.[153]

It is possible to ascribe this result to the principle of estoppel[154] on the basis that the other party has permitted the conduct,[155] and thus acted on the representation (implicit in the conduct) that there has been an election to affirm. However, it is preferable[156]

146 For an example of equivocation, see *Alleyn v Thurecht* [1983] 2 Qd R 706 (FC).

147 *Clough v London & North Western Railway Co* (1871) LR 7 Ex 26 (Ex Ch); *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, Lord Dunedin at 779.

148 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Stephen J at 646; cited with approval in *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, Deane, Toohey, Gaudron and McHugh JJ at 38-39.

149 *Scholey v Central Railway Co of Venezuela Ltd* (1868) LR 9 Eq 266n.

150 *Haynes v Hirst* (1927) 27 SR (NSW) 480.

151 *Long v Lloyd* [1958] 2 All ER 402 (CA).

152 See *Civil Service Co-operative Society of Victoria Ltd v Blyth* (1914) 17 CLR 601, Isaacs J at 615 (in some cases, relevant knowledge is "an almost irresistible inference").

153 *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, Sholl J at 443 (FC); *Ryan v Hooke* [1987] ANZ Conv R 39, Ryan J at 42-43 (SC Qld).

154 *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, Sholl J at 443 (FC).

155 Difficulties with this rationale would arise where the other party did not know of the conduct.

156 See *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, Herring CJ at 437 (FC).

to recognise the operation of a rule of law, and not to appeal to estoppel or imputed intention.[157] The cases represent the attempts of the courts to weigh the unconscionability (if any) that produced or seeks to maintain the transaction[158] against any unconscionability perceived by the court as arising from the attempt to rescind, despite the knowledge and the adverse action. Account is taken of the nature of the conduct. Only some exercises of rights under the transaction will be regarded as "adverse" to the other party.[159] Other exercises of rights are merely considered "neutral" (*Champtaloup v Thomas* [1976] 2 NSWLR 264, Mahoney JA at 278-279 (CA)). There must also be an assessment of timing. Even after the relevant knowledge has been gained, time is allowed to decide whether to rescind or affirm. Acts done during this period, not being clearly "adverse" to the other party, do not preclude rescission,[160] being directed only to maintaining the current position while a decision is being reached.[161] Likewise, acts indicating a willingness to continue, done before a party is presented with a final choice as to whether to affirm or rescind, may not constitute an election to affirm (*Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26). In such circumstances, there is no estoppel. Any representation is merely that the party entitled to rescind is deferring a decision.[162]

Other bars

[2520] Lapse of time may affect a party's right to rescind. Delay by itself is no bar to relief in equity.[163] Delay may, however, raise an

157 The difficulties involved in this question were referred to in *Baburin v Baburin (No 2)* [1991] 2 Qd R 240, McPherson J at 244 (FC). In the result, the right to rescind was held to have been lost through delay: see below, para [2520].

158 See *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, Herring CJ at 437 (FC).

159 For example, adverse exercises of rights include requiring and receiving payments pursuant to the contract and requiring other payments to be made: see *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; or doing work on property which (the property being returned) might expose the defendant to further costs: *Ryan v Hooke* [1987] ANZ Conv R 39, Ryan J at 43 (SC Qld). The making of requisitions on title in exercise of a right under the contract may or may not be "adverse", depending on circumstances: *Champtaloup v Thomas* [1976] 2 NSWLR 264, Glass JA at 268-269; Mahoney JA at 279-280 (CA); but not when submitted out of time, as there is then no obligation to answer: *Uremovic v Pei* (1986) 4 BPR 97248, Hodgson J at 9153 (SC NSW).

160 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Mason J at 656; *Proton Investments Pty Ltd v Vahekin Pty Ltd* (1988) 4 BPR 97298, Hope JA at 9549-9551 (CA NSW) (no election to terminate for breach).

161 *Champtaloup v Thomas* [1976] 2 NSWLR 264, Glass JA at 268-269 (CA); *Morris v Smith* (1981) 1 SR (WA) 280, Ackland J at 282 (Dist Ct) ("He was entitled to suspend his judgment").

162 *Champtaloup v Thomas* [1976] 2 NSWLR 264, Glass JA at 269 (CA). See also *Evans v Benson & Co* [1961] WAR 12, Hale J (for the Full Court), at 16.

163 *Baburin v Baburin (No 2)* [1991] 2 Qd R 240, McPherson J at 244 (FC). See also McPherson J's comment, at 244, that such an attitude may be "ill-suited" to modern conditions. Lack of complaint, or delay, may be explicable, or at least equivocal: *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227, Cooper J at 281-282.

estoppel[164] or be regarded as evidence of an election to affirm[165] or as conduct precluding rescission.[166] This is particularly so where prompt action could be expected,[167] as is often illustrated by transactions involving the acquisition of shares.[168] In other transactions, delay may bar rescission[169] where the inequity that infects the transaction is outweighed by the inequity in undoing it. Some judges refer specifically to the defence of laches.[170] Whether or not that doctrine is strictly applicable, where there are prima facie grounds for rescinding a transaction, the effect of delay[171]

> "must itself be governed by the kind of considerations upon which the principles of equity proceed. If the delay means that to grant relief would place the party whose title might otherwise be voidable on equitable grounds in an unreasonable situation, or if, because of a change of circumstances, it would give the party claiming relief an unjust advantage or would impose an unfair prejudice on the opposite party, these are matters which may suffice to answer the prima-facie grounds for relief."

Relevant factors, among others, are depreciation in the value of money and the rise in the value of property (often land),[172] and the fact that the rescinding party will profit by the efforts spent and risks taken by others, without the rescinding party having been at risk.[173]

164 The other requirements for raising estoppel, such as reliance by the other party, must be made out.

165 *Clough v London & North Western Railway Co* (1871) LR 7 Ex 26.

166 "Where it would be practically unjust to give a remedy, either because a party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material": *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir Barnes Peacock (for the Privy Council) at 239-240. In *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1279 said: "I have looked in vain for any authority which gives a more distinct and definite rule than this."

167 See *Civil Service Co-operative Society of Victoria Ltd v Blyth* (1914) 17 CLR 601, Griffith CJ at 608-609, Barton J at 610, Isaacs J at 612-614.

168 See *Scholey v Central Railway Co of Venezuela* (1868) LR 9 Eq 266n; *Civil Service Co-operative Society of Victoria Ltd v Blyth* (1914) 17 CLR 601. But see *Elder's Trustee & Executor Co Ltd v Commonwealth Homes & Investment Co Ltd* (1941) 65 CLR 603, where rescission was permitted despite considerable delay.

169 See *Leaf v International Galleries* [1950] 2 KB 86 (CA).

170 *Commonwealth Homes & Investment Co Ltd v Smith* (1937) 59 CLR 443, Dixon J at 463; Evatt J at 466 (quoting Cleland J at first instance: *Smith v Commonwealth Homes Ltd* [1937] SASR 337); *Civil Service Co-operative Society of Victoria Ltd v Blyth* (1914) 17 CLR 601, Isaacs J at 612. For discussion of delay and the defence of laches, see below, Chapter 29: "Equitable Defences".

171 *Fysh v Page* (1956) 96 CLR 233, Dixon CJ, Webb and Kitto JJ at 243.

172 These matters go to the justice, if not the ability, of effecting restitution by ordering a return of money in exchange for property.

173 For discussion of these and other factors see *Fysh v Page* (1956) CLR 233; *Baburin v Baburin (No 2)* [1991] 2 Qd R 240 (FC). See also *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378 (FC), the Court at 384-389, reversing the decision below.

No definite limit can be set, although time will not commence to "run" in respect of transactions procured by pressure,[174] undue influence[175] or like factors,[176] until the pressure or influence is removed.[177] Delay may combine with other conduct to produce a situation where rescission will be denied.

[2521] The acquisition by a third party of rights that would be affected by rescission may be a bar to obtaining the remedy.[178] This rule is justified on the basis that, the transaction having remained valid until rescinded, restoration has become legally impossible because of the injustice of depriving an innocent party.[179] Rescission will be available where no injustice results, such as where the third party had knowledge of the matters which are the basis of the right to rescind, or gave no value,[180] or can be adequately protected by court order.[181] Rescission will be denied where the third party acquires title to property,[182] but acquisition of other interests will suffice to activate the rule. Thus, a shareholder will not be removed from the list of members of a

174 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705.

175 *Allcard v Skinner* (1887) 36 Ch D 145 (CA); *Quek v Beggs* (1990) 5 BPR 97405, McLelland J at 11,780 (SC NSW). In *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399, influence was presumed, and actual pressure proved.

176 In *Baburin v Baburin (No 2)* [1991] 2 Qd R 240 (FC), the ground for relief was unconscionable dealing but not undue influence: Williams J at 257-258 (Demack J agreeing, McPherson J by inference) held that the appellant knew sufficient about the transaction, and was sufficiently free of the disability and disadvantage of which the respondent took advantage, to have sought independent advice, so that time "ran" from the date of the transaction.

177 In both *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 and *Allcard v Skinner* (1887) 36 Ch D 145 (CA), delay thereafter was sufficient to bar the remedy. But see *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 (pressure continued up to the issue of the writ); *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399, Duggan J at 417; *Quek v Beggs* (1990) 5 BPR 97405, McLelland J at 11,780 (SC NSW) (influence endured until death; no undue delay thereafter); *Cockerill v Westpac Banking Corporation* (1996) 142 ALR 227, Cooper J at 281-282 (threat of appointment of receiver and manager was not 'spent' when agreement was made).

178 *McKenzie v McDonald* [1927] VLR 134 (plaintiff denied rescission but awarded equitable compensation). At the least, therefore, a third party whose rights may be affected has a right to be heard on the issue: *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, the Court (Ipp, Owen and McKechnie JJ) at 215-216 referring to *Webb Distributors (Australia) Pty Ltd v Victoria* (1993) 179 CLR 15, Mason CJ, Deane, Dawson and Toohey JJ at 29.

179 *Waters Motors Pty Ltd v Cratchley* (1963) 80 WN (NSW) 1165, Else-Mitchell J at 1177.

180 *Scholefield v Templer* (1859) 4 De G & J 429, Lord Campbell LC (for the Court) at 433-434; 45 ER 166; *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420; *Quek v Beggs* (1990) 5 BPR 97405, McLelland J at 11,778 (SC NSW). With *Hunter BNZ Finance Ltd v C G Maloney Pty Ltd* (1988) 18 NSWLR 420 compare *Orix Australia Corporation Ltd v M Wright Hotel Refrigeration Pty Ltd* [2000] 155 FLR 267 where the third party was not a volunteer and rescission was denied: see Bleby J at 275.

181 *Waters Motors Pty Ltd v Cratchley* (1963) 80 WN (NSW) 1165. To be entitled to protection, the third party must be sufficiently connected with the impeached transaction: see *Scholefield v Templer* (1859) 4 De G & J 429, Lord Campbell LC (for the Court) at 435; 45 ER 166.

182 *Lewis v Avery* [1972] 1 QB 198 (CA) (transaction was voidable for fraud). But see *Ingram v Little* [1961] 1 QB 31 (CA) (transaction was held to be void, so that third party could acquire no right).

company consequent on an attempt to rescind after liquidation of the company has commenced.[183]

[2522] Full execution of some kinds of contract is a bar to rescission on the ground of innocent misrepresentation. Execution will not be a bar, however, where there has been fraud, or what amounts to a total failure of consideration.[184] This rule, often referred to as "the rule in *Seddon's* case",[185] is specific to contracts rather than transactions generally. It extends to contracts made by parties labouring under a common[186] or unilateral[187] mistake, but does not apply where one party is guilty of fraud "in the wide equitable sense which includes unconscionable dealing" (*Taylor v Johnson* (1983) 151 CLR 422, Mason ACJ, Murphy and Deane JJ at 431). If the rule in *Seddon's* case is law in Australia,[188] it is confined to those contracts where there is no unconscionability at the time of contracting,[189] but only in seeking to insist on maintaining the contract.

183 *Oakes v Turquand* (1867) LR 2 HL 325 (rescission would alter the list of contributors in liquidation, and thus the rights of creditors of the company). This rule was referred to in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15, Mason CJ, Deane, Dawson and Toohey JJ at 31, where it was "common ground" that the rule applied. See also *Westpac Banking Corp v Markovic* (1985) 82 FLR 7 (SC SA), where an undischarged bankrupt by fraud obtained a loan to pay for shares, which thereupon vested in the Official Receiver in Bankruptcy as after-acquired property. Zelling J (at 11) held there to be "nothing improper in the conduct of the Official Receiver in asserting as he does his claim to the shares on behalf of the creditors of the bankrupt".

184 *Svanosio v McNamara* (1956) 96 CLR 186, Dixon CJ and Fullagar J at 198-199, McTiernan, Williams and Webb JJ at 207; *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 (HC), Brennan, Deane, Gaudron and McHugh JJ at 585; *Morris v Smith* (1981) 1 SR (WA) 280, Ackland J at 282 (Dist Ct).

185 See *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326.

186 *Svanosio v McNamara* (1956) 96 CLR 186.

187 *Cousins and Cousins v Freeman* (1957) 58 WALR 79.

188 The rule has been abrogated or modified in some jurisdictions: see *Law Reform (Misrepresentation) Act* 1977 (ACT), s 3(b)(c); *Sale of Goods Act* 1923 (NSW), s 4(2A) (for sale of goods); *Misrepresentation Act* 1971 (SA), s 6; *Goods Act* 1958 (Vic), s 100(1) (consumer sales); s 111(1) (consumer leases). For consideration of the rule where there has been no statutory amendment, see the critique of Helsham CJ in Eq in *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381 at 383-387, and compare the extended discussions in *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1986) 9 NSWLR 731, Wood J at 733-737 and *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, Young J at 379-380. Both Wood J and Young J declined to apply the rule in *Seddon's* case, but it having been "recently cited with apparent approval by the High Court in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 585" its application remains "a live issue" in Australia: *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, Mason P at 369.

189 Some instances of common mistake and innocent misrepresentation are examples of situations where there was no fraud at the time of contracting. Fraud, duress, undue influence and unconscionable dealing constitute unconscionable behaviour when entering into a contract.

There is some doubt as to the kinds of contract to which the rule might apply. It has been held not to apply to contracts of a "continuing nature"[190] or to contracts for the sale of goods,[191] but has been applied in Australia to contracts for the sale of land[192] and for the sale of a business (*Vimig Pty Ltd v Contract Tooling Pty Ltd* (1986) 9 NSWLR 731).

190 Possibly this is because such contracts are not regarded as "executed". For examples see *Senanayake v Cheng* [1966] AC 63 at 82-84 (PC) (partnership); *Mihaljevic v Eiffel Tower Motors Pty Ltd* [1973] VR 546, Gillard J at 564-565 (hire-purchase); *Grogan v "The Astor" Ltd* (1925) 25 SR (NSW) 409, Long Innes J at 411 (allotment of shares, creating a continuing contractual relation between allottee and company: Long Innes J distinguished *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 itself as being concerned with a sale of shares). See also *MacKenzie v Royal Bank of Canada* [1934] AC 468 at 475-476 (PC) ("bank guarantee" of a continuing indebtedness of company, and hypothecation of shares). A lease of land can be regarded as "executed" for the purposes of the rule: *Angel v Jay* [1911] 1 KB 666. For the purpose of the rule, "execution" may refer to some formal act of conveyance requiring reconveyance to effect rescission, such as a conveyance of land, the creation of a lease or the transfer of shares, rather than to the signing of documents in completion or formalisation of the process of contracting.

191 *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381.

192 *Svanosio v McNamara* (1956) 96 CLR 186; *Cousins and Cousins v Freeman* (1957) 58 WALR 79; *Dean v Gibson* [1958] VR 563. It is not a ground for distinction that the vendor takes a mortgage to secure repayment of part of the price: *Kramer v Duggan* (1955) 55 SR (NSW) 385, McLelland J at 389, but if the price is payable "on terms", the contract is executory and can be rescinded for innocent misrepresentation: *Wilson v Brisbane City Council* [1931] St R Qd 360.

CHAPTER TWENTY-SIX

TAKING ACCOUNTS

Ian E Davidson and Mark P Cleary

INTRODUCTION

[2601] The action for account is an equitable remedy which is available to give effect to an equitable right or, in certain circumstances, in aid of a common law right. The remedy of taking accounts is usually applied in the context of taking an account of profits, either from a fiduciary or other person in breach of an equitable obligation, or from a person breaching obligations of confidentiality[1] or infringing intellectual property rights, including cases of passing off. In the intellectual property and passing off cases, the remedy is usually granted as ancillary to an injunction.

The historical background to the equitable action for account is that the original, and very limited, common law action for account was effectively superseded by approximately 1760 by the equitable action of account.[2] The demise of the common law action was due to the elaborate technicality involved at its various stages and to the growth of the common law action for money had and received, which had procedural advantages over the action of account. Equity had greater flexibility, particularly in accounts of any complexity and where multiple parties were involved. The role of the masters in Chancery as administrative officers with powers to assist in examining accounts, enabled accounts to be examined more effectively in equity than at law.

1 The issue of whether confidential information is "property" is not considered here: see McPherson B H, "Information as Property in Equity", in Cope M (ed), *Equity: Issues and Trends* (Federation Press, Sydney, 1995), p 234; Stuckey J E, "The Equitable Action for Breach of Confidence: Is Information Ever Property?" (1981) 9 *Sydney Law Review* 402; Palmer N, "Information as Property" in Clarke L (ed), *Confidentiality and the Law* (Lloyd's of London, London, 1990), Ch 5; Gurry F, *Breach of Confidence* (Clarendon Press, Oxford, 1984), pp 46-56; Dean R, *The Law of Trade Secrets* (Law Book Co, Sydney, 1990), pp 43-46.

2 See *Ex parte Bax* (1751) 2 Ves Sen 388; 28 ER 248; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2501]-[2503]; Stoljar S J, "The Transformation of Account" (1964) 80 *Law Quarterly Review* 203.

Commencing in the testamentary field, equity began to expand the availability of account until the whole notion of account or accounting became associated only with equity.[3]

The nature of the equitable remedy of taking accounts was affected by whether the plaintiff was relying on a common law right or an equitable right. The nature of the remedy is still considerably influenced by its equitable roots.

The remedy of taking accounts is personal against the party liable to account. Taking accounts does not of itself create a trust or an equitable interest in property. This remedy needs to be distinguished from remedies where a trustee, fiduciary or other person holds property which is subjected to a trust (including a constructive trust) or other equitable proprietary interest, such as an equitable charge, equitable lien or a tracing claim.[4] Unless there is property to which equitable remedies such as a constructive trust can apply as an "in personam remedy attaching to property",[5] a person entitled to take accounts will simply be an unsecured creditor of the defendant for the sum for which the defendant is liable to account (*Nimmo v Westpac Banking Corp* [1993] 3 NZLR 218 at 226).

[2602] The distinction between a fiduciary being declared a trustee of property gained in breach of duty, and being called to account personally for profits,[6] can be complicated for a number of reasons. First, provided the fiduciary's gain exists in the form of identifiable property, there is likely to be a declaration of constructive trust (or another remedy attaching to property, such as an equitable charge[7]) as a means for enabling the gain to be recovered.[8] Indeed, the much-criticised exception to this general rule in *Lister v Stubbs* (1890) 45 Ch D 1, suggesting that a dishonest fiduciary who received a bribe from a third party could

3 See Stoljar S J, "The Transformation of Account" (1964) 80 *Law Quarterly Review* 203.

4 See also above, Chapter 3: "Equity and Property"; Chapter 21: "Constructive Trusts"; and Chapter 23: "Tracing".

5 *Muschinski v Dodds* (1985) 160 CLR 583, Deane J at 615.

6 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, Gibbs J at 395; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, Mason CJ, Brennan, Deane, Dawson and Gaudron JJ at 557.

7 As occurred in *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

8 See *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 198-199; *Re Jarvis (decd); Edge v Jarvis* [1958] 2 All ER 336, Upjohn J at 340 (Ch); Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), pp 202-203; Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 715-718; Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), paras [1727]_[1733]; Cope M, *Constructive Trusts* (Law Book Co, Sydney, 1992), pp 284ff; Jackman I M, *The Varieties of Restitution* (The Federation Press, Sydney, 1998), p 134.

not be a constructive trustee but only had an unsecured personal liability to account for that sum, should be no longer accepted as applying in Australia now that *Lister v Stubbs* has been disapproved and convincingly rebutted by the Privy Council in *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324.[9] Further, it is arguable that "the fundamental liability of the defaulting fiduciary is to account, and the constructive trust is merely a means of achieving accounting".[10] Thus, the profit or gain of a defaulting fiduciary, including determination of what are "just allowances" to the defaulting fiduciary, will need to be identified and measured whenever the possible application of the constructive trust remedy is to be considered, even if a formal account is not taken.[11] Confusion can also arise because, at times, a defendant is labelled a "constructive trustee merely as a formula for equitable relief by way of a personal liability to account".[12]

Where a fiduciary is liable to account personally for a profit, benefit or gain acquired in breach of fiduciary duty, but the relevant property is no longer in existence or cannot be traced into the hands of the fiduciary (or, in limited circumstances, a third party holding the property subject to a constructive trust) so as to be the subject of a declaration of a constructive trust or other remedy attaching to property, the personal remedy of account of profits is the only means of attempting to recover that profit. Where property representing the gain is available, the personal remedy of account of profits may be used to supplement a declaration of constructive trust over the relevant property.[13]

9 notwithstanding the dicta of Gibbs CJ in *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 379; see also *Zobory v Commissioner of Taxation (C'th)* (1995) 64 FCR 86. For criticisms of *Lister v Stubbs*, see Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 740-742; Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 202; Richardson N, "Bribery and Constructive Trusts_The Demise of *Lister v Stubbs*" [1994] NZLJ 124; Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), para [1730]; Jackman, I M *The Varieties of Restitution* (The Federation Press, Sydney, 1998), pp 145-146. But cf Watts P, "Bribery and Constructive Trusts" (1994) 110 *Law Quarterly Review* 178.

10 Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 203.

11 See Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 204, who suggests that "upon the breach of fiduciary duty being established, the task is . . . first to identify and measure the content of the fiduciary's gain, and then to determine whether a constructive trust provides the appropriate formula for the relief".

12 Cope M, *Constructive Trusts* (Law Book Co, Sydney, 1992), pp 57, 294-296. See also *Nimmo v Westpac Banking Corp* [1993] 3 NZLR 218 at 226 and Wright D M, *The Remedial Constructive Trust* (Butterworths, Sydney, 1998), para [7.20].

13 Cope M, *Constructive Trusts* (Law Book Co, Sydney, 1992), p 295. See also Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), pp 201ff.

Whether a fiduciary's liability to account should be secured by an equitable lien or charge is a matter within the discretion of the court (*United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, McLelland J at 815).[14] Often it would be more advantageous to have a remedy binding property than the mere personal account of profits.[15]

[2603] Particular equitable remedies which, in certain circumstances, may well be sought in conjunction with, or as an alternative to, taking accounts (in addition to the constructive trust) include injunctions and Anton Piller orders, equitable compensation, tracing, delivery up and cancellation and the appointment of a receiver. Common law damages or common money counts, such as an action for money had and received in certain circumstances, may be sought in conjunction with, or as an alternative to, taking accounts. Indeed, the developing law of restitution has a considerable overlap with the remedy of taking accounts. At least insofar as the liability of an infringer of intellectual property to account is concerned, there is an overriding concern to recover the value of an "unjust enrichment"[16] from the defendant,[17] and not punish the defendant. An account of profits is confined to the profits actually made (*Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101).[18]

14 See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544, Mason CJ, Brennan, Deane, Dawson and Gaudron JJ at 559.

15 See *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *Warman International Ltd v Dwyer* (1995) 182 CLR 544. See also the judgment at first instance in *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, and of the New South Wales Court of Appeal in *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157. At first instance, McLelland J stated that he would not have awarded a constructive trust or any other ancillary proprietary relief, but would have awarded an account of profits, equitable compensation or common law damages at the election of the plaintiff. The Court of Appeal imposed a constructive trust over the assets. The decision was later reversed by the High Court in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. Mason J in the High Court dissented in the finding that there was no fiduciary duty. However, he was the only High Court judge to consider accounting, and would have restored the orders providing the limited relief granted by McLelland J. He further indicated that he may have included certain profits of the defendant made by it in the United States.

16 See (for the equitable principle of an account of profits) *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 175 CLR 101 at 111, 114-115, and the comments on *Dart* in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557. Compare (for restitution cases) *Australia & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 167 CLR 662 at 663; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 227, 256-257; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 375. See also *Lipkin Gorman (a Firm) v Karpnale Ltd* [1991] 2 AC 548 at 572; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 154; Mason A, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238.

17 The relationship between the remedy of account and unjust enrichment in the context of a defaulting fiduciary appears somewhat unclear: see below, para [2608].

18 See also *Apand Pty Ltd v Kettle Chip Company Pty Ltd (In Liq)* (1999) 88 FCR 568.

AVAILABILITY OF REMEDY

[2604] A plaintiff relying on an equitable right is generally entitled to a decree for accounts if an account is necessary to give effect to the equitable right. This includes ordinary suits by beneficiaries against their trustees, accounts taken in an action for the administration of a deceased estate, or suits by those entitled in equity to a remainder interest to calculate the quantum of equitable waste.[19] A claim against a fiduciary for breach of duty is in the same category. It is not necessary for loss to be suffered by the party to whom a fiduciary duty is owed, before a fiduciary could be liable to account for profits derived in breach of fiduciary obligations.[20] It is not relevant to the liability of a defaulting fiduciary to account for profits, that the profit was not available to the party to whom the fiduciary duty was owed.[21] While the case for an account of profits or constructive trust may be very strong where there has been a breach of fiduciary duty, the remedy of taking accounts remains within the discretion of the court but to be granted or withheld according to settled principles.[22]

[2605] The availability of an account in equity in aid of a common law right is less clear. Historically, the Court of Chancery refused to say precisely when it would grant or withhold that remedy (*North-Eastern Railway Co v Martin* (1848) 2 Ph 758; 41 ER 1136, Lord Cottenham LC at 762 (Ch)). Meagher, Gummow and

19 *London, Chatham & Dover Railway Co v South Eastern Railway Co* [1892] 1 Ch 120, Lindley LJ at 138; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2503].

20 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557; *Furs Ltd v Tomkies* (1936) 54 CLR 583, Latham CJ at 592; *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, Dixon J at 408-409; *Parker v McKenna* (1874) LR 10 Ch App 96, Sir W M James LJ at 124 (CA); *Green v Bestobell Industries Pty Ltd* [1982] WAR 1, Kennedy J at 20 (FC). An example of such a rule is the conflict of interest and duty rule. For an explanation of this rule and others, see above, Chapter 10: "Fiduciary Obligations".

21 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, Lord Russell at 386-387; *Boardman v Phipps* [1967] 2 AC 46; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Green v Bestobell Industries Pty Ltd* [1982] WAR 1, Kennedy J at 20 (FC). But see *Chan v Zacharia* (1984) 154 CLR 178, Deane J at 204-205, for a limit on extreme applications of an inflexible principle requiring fiduciaries acting in good faith to account for profits.

22 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559-560 (referring to equitable defences such as estoppel, laches, acquiescence and delay, and approving the comments of Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 204-205 that the liability to account will not arise where it would be "unconscientious to assert it" or where there was no possible conflict between personal interest and fiduciary duty and it was in the interests of the person to whom the fiduciary duty is owed that the fiduciary obtain rights or benefits). See also *Estate Realties v Wignall* [1992] 2 NZLR 615 at 628; Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), pp 202-203.

Lehane[23] suggest seven categories where equity can decree an account in aid of a common law right. While the remedy is usually thought of as an account of profits, some of these categories relate to legal or equitable debts owing between the parties. In summary, the identified categories are as follows:

- mutual accounts involving receipts and payments on both sides (rather than on one side only, which would be only a question of set-off unless the accounts were extremely simple);
- where the parties are in a quasi-fiduciary relationship or a relationship of confidence (for example, a principal in respect of an agent), even where the right relied on by the plaintiff is legal;
- where the court orders general administration of a dissolved partnership;
- in cases where it is considered that an account would be too complicated to settle at law (*Taff Vale Railway Co v Nixon* (1847) 1 HLC 111; 9 ER 695);[24]
- in the case of legal waste which has already been committed,[25] and the plaintiff asks for an injunction;
- in industrial and intellectual property cases, such as passing off and infringement of patent or trade mark cases. Here, the subject matter of the decree is not a state of indebtedness but the profit of the defendant. These situations, governed by statute and the general law, constitute the most important example of accounts assisting rights at law. The remedy was ordinarily only available in intellectual property cases as ancillary to an injunction. However, in Australia it is now clear that it may be available in some circumstances where an injunction will not be possible;[26]

23 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2504]. The authors note that these categories may not be closed.

24 See also *Lang v Simon* (1952) 53 SR (NSW) 508.

25 An account for equitable waste is more readily obtained and is not dependent on a right to an injunction. This is perhaps because damages at law cannot be recovered and because the personal action does not lie in equity with the plaintiff: see Browne D (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933), p 366.

26 See below, paras [2611] and [2618]. See also *Smith v London & South-Western Railway Co* (1854) Kay 408; 69 ER 173 (Ch); *Price's Patent Candle Co Ltd v Bauwen's Patent Candle Co Ltd* (1858) 4 K & J 727; 70 ER 302, Page Wood V-C at 730 (Ch); *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 31. It is arguable that categories (5) and (6) suggested in Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2504], and set out in the text above, are subsumed in a general jurisdiction in equity to give an account as ancillary to the jurisdiction to grant an injunction wherever one would be available in respect of a legal wrong (for example, trespass), rather than merely the legal wrongs listed in categories (5) and (6). But see Browne D (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933), pp 349-350.

- cases where not to order an account would abort the plaintiff's rights, being cases where the plaintiff would have had a legal right to be paid money from the defendant if the defendant had not wrongfully prevented the plaintiff's rights accruing.[27]

In addition to the above seven categories, there are more controversial areas where the availability of an account to assist common law rights has been canvassed. In contract law (at least in Australia) the orthodox view is that a plaintiff is not entitled to an account of the profits made from a defendant's breach of contract.[28] However, there have been some judicial and academic suggestions that, at least in some circumstances, a restitutionary claim for profits gained in breach of contract should be available.[29] In *Attorney-General v Blake* [2001] 1 AC 268 the House of Lords held that for England an account of profits is available as a remedy for breach of contract in what is described as an exceptional case. In *Attorney-General v Blake* the Crown successfully argued that Blake, a member of the British secret service in the 1950s, was under a contractual undertaking not to divulge official information obtained by him as a result of his employment by the Crown. Blake, while a prison escapee in Moscow, wrote an autobiography which contained official information obtained by him as a result of his employment by the Crown. The House of Lords upheld orders made for an account of profits for the money payable to Blake under his contract with a British publisher (*Attorney-General v Blake* [2001] 1 AC 268, Lord Nicholls, Goff, Browne-Wilkinson, Steyn and Hobhouse).[30]

27 *London, Chatham & Dover Railway Co v South Eastern Railway Co* [1892] 1 Ch 120, Lindley LJ at 140 (CA); *McIntosh v Great Western Railway Co* (1850) 2 Mac & G 74; 42 ER 29 (Ch).

28 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, McHugh J at 161; *Ravinder Rohini Pty Ltd v Krizaic* (1991) 30 FCR 300, Wilcox J at 317; *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361; *Tito v Waddell (No 2)* [1977] Ch 106 at 332; see also Jackman I M, *The Varieties of Restitution* (Federation Press, Sydney, 1998), pp 127-131.

29 See *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Deane J (dissenting) at 124-125; Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), Ch 18; Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 515-522; Jones G, "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 *Law Quarterly Review* 443; Birks P, "Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity" [1987] *Lloyd's Maritime and Commercial Law Quarterly* 421; Pizer J, "Public Interest Exception to Breach of Confidence Action" (1994) 20 *Monash University Law Review* 67 at 99; Edelman J, "Gain-based Remedies for Wrongdoing" (2000) 74 *Australian Law Journal* 231.

30 However, in *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (2001) ATPR 41-813 Gyles J of the Australian Federal Court held that an account of profits was not available in a claim for compensatory relief under the *Trade Practices Act* 1974 (Cth), s 87. In an earlier case, *Australian Rugby Union v Hospitality Group* (2000) 173 ALR 702 at 741, [129] Gyles J had rejected an argument based upon the English Court of Appeal decision of *Attorney-General v Blake* ([1998] 3 WLR 625) that was upheld by the House of Lords, that the tort of inducing a breach of contract was appropriate for the award of restitutionary damages by way of account of profits. See discussion by Heydon JA in *Brambles Holdings Limited v Bathurst City Council* [2001] NSWCA 61 at [93]. See also Erbacher S, "Account of Profits for Breach of Contract (Attorney-General v Blake)" (2001) 29(1) *Australian Business Law Review* 73; Anderson J, "Account of Profits for Breach of Contract" [2000] *New Zealand Law Journal* 415.

More established is the ability of a plaintiff against whom a tort has been committed to elect to sue in restitution to recover the defendant's unjust benefit rather than to sue in tort to recover damages.[31] The election by the plaintiff to sue in restitution is most commonly available to torts of conversion and detinue, trespass to land and goods and deceit.[32] It may be that this election is available in all torts, although it would be necessary for the defendant to have benefited from the tort for restitution to be an alternative remedy.[33]

Given that an order for account may be made in any division of the State Supreme Courts and in the Federal and High Courts, the remedy of taking accounts is likely to be available to assist in the aid of a common law right in situations outside the specific examples noted above where necessary to assist the enforcement of a common law right. However, the remedy remains discretionary and it may well be refused under general equitable principles in any new situation if there were no clear need for the remedy to be applied.

[2606] Numerous statutes, primarily in the area of intellectual property, specifically provide for a remedy of account of profits.[34] These statutes do not appear to enlarge the scope of account of profits from that previously available (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 31-32).[35] In each case, the legislation provides that an injunction may be granted, and that damages or an account of profits may also be ordered. In all but two provisions,[36] it is stated that the plaintiff has the option of choosing whether damages or account of profits will be the form of relief granted. There is some debate

31 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; *Sutton Motors Pty Ltd v Campbell* (1956) 56 SR (NSW) 304 at 311.

32 Balkin R and Davis J, *The Law of Torts* (2nd ed, Butterworths, Sydney, 1996), pp 795-796; Goff R and Jones G, The *Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), pp 780-783 and the cases cited in each text. See also Mason K, and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), Ch 16.

33 Mason K and Carter J W, *Restitution Law in Australia* (Butterworths, Sydney, 1995), Ch 16; Balkin R and Davis J, *The Law of Torts* (2nd ed, Butterworths, Sydney, 1996), pp 795-796; Goff R and Jones G, *The Law of Restitution* (5th ed, Sweet & Maxwell, London, 1998), Ch 38, especially pp 780-783.

34 *Circuit Layouts Act* 1989 (Cth), s 27(2); *Copyright Act* 1968 (Cth), s 115(2); *Designs Act* 1906 (Cth), s 32B(1); *Patents Act* 1990 (Cth), s 122(1); *Plant Breeder's Rights Act* 1994 (Cth), s 56(3); *Trade Marks Act* 1995 (Cth), s 126.

35 However, some of these statutes affect discretionary considerations: see below, para [2616].

36 *Circuit Layouts Act* 1989 (Cth), s 27(2); *Copyright Act* 1968 (Cth), s 115(2).

regarding whether the omission of this option to the plaintiff has any practical effect.[37]

Statutory recognition of the availability of an account of profits is not confined to the intellectual property area. For example, the *Estate Agents Act* 1958 (Vic), s 37(2)(b), considered in *Overton v Loukides* [1970] VR 462, McInerney J at 463,[38] provided that any person convicted of an offence against s 37(2)(a) shall, in addition to any court penalty, "be ordered by the court to account for and pay over to [the client] all profits resulting or which in the opinion of the court may result from the purchase and any subsequent dealing with any such real estate or business".

[2607] Taking an account is an order of the court for an inquiry. An account of profits aims to establish and to recover the net gain received by the defendant (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 32). An account, where not of profits, is still an inquiry to establish a final figure which will represent the amount of a liability or debt at law or equity. An order for an account may have different consequences from a judgment.[39]

By contrast, a "settled account" is not an inquiry, but an equitable plea available as a defence to an equitable suit for accounts. This is on the basis of a balance having been struck between the parties with respect to all accounts then outstanding between the parties. This plea requires valuable consideration, and is therefore only available where there have been mutual debits and credits (*Anglo-American Asphalt Co Ltd v Crowley Russell & Co Ltd* [1945] 2 All ER 324, Romer J at 331 (Ch)).[40]

The common law concept of "account stated" is similar to the equitable concept of "settled account" in that there must be

37 The general rule is that the plaintiff must elect either damages or an account of profit: see below, para [2610]. See *Zupanovich Pty Ltd v Beale Nominees* (1995) FCR 49, Carr J at 63-65 (rejecting the suggestion by Legoe J in *Concrete Systems Pty Ltd v Devon Symonds Holdings Ltd* (1978) 20 SASR 79 at 84 that s 115 (2) of the *Copyright Act* 1968 (Cth), removes the election option from the plaintiff); *Television Broadcasts Ltd v Tu* (1990) 19 IPR 307, O'Loughlin J at 320 (Fed Ct); *Prior v Lansdowne Press Pty Ltd* [1977] VR 65; Wells T H W, "Monetary Remedies for Infringement of Copyright" (1989) 12 *Adelaide Law Review* 164 at 174.

38 defendant employee real estate agent arranged for his wife to purchase property from the vendor client of his employer, without his client's consent.

39 See *Re Barrett; Whitaker v Barrett* (1889) 43 Ch D 70, North J at 73-74.

40 See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2507]-[2511] for a more detailed discussion.

mutual debits and credits, and an agreement for good consideration to pay the balance only. Usually, an "account stated" at common law is a cause of action asserted by a plaintiff.[41] Money due in equity could be recovered by a beneficiary in an action at law for money had and received, or on an account stated where the trustee had stated an account and admitted to the beneficiary that sums held by the trustee were payable to the beneficiary and had been appropriated to the beneficiary's use.[42] There are two main differences between pleading an account stated defensively at common law, and a settled account in equity. First, at common law the striking of the balance and subsequent payment must be proved, whereas in equity a mere striking of a balance is sufficient. Secondly, at common law an account stated is final and cannot be avoided except for fraud, whereas in equity a settled account is less conclusive.[43]

In an action for an account, where the issue of whether the defendant has already accounted to the plaintiff by accounts stated or settled between the parties is raised and supported by evidence, it will be premature to give an order to take an account before trial of that issue (*Cullen v Steen* [1932] St R Qd 192 (FC)).

Any division of a Supreme Court can order an account and the various Supreme Courts' Rules provide for taking accounts.[44] The High Court and Federal Court can order an account.[45]

41 See the discussion of possible meanings of "account stated" by Brennan J (as he then was) in *Bank Of NSW v Brown* (1983) 151 CLR 514 at 535-537. See also *Hampton Gold Mining Areas Ltd v Metals Exploration Ltd* (unreported, FC WA, 6 December 1995, 734 of 1995).

42 *Roper v Holland* (1835) 3 Ad & El 99; 111 ER 351; *Remon v Hayward* (1835) 2 Ad & El 666; 111 ER 256; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [143](b), where it is noted that the plaintiff's entitlement was based simply on the defendant's admission of debt and that the position was the same with executors.

43 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2508]-[2511]; but compare *Hampton Gold Mining Areas Ltd v Metals Exploration Ltd* (unreported, FC WA, 6 December 1995, 734 of 1995).

44 See: *Rules of the Supreme Court of the Australian Capital Territory* (ACT), O 4, O 36; *Supreme Court Rules* 1970 (NSW), Pt 48, Pt 49; *Supreme Court Rules* (NT), O 52; *Supreme Court Rules* (Qld), O 19, O 37, O 67; *Supreme Court Rules* 1987 (SA), rr 71, 85; *Rules of the Supreme Court* 1965 (Tas), O 3, O 17; *General Rules of Procedure in Civil Proceedings* 1986 (Vic), O 52, O 78; *Rules of the Supreme Court* 1971 (WA), O 45, O 61. In respect of any particular jurisdiction, the relevant practice service should be checked from time to time.

45 See *High Court Rules* (Cth), O 15, O 34; *Federal Court Rules* (Cth), O 39.

ACCOUNT OF PROFITS: GENERAL PRINCIPLES

Nature of relief

[2608] An account of profits aims, by means of an inquiry, to establish and recover the net gain received by the defendant as profit.[46] In *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101 at 111 and 114-115, it was said that the purpose of an account of profits is not to punish the defendant but to prevent her or his unjust enrichment. In *Warman International Ltd v Dwyer* (1995) 182 CLR 544, this rationale for an account of profits was restricted to the context of patent infringement. The court said that "the liability of a fiduciary to account differs from that of an infringer in an intellectual property case" (at 557). Later, the court seemed to suggest a role for unjust enrichment of a plaintiff in limiting extremes of liability for a fiduciary to account for profits of a business (at 561).[47] A key issue when an account is claimed against a defaulting fiduciary will be whether the account will be of profits from a business or merely of specific assets or particular benefits to the fiduciary obtained in breach of fiduciary duty (*Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559-561). Profits not actually received by a defendant may be recovered as an account of profits where the account is on the basis of wilful default[48] and where there is unrealised profit.[49]

[2609] Common law damages can be contrasted with an account of profits. Windeyer J succinctly distinguished the functions of the two remedies in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 as follows:

46 *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 405-406 (FC); affd *Dart Industries Inc v The Decor Corp Pty Ltd* (1993) 179 CLR 101 (in the context of a patent infringement case). See also *Goodlet v Fowler* (1876) 14 SCR (NSW) 496, Martin CJ at 498-499 (in the context of a patent case); *My Kinda Town Ltd v Soll* [1982] FSR 147, Slade J at 156 (Ch) (in the context of a passing off case); revd [1983] RPC 407 (CA, no passing off). See further *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 34.

47 The court expressed its view in the following enigmatic way: "This is not to say that the liability of a fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff."

48 See below, para [2617].

49 See below, para [2625].

> "The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed: by the latter he is required to compensate the party wronged for the loss he has suffered. The two computations can obviously yield different results, for a plaintiff's loss is not to be measured by the defendant's gain, nor a defendant's gain by the plaintiff's loss. Either may be greater, or less, than the other. If a plaintiff elects to take an inquiry as to damages the loss to him of profits which he might have made may be a substantial element of his claim. But what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as what the defendant did make by doing so." (Windeyer J at 32)[50]

[2610] Normally, a plaintiff must elect between damages and an account of profits[51] in circumstances where the relevant infringement could be remedied either by an account of profits or by common law damages (or, in respect of infringement of a purely equitable right, equitable compensation in the exclusive jurisdiction of equity). The election need not be made before the trial starts, and may even be delayed until determination of the substantive cause of action.[52] Therefore, there is no difficulty in claiming both damages or equitable compensation and an account of profits in the relief sought. Ordinarily the election must be made when, but not before, judgment is given in the plaintiff's favour and the judge is asked to make orders against the defendant.[53] Where the plaintiff does not know which remedy will be more advantageous at the time of judgment on liability, the court may

50 Although that case concerned the *Trade Marks Act* 1955 (Cth), s 65 (see now the *Trade Marks Act* 1995 (Cth), s 126), these comments are generally applicable to the remedy of account of profits. Windeyer J emphasised that the effect of s 65 was merely to make available, in the case of the infringement of a registered trade mark, the same remedies and relief as can be had in a passing off action in the case of a common law trade mark. See also *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101.

51 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 32. See also *Neilson v Betts* (1871) LR 5 HL 1, Lord Westbury at 22; *De Vitre v Betts* (1873) LR 6 HL 319, Lord Chelmsford at 321. In respect of equitable compensation as an alternative to account of profits, see *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, McLelland J at 816 and *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

52 See *Minnesota Mining & Manufacturing Co v Jeffries Pty Ltd* (1992) 37 FCR 294; *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *Lever Brothers, Port Sunlight, Ltd v Sunniwite Products, Ltd* (1949) 66 RPC 84, Romer J at 102 (Ch); *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* (1988) 12 IPR 48 (HC NZ); *Rockhampton Permanent Building Society v Petersen* [1986] 1 Qd R 128, Connelly J (for the Full Court) at 130.

53 *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, the Court at 521; see also *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1996) 36 IPR 293. When there is not a split trial on liability and monetary relief, a court may not always permit the plaintiff to defer an election until after the conclusion of the final hearing: see *Gentry Homes Pty Ltd v Diamond Homes Pty Ltd* [1993] AIPC 39,471 (¶ 91-008).

order discovery or make other orders designed to give the plaintiff the information needed to make the election.[54]

An exception to the general rule of election is that where there is both a breach for which an account of profits would be available and a breach of an independent common law obligation (such as arising out of a contract), common law remedies (including damages) may be available alternatively, or possibly additionally to, any available equitable relief, including an account of profits. In *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, employees were involved in both a breach of fiduciary duty and a breach of their common law duty of good faith to their employer arising from their contract of employment. Orders were made granting the employer an inquiry regarding damages in respect of the loss suffered by it from breach of the defendants' contracts of employment, and an account of profits regarding the breach of their fiduciary duty. The defendants unsuccessfully argued that the only available remedy was an account of profits and not an inquiry regarding damages. If there had not been a breach of common law duties arising out of the contract of employment in addition to the breach of fiduciary obligations by the employees, then presumably an election may have had to have been made by the plaintiff between the remedies of equitable compensation and an account of profits (available for breach of a purely equitable duty). Furthermore, to the extent that the common law and equitable causes of action arose out of the same facts, it would be against principle to permit a plaintiff to recover both the full amount of profits derived by the defendant and damages sustained by the plaintiff, without adjustment to prevent double counting.[55]

54 *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, the Court at 521; *Island Records Ltd v Tring International Plc* [1996] 1 WLR 1256, Lightman J at 1258-1260; *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1996) 36 IPR 293 (where the plaintiff whose copyright had been breached was entitled to defer election until after discovery, and in particular, until after discovery of documents relating to overheads, but was not entitled to defer election until after a further hearing on the quantum of monetary relief); see also Leeming M J, "When Should a Plaintiff Take an Account of Profits?" (1996) 7 *Australian Intellectual Property Journal* 127 at 128-131.

55 *House of Spring Gardens Ltd v Point Blank Ltd* [1983] FSR 489 (SC Ireland) (intellectual property case, three causes of action arising out of the same facts, double counting not permitted); *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324 at 331 (PC): "There is no reason why equity should not provide two remedies so long as they do not result in double recovery". The decision at first instance in *United States Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, McLelland J at 819-821, supports the view that double counting will not be permitted where common law and fiduciary obligations (or other obligations in respect of which an account of profits is available) are breached. In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Mason J (dissenting, and the only judge to consider this issue) would have restored the orders made by McLelland J. See also *Midland Montagu Australia Ltd v Harkness* (1994) 35 NSWLR 150 at 159.

In electing between seeking an account or damages (or equitable compensation where applicable), a plaintiff in certain situations would prefer to have an account of profits. This is particularly so in circumstances where a defendant has made more money using the plaintiff's property or rights than the plaintiff would have made by using them, or where a defendant has made more money by breaching an obligation owed to the plaintiff than the injury or loss suffered by the plaintiff by reason of the breach of obligation.[56] One advantage for a plaintiff of an account of profit over damages, particularly in the intellectual property context, is that the account may involve actual examination of the defendant's books of account. This may incidentally afford the plaintiff a sight of customers' names and other information about the defendant.[57] Arguably, such a plaintiff would need to take care not to use such information in a way which could involve a contempt of the court, by breaching implied obligations not to use information disclosed through compulsory court disclosures for any purpose other than the litigation.[58]

However, there may be disadvantages to a plaintiff in electing to take an account of profits. Where calculation of profit is difficult,[59] the plaintiff may end up paying increased costs.[60] Furthermore, the remedy of account may be unavailable due to discretionary factors.[61]

[2611] The relationship of account of profits with the remedy of injunction is of particular importance where account of profits is considered outside the exclusive jurisdiction of equity. The traditional view was that the right to an account of profits was

56 Where a large defendant breaches a confidence placed in it by a small plaintiff, it may well be that the profits made by the defendant from her or his breach will exceed the damages which could be awarded to the plaintiff. See Patfield F, "The Remedy of Account of Profits in Industrial and Intellectual Property Litigation" (1984) 7 *University of New South Wales Law Journal* 189 at 190-191; Patfield F, "The Modern Remedy of Account" (1987) 11 *Adelaide Law Review* 1 at 5; Leeming M J, "When Should a Plaintiff Take an Account of Profits?" (1996) 7 *Australian Intellectual Property Journal* 127. See also Sindone M P "Account of Profits Under Section 115(2) of the *Copyright Act* 1968 (C'th)" (1999) 16(4) *Copy Reporter* 152 for a discussion of disadvantages and advantages of account of profits as a remedy in breach of copyright cases.

57 Patfield F, "The Remedy of Account of Profits in Industrial and Intellectual Property Litigation" (1984) 7 *University of New South Wales Law Journal* 189 at 191, citing Cornish W R, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (3rd ed, Sweet & Maxwell, London, 1996), para [2-42].

58 See *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 (CA), which held that there is an implied obligation not to use material obtained through interrogatories for purposes other than the litigation, and that the rule is not limited to the usually applied context of the use of discovered material.

59 See below, para [2624].

60 See below, para [2623].

61 See below, paras [2612]ff.

dependent upon the right to an injunction, so that a plaintiff who was not entitled to an injunction could not have an account of profits.[62] However, there is no longer an inflexible principle that an account of profits may only be granted as ancillary to an injunction (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 31).[63] The current position is that, if an injunction is refused on general discretionary grounds, such as delay[64] or lack of "clean hands",[65] an account of profits is also likely to be refused. An undertaking to keep an account of profits by an alleged infringer may be a discretionary factor militating against an interlocutory injunction (*Triangle Corp v Carnsew* (1994) 29 IPR 69).

Discretionary factors barring relief

[2612] Discretionary factors may, in certain cases, prohibit a successful plaintiff from electing for an account of profits. The fact that the remedy of account of profits is discretionary is an important point of distinction from the remedy of damages. Particular factors which may affect the court's discretion are delay, knowledge, and the degree of difficulty in calculating profits.

Delay

[2613] Delay on the part of a plaintiff may have the effect of limiting the period for which an account of profits may be claimed or, in a more extreme situation, precluding the plaintiff from electing an account of profits.[66] Delay by the plaintiff has resulted in a limiting of the period for which an account of profits could be calculated.[67] Delay has also prevented a plaintiff company from electing an account of profits in a case where the delay was in

62 *Smith v London & South-Western Railway Co* (1854) Kay 408; 69 ER 173; *Price's Patent Candle Co Ltd v Bauwen's Patent Candle Co Ltd* (1858) 4 K & J 727; 70 ER 302, Page Wood V-C at 730.

63 Trade mark case, in which an injunction could have been granted when the suit commenced but for practical reasons could not be granted at time of first judgment. Account of profits was ordered even though injunction could not be ordered.

64 *Smith v London & South-Western Railway Co* (1854) Kay 408; 69 ER 173.

65 See below, Chapter 29: "Equitable Defences".

66 *Aquaculture v NZ Green Mussel (No 2)* (1986) 10 IPR 319 at 332-333 (revd, on another point, [1990] 3 NZLR 299).

67 *Lever Brothers, Port Sunlight, Ltd v Sunniwite Products, Ltd* (1949) 66 RPC 84 (Ch) (plaintiff delayed for nine months after the infringement of a trade mark before sending a letter of complaint to the defendant. The account of profits was subsequently calculated from the date of the letter of complaint). See also *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 (four years elapsed between registration of a trade mark and complaint to the defendant about infringement. It is not clear from judgment when plaintiff became aware of infringement. The account of profits was dated from time of complaint).

part deliberate.[68] That plaintiff, which delayed for ten years in bringing an action, was restricted to an inquiry regarding damages. By contrast, a delay of four months in a passing off case, which could be explained by illness, caution and the need for advice from counsel, did not prevent the plaintiff from recovering an account of profits for the whole period of the defendant's sales (*Edward Young & Co Ltd v Holt* (1948) 65 RPC 25 (Ch)). Less account may be taken of delay where an account of profits is claimed and the original breach was intentional and deliberate.[69] Where there is significant delay, the possibility of the defendant being precluded from obtaining an account of profits on the basis of acquiescence or laches may need to be considered.[70] In *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J rejected the defendant's argument that the plaintiff's delay amounted to laches barring its rights to an account. In that case, the plaintiff's trade mark had been registered for four years before the plaintiff complained to the defendant, but it is not clear from the judgment how long the plaintiff was aware of the infringement by the defendant.

Knowledge

[2614] Knowledge by the defendant is important to the availability of the remedy of an account of profits for a plaintiff in cases concerning the infringement of intellectual property rights. An account of profits "is limited to the profits made by the defendant during the period when he knew of the plaintiff's rights" (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 34).[71] The onus of proving knowledge by

68 *Electrolux Ltd v Electrix Ltd* (1953) 70 RPC 158 (Ch) (the plaintiffs were aware of the defendant's infringement of a trade mark for up to ten years before the action was commenced, but delayed to enable the plaintiff's registered trade mark to be brought into use). See also *International Scientific Communications Inc v Pattison* [1979] FSR 429, Goulding J at 439 (Ch); *Re Jarvis (decd); Edge v Jarvis* [1958] 2 All ER 336, Upjohn J at 341-342 (Ch).

69 *LED Builders Pty Ltd v Masterton Homes (NSW) Pty Ltd* (1994) 54 FCR 196 at 198 (appeal dismissed in *Masterton Homes (NSW) Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417).

70 Australian cases based on acquiescence and laches include *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 84 FLR 101 (SC Qld) and *Orr v Ford* (1989) 167 CLR 316. The Full Federal Court in *Masterton Homes Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417, Lockhart at 425 expressly left open the question whether laches, acquiescence or delay are available as a defence to a statutory action for an account of profits under s 115 of the *Copyright Act* 1968 (Cth). See also below, Chapter 29: "Equitable Defences". Estoppel by acquiescence is arguably subsumed under general equitable estoppel and, possibly, a unified estoppel doctrine: see above, Chapter 7: "Estoppel". Estoppel by acquiescence is arguably subsumed under general equitable estoppel and, possibly, a unified estoppel doctrine: see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394.

71 See also *Edelsten v Edelsten* (1863) 1 De GJ & S 185; 46 ER 72, Lord Westbury LC at 199 (CA); *Moet v Couston* (1864) 33 Beav 578; 55 ER 493, Sir John Romilly MR at 580; *A G Spalding & Bros v A W Gamage Ltd* (1915) 32 RPC 273; [1979] 2 All ER 927, Lord Parker at 283 (HL).

the defendant is on the plaintiff (Windeyer J at 35). What constitutes knowledge of the "plaintiff's rights" will vary depending on the right in question. For trade marks, registered designs and patents, a defendant does not necessarily have sufficient knowledge of the plaintiff's rights to make it accountable if the defendant is merely aware that the plaintiff has been selling goods under the same name or design, or using the same invention.

Statutory changes to the position with respect to knowledge and constructive knowledge for patents and registered designs, as well as copyright and circuit layouts, are noted below, para [2616]. Subject to statutory modifications, to have knowledge of the relevant right, a defendant must have knowledge of the relevant registration.[72] It has been held that a defendant was not fixed with constructive knowledge by reason of registration of a trade mark (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 32-33).[73] A defendant was held to be put on inquiry that he was not infringing the rights of the owner of the brand name "Mencoza" where he received an inquiry as to whether "Mencoza" was a typographical error for "Mendoza".[74] In the areas of passing off and possibly of confidential information it is more difficult to say what constitutes knowledge of a plaintiff's rights. There may be less of a distinction between knowing of a plaintiff's activities or that particular information is confidential, and knowing of the plaintiff's rights.[75]

Difficulty of profit calculation

[2615] The degree of difficulty involved in taking an account is a factor the court can consider when exercising its discretion on whether to grant the remedy.[76] However, the practical difficulties of

72 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 32-33 (managing director of the defendant was aware that the plaintiff was using same name for goods; defendant only had knowledge when informed that the plaintiff had a registered trade mark).

73 See also *Slazenger & Sons v Spalding & Brothers* [1910] 1 Ch 257, Neville J at 261.

74 *Edward Young & Co Ltd v Holt* (1948) 65 RPC 25, Wynn Parry J at 29 (Ch) (a passing off case). Wynn Parry J found in the absence of specific inquiry that the defendant should have made inquiries such as searching trade journals: see Patfield F, "The Modern Remedy of Account" (1987) 11 *Adelaide Law Review* 1 at 11-12, for a discussion of whether this case is inconsistent with *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 on the question of constructive knowledge.

75 See Patfield F, "The Modern Remedy of Account" (1987) 11 *Adelaide Law Review* 1 at 10.

76 See *Docker v Somes* (1834) 2 My & K 655; 39 ER 1095, Lord Brougham LC at 673-674 (Ch); *Aquaculture v NZ Green Mussel (No 2)* (1986) 10 IPR 319 at 332 (reversed on another point [1990] 3 NZLR 299).

taking an account of profits will only prevent a plaintiff from electing to take an account in an extreme case.[77]

[2616] Statutory modification of the concepts of knowledge and availability of discretionary relief has occurred in relation to some infringements of intellectual property rights.[78] The *Trade Marks Act* 1955 (Cth), s 65, did not alter the scope of the account of profits remedy from that available in equity (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 31-34).[79] There is no reason to assume that the similar wording of other intellectual property legislation will not be similarly interpreted.[80] There are no specific provisions in the *Trade Marks Act* 1995 (Cth) dealing with knowledge or how the discretion is to be exercised.

The *Patents Act* 1990 (Cth), s 123, deals specifically with the position of the innocent infringer and provides for a presumption of awareness. A court may refuse to make an order for an account of profits in respect of a patent infringement "if the defendant satisfies the court that, at the date of the infringement, the defendant was not aware, and had no reason to believe, that a patent for the invention existed". If patented products, marked to indicate they are patented in Australia, "were sold or used in the patent area to a substantial extent before the date of the infringement, the defendant is to be taken to have been aware of the existence of the patent unless the contrary is established". These provisions may give the court a discretion to award an account of profits even when the defendant is not aware, and had no reason to be aware, of the infringement, whereas under the general law, knowledge would appear to have been necessary for an account of profits (but not damages) to be awarded. It would be rare that an account of profits would be awarded in such circumstances. In contrast to the general law, s 123(1) places the onus on the defendant to

77 *Dart Industries Inc v D˘82cor Corporation Pty Ltd* (1993) 179 CLR 101, Mason CJ, Deane, Dawson and Toohey JJ at 111: "Whilst it is accepted that mathematical exactitude is impossible, the exercise is one that must be undertaken". As an example of an extreme case, an account might be refused if it were clear that there were no profits: see *Colburn v Simms* (1843) 2 Hare 543; 67 ER 224, Wigram V-C at 560 (Ch); *Powell v Aiken* (1858) 4 K & J 343; 70 ER 144, Page Wood V-C at 353 (Ch).

78 *Circuit Layouts Act* 1989 (Cth), s 27(2); *Copyright Act* 1968 (Cth), s 115(2); and see *LED Builders Pty Ltd v Masterton Homes (NSW) Pty Ltd* (1994) 54 FCR 196 at 197ff; *Designs Act* 1906 (Cth), s 32B(1); *Olympic Insignia Protection Act* 1987 (Cth), s 9; *Patents Act* 1990 (Cth), s 122(1); *Plant Breeder's Rights Act* 1994 (Cth), s 56(3); *Trade Marks Act* 1995 (Cth), s 126.

79 See now *Trade Marks Act* 1995 (Cth), s 126.

80 *Circuit Layouts Act* 1989 (Cth), s 27(2); *Copyright Act* 1968 (Cth), s 115(2); *Designs Act* 1906 (Cth), s 32B(1); *Olympic Insignia Protection Act* 1987 (Cth), s 9; *Patents Act* 1990 (Cth), s 122(1); *Plant Breeder's Rights Act* 1994 (Cth), s 56(3); *Trade Marks Act* 1995 (Cth), s 126.

show lack of awareness of the infringement. The requirement in this provision that the defendant satisfy the court that he or she had no reason to believe that a patent existed involves the concept of constructive knowledge, while s 123(2) illustrates one situation where constructive knowledge is assumed unless the contrary is established. Although s 123(2) is not the only situation where constructive knowledge can be shown, it does not appear that registration of a patent of itself is a ground for constructive knowledge.

The *Plant Breeder's Rights Act* 1994 (Cth), s 57(1), under which the court may refuse to make an order for an account of profits if the infringer "satisfies the Court that, at the time of the infringement, the person was not aware of, and had no reasonable grounds for suspecting, the existence" of the right is somewhat similar to the *Patents Act* 1990 (Cth), s 123(1). Also, under s 57(2) there is a presumption of awareness of the existence of a plant breeder's right in a variety where the propagating material of plants of that variety, labelled so as to indicate the plant breeder's right is held in the variety in Australia, has been sold to a substantial extent before the date of the infringement.

The *Designs Act* 1906 (Cth), s 32B(2) deals with the "ignorance" defence in a slightly different way from the *Patents Act* 1990 (Cth). The court may refuse to award an account of profits in respect of an infringement if the defendant satisfies the court that the defendant was not aware that the design was registered at the time of the infringement and that the defendant "had, prior to that time, taken all reasonable steps to ascertain whether a monopoly in the design existed".[81] The comments above regarding the court's discretion and the onus of proof in respect of patents are equally applicable here. Although s 32B(2) has no deemed presumption of awareness, the requirement to take all reasonable steps to ascertain whether a monopoly in the design existed requires more than a showing that there was no reason to believe that a patent existed. This requires positive action by the defendant, and the issue arises as to whether a search of the register of designs would be necessary before all reasonable steps had been taken. If that were the case, the s 32B(2) defence would not be able to be satisfied unless there were some breakdown in obtaining the results of a search. There do not appear to be reported cases dealing with this issue, but it has been argued that what is reasonable may be affected by the circumstances of the particular defendant, particularly the general awareness of the defendant of the registered design regime.[82]

81 *Designs Act* 1906 (Cth), s 32B(2)(b).

82 Patfield F, "The Modern Remedy of Account" (1987) 11 *Adelaide Law Review* 1 at 15-16.

The wording in respect of innocent infringements in the *Copyright Act* 1968 (Cth), s 115(3), and the very similar wording in the *Circuit Layouts Act* 1989 (Cth), s 27(3), is somewhat different from the other legislation and, on a literal interpretation, would give rise to anomalies. The *Copyright Act* 1968 (Cth), s 115(3), provides:

> "Where, in an action for infringement of copyright, it is established that an infringement was committed but it is also established that, at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, the plaintiff is not entitled under this section to any damages against the defendant in respect of the infringement, but is entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not."

On one interpretation of "entitled", a plaintiff would always be able to obtain an account of profits where the defendant was unaware and had no reasonable grounds for suspecting that there was an infringement. An alternative view is that "entitled" merely means not disentitled by that section so that the discretion of the court to grant or refuse equitable relief is not taken away by that section.[83] However, the proviso to s 115(3) permits an account to be granted in copyright proceedings or proceedings under the *Circuit Layouts Act* 1989 (Cth) where it would not be available under the general law and the *Trade Marks Act* 1995 (Cth), and there would at the least be a discretion not to award it under the other intellectual property legislation. To that extent, the proviso can be criticised as being anomalous.[84] The Full Federal Court in *Masterton Homes Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417 expressly left open the question of whether laches, acquiescence or delay are available as defences to an action for an account of profits under s 115 of the *Copyright Act* 1968 (Cth) (*Masterton Homes Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417, Lockhart J at 425).

83 See Wells T H W, "Monetary Remedies for Infringement of Copyright" (1989) 12 *Adelaide Law Review* 164 at 176; Lahore J, *Intellectual Property in Australia: Copyright Law* (Butterworths, Sydney, 1988), para [4.15.245]; *LED Builders Pty Ltd v Masterton Homes (NSW) Pty Ltd* (1994) 54 FCR 196 at 197-198; *Zupanovich Pty Ltd v Beale Nominees* (1995) 59 FCR 49.

84 See Wells T H W, "Monetary Remedies for Infringement of Copyright" (1989) 12 *Adelaide Law Review* 164 at 176.

Wilful default

[2617] A decree that accounts be taken on the basis of wilful default can be obtained by a plaintiff where a defendant is in legal or physical possession of property in which the plaintiff has an equitable interest. A defendant obliged to account on the basis of wilful default must account not only for receipts and payments actually made, but also for all moneys which the defendant would have possessed or received if the property had been managed prudently. The typical relationships in which accounts are decreed on the basis of wilful default are beneficiary and trustee, beneficiary and legal personal representative, and mortgagor and mortgagee.[85] A mortgagor can obtain a decree against the mortgagee in possession without alleging or proving any act or wilful default by the mortgagee, providing the mortgagor offers to redeem, or alleges that no default has taken place, and therefore that there is no necessity to redeem.[86] In other cases, in order to be entitled to accounts on the basis of wilful default, the plaintiff must allege in the pleading and prove at least one example of wilful default by the defendant.[87]

PROCEDURE FOR TAKING THE ACCOUNT

[2618] The appropriate time for taking account is affected by the fact that an account does not create a new cause of action and is only possible when there are underlying substantive rights (*Rapid Metal Developments (Aust) Pty Ltd v Rosato* [1971] Qd R 82, Wanstall J at 88). Thus, where the state of an account and the balance depend on the determination of disputed questions of fact or law, those questions should be determined before an account is taken.[88] Accounts should not be ordered until the plaintiff's right to such accounts has been admitted or

85 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2506], [2513].

86 *Hickey v Heydon* (1894) 15 LR (NSW) Eq 167; *Mayer v Murray* (1878) 8 Ch D 424; *Tannock v North Queensland Securities Ltd* [1932] St R Qd 285. See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2506].

87 *Sleight v Lawson* (1857) 3 K & J 292; 69 ER 1119; *Job v Job* (1877) 6 Ch D 562; *Re Symons; Luke v Tonkin* (1882) 21 Ch D 757; *Re Youngs; Doggett v Revett* (1885) 30 Ch D 421 (CA); *White v City of London Brewery Co* (1889) 42 Ch D 237 (CA); *Re Wrightson; Wrightson v Cooke* [1908] 1 Ch 789.

88 *Rapid Metal Developments (Aust) Pty Ltd v Rosato* [1971] Qd R 82, Wanstall J at 90; *Rockhampton Permanent Building Society v Petersen* [1986] 1 Qd R 128, Connolly J (for the Full Court) at 130; *Poole v Perpetual Executors, Trustees & Agency Co (WA) Ltd* (1930) 32 WALR 96; *McKenzie v Beaver* (1910) 12 WALR 45.

established (*Batthyany v Walford* (1887) 36 Ch D 269, Cotton LJ at 276-277). However, allegations by a defendant which do not raise a preliminary point to the right to an account may not prevent the account being taken.[89] Where there is no preliminary question to be determined, rules of court often provide a summary jurisdiction for taking accounts where appropriate, and should be consulted. At the conclusion of the final hearing and after the plaintiff has made an election, the judge will normally direct that an account of profits be taken by the Master, Registrar or other senior court officer.

In interlocutory proceedings involving infringement of intellectual property rights, a defendant may be put on terms to keep separate accounts where an interlocutory injunction is refused. The issue is one of the balance of convenience, and an order for an account rather than an interlocutory injunction may be unsatisfactory for the protection of the plaintiff.[90]

[2619] A claim for an account should state facts showing that the plaintiff is entitled to the account claimed, and that the defendant has failed in her or his duty by not rendering proper accounts.[91] Usually, the plaintiff would allege that the plaintiff did not know the state of accounts and the exact amount due.[92] The election to seek an account of profits will not normally need to be made before the end of hearing on the substantive issue. The rules of court of the relevant jurisdiction should always be examined for guidance regarding the procedure of taking accounts in that jurisdiction.

[2620] The form of an order for taking accounts requires considerable care. A court cannot give a declaration of "accountability", and the order for accounts should state the basis on which they will be taken (*McGrath Trailers Pty Ltd v Kopittke* (1967) 41 ALJR 31, Barwick CJ, McTiernan, Taylor, Kitto and Windeyer JJ at 32). There may be advantages in determining issues affecting the precise nature of the account before the account is taken. Thus, the order for an account may be varied before the account is taken to "make it clear precisely what receipts and outgoings of a revenue or capital nature are to be brought to account by the

89 See *Le Mesurier v Connor* (1926) 29 WALR 66; appeal dismissed (1926) 42 CLR 597n.

90 See *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, Kitto, Taylor, Menzies and Owen JJ at 625-626; *Harman Pictures NV v Osborne* [1967] 2 All ER 324, Goff J at 336; *Triangle Corp v Carnsew* (1994) 29 IPR 69.

91 *Squire v Rogers* (1979) 39 FLR 106, Deane J (with whom Brennan and Forster JJ agreed) at 123 (FC Fed Ct); *Maher v Maher* [1961] Qd R 333, Stable J at 338.

92 *Squire v Rogers* (1979) 39 FLR 106 (FC Fed Ct); *Maher v Maher* [1961] Qd R 333.

defendant and allowed in his favour" (*Squire v Rogers* (1979) 39 FLR 106, Deane J (with whom Brennan and Forster JJ agreed) at 123 (FC Fed Ct)).

[2621] There is considerable discretion vested in a judicial officer administering the taking of accounts to determine issues, such as just allowances, which will affect the ultimate amount of the account. The judge determining the substantive right may be reluctant to prescribe in advance the procedure in taking the account, and may prefer to wait until material is provided when the account is taken.[93] After accounts have been filed, questions requiring directions from a judge may need to be considered.[94]

[2622] The order is likely to require the defendant to state and verify by affidavit the sales, gross profits and net profits after deducting expenses arising from the infringement.[95] The plaintiff will be entitled to inspect the defendant's account to verify the figures. Where an item of deduction is disputed, the defendant bears the onus of proving its correctness.[96] A defendant seeking to apportion profits from a sale may be required to state how much of the net profits are admitted to be attributable to the infringement. Neither party bears an onus of proving precisely what figure of apportionment shall apply. The court attempts a fair apportionment so that neither party has what justly belongs to the other.[97]

[2623] The costs of the account will usually be reserved where an account of profits is ordered. Depending on the complexity of the matter and the difficulty of calculating profits, the costs may be high. A plaintiff risks an adverse costs order if it ultimately emerges that the defendant made no profits, or if the plaintiff has refused to accept an offer of payment by the defendant in

93 See *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, Kearney J at 508; *Overton v Loukides* [1970] VR 462, McInerney J at 469-470.

94 See *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 (FC); affd *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101.

95 Reference to the directions made in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 48, concerning the taking of the account, may assist consideration of the form of order to be requested in a particular situation.

96 *Leplastrier & Co Ltd v Armstrong-Holland Ltd* (1926) 26 SR (NSW) 585, Harvey CJ in Eq at 593; *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, Mason CJ, Deane, Dawson and Toohey JJ at 118; McHugh J at 134. See below, para [2626] for deduction of just allowances.

97 *My Kinda Town Ltd v Soll* [1982] FSR 147, Slade J at 158-159 (Ch); revd [1983] RPC 407 (CA, no passing off). See also *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 406 (FC); affd *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101 (the burden of proof will be on the wrongdoer to justify apportionment where the wrongdoer mixes legitimate business with activities involving infringement of someone else's property right. This case relates to just allowances rather than to apportionment). See below, paras [2627]-[2630] on apportionment.

respect of the profits for which he or she is accountable, and the amount ultimately determined as profits on the taking of accounts does not exceed the amount of the prior offer of payment.[98]

CALCULATION OF PROFIT

General

[2624] There is often considerable difficulty in the calculation of profit when accounts are taken.[99] No single definition of profit will fit all cases[100] and the reported cases give little precise guidance to litigants regarding how to apply the general principles of calculation of profits to a particular fact situation. To establish profits, deductions must be made for the cost of earning the profit and, if appropriate, an apportionment made to identify that part of the profit attributable to the defendant's breach, as distinct from other factors such as the use of non-infringing material. These difficulties and consequent costs associated with ascertaining profits, together with the risks of an adverse costs order, are factors a plaintiff must consider before electing to take an account of profits. However, in cases where no apportionment is required, an account of profits may be relatively simple to calculate.[101] Assessing damages may also involve speculative judgments and notional computations of sales profits or royalties which "would" have been received by the plaintiff but for the defendant's actions.[102]

The emphasis is on determining what profit the defendant made by the wrongful use of the plaintiff's property (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 42). Thus, it is necessary to examine the precise form of the breach and the property involved in order to determine the quantum of

98 *Draper v Trist & Tristbestos Brake Linings Ltd* (1939) 56 RPC 225 (Ch) (decision overruled on another point by the Court of Appeal in *Draper v Trist & Tristbestos Brake Linings Ltd* (1939) 56 RPC 429). See also *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 46.

99 See *Siddell v Vickers* (1892) 9 RPC 152, Lindley LJ at 162 (CA); *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 44-46.

100 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 37.

101 See *House of Spring Gardens Ltd v Point Blank Ltd* [1983] FSR 489 (HC Ireland); *Hogg v Kirby* (1803) 8 Ves Jun 215; 32 ER 336, Lord Eldon LC at 223.

102 Wells T H W, "Monetary Remedies for Infringement of Copyright" (1989) 12 *Adelaide Law Review* 164 at 178. On assessing "loss of opportunity" damages, see *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

what the defendant made, what deductions are allowable and whether an apportionment of profits is possible to exclude profits not related to the breach. Principles expressed in cases involving a breach of fiduciary obligations, a breach of confidence or a breach of a particular type of intellectual property, may also be applicable in a different context where an account of profits is sought. However, careful consideration should be given to whether the different context affects the application of such principles.[103] In relation to intellectual property, the final figure of profit should notionally represent the sum of profits on each relevant sale. It is not the profit of the business which is being claimed; hence if some articles are sold at a profit and some at a loss, the latter cannot be deducted from the former (*Leplastrier & Co Ltd v Armstrong-Holland Ltd* (1926) 26 SR (NSW) 585). Where a fiduciary obligation has been breached, in some cases the actual business may be the relevant property in respect of which an account of profits is to be taken, while in others the account may only be over particular benefits flowing from the breach of duty by the fiduciary.[104]

In a trade mark infringement case an account of profits was held to properly include capital profits, such as profits on the sale of trade marks and associated goodwill, as well as profit derived on revenue account where the capital profit was made as a result of the infringement of the innocent party's rights (*Apand Pty Ltd v Kettle Chip Company Pty Ltd* (1999) 88 FCR 568, Beaumont and Heerey JJ, Emmett J dissenting). In either case there is a gain the infringer would not have received but for its wrongful conduct (Heerey J at 584).

[2625] Unrealised profits can be recovered as an account of profits in some cases. For example, where trust moneys have been used in the profitable purchase of a house, an account can be made on the basis of a notional sale (*Scott v Scott* (1963) 109 CLR 649, McTiernan, Taylor and Owen JJ at 663). In *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 (Ch), Millett J stated that, where a plaintiff establishes an infringement of copyright, he or she is entitled to an account of unrealised profit because the remedy is given to prevent the unjust enrichment of the defendant.[105]

103 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557: "the liability of a fiduciary to account differs from that of an infringer in an intellectual property case".

104 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558-562; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 110.

105 *Potton Ltd v Yorkclose Ltd* [1990] FSR 11, Millett J at 15 (Ch) (the houses built by the infringement of copyright drawings had been sold, so profits were realised). See also *Zupanovich Pty Ltd v Beale Nominees* (1995) 59 FCR 49, Carr J at 66.

Allowances

[2626] Just allowances may be deducted from gross receipts in relation to defendants against whom accounts are taken. Rules of court generally provide that all just allowances are to be made without any direction for that purpose.[106] The court has considerable flexibility in deciding what constitute just allowances, particularly in a business where the source of profits is not just capital resources but the skill and industry of the defendant.[107] What will be accepted as just allowances may be considerably affected by the circumstances of the breach in question. Fraud may lead to the exclusion of just allowances.[108] In contrast, a fiduciary who has made an honest mistake without fraud may well receive just allowances.[109]

In calculating deductible costs, "it is a question of fact, in each case, whether a purely proportionate allocation is appropriate, or whether the special characteristics of the business demand an allocation tailored to meet the requirements of the particular situation".[110] The onus is on the infringer to provide a reasonable, acceptable basis for allocation but typical business and accountancy practices in the relevant industry can be looked at in determining the proper allocation of costs (*Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, Mason CJ, Deane, Dawson and Toohey JJ at 118).

106 See *High Court Rules* (Cth), O 34 r 9; *Federal Court Rules* (Cth), O 39 r 7; *Supreme Court Rules* (ACT), O 36 r 10; *Supreme Court Rules* 1970 (NSW), Pt 48 r 7; *Supreme Court Rules* (NT), O 52 r 6; *Supreme Court Rules* (Qld), O 67 r 25; *Supreme Court Rules* 1987 (SA), O 7 r 71; *Rules of the Supreme Court* 1965 (Tas), O 35 r 10; *Rules of the Supreme Court* 1971 (WA), O 45 r 8.

107 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558-562; and see Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), pp 191-201, on the flexibility available in calculating gain and just allowances in the fiduciary context, particularly in commercial contexts.

108 *Australian Postal Corp v Lutak* (1991) 21 NSWLR 564 at 596; *Estate Realties v Wignall* [1992] 2 NZLR 615 at 629-630. See *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, where the New South Wales Court of Appeal would have refused to reward the fraudulent fiduciary by granting just allowances. See also *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, where Kearney J held that the nature of activities in carrying out a competing business justified the making of just allowances to those in charge of business, but that fraudulent fiduciaries were excluded from just allowances.

109 *Re Jarvis (decd); Edge v Jarvis* [1958] 2 All ER 336; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n; *Boardman v Phipps* [1967] 2 AC 46. While in *Guinness plc v Saunders* [1990] 2 AC 663, Lord Goff at 701 questioned whether there was jurisdiction to award just allowances to a company director in breach of fiduciary obligation, just allowances in respect of a defaulting company director were permitted in *Paul A Davies (Australia) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440. See also *Estate Realties v Wignall* [1992] 2 NZLR 615, Tipping J at 626-627.

110 *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 402 (FC); affd in *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101.

Examples of costs which may be allowable deductions in a particular case include the cost of materials and wages,[111] the cost of obtaining infringing articles and getting them to the defendant's store or place of business (including charges for customs duties)[112] and the cost of selling and delivering articles sold, including costs directly attributable to such sales and deliveries (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 39). In *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*, Windeyer J (at 39) held that no part of general overhead costs or managerial expenses of the defendant's business were deductible "as it seems that all these would have been incurred in any event in the ordinary course of its business". However, overheads and general expenses may be recoverable where defendants can demonstrate that they are attributable to obtaining the relevant profit.[113] This method of calculating allowable cost deductions is referred to as the incremental method of accounting (*Strata Consolidated v Bradshaw* [1999] NSWSC 22, Hunter J at [15]).

Allowable costs do not include any profit element to the wrongdoer as the infringer should not profit by the wrong.[114] A defendant usually cannot claim any remuneration or director's fees for carrying out the business or interest on capital contributed by the defendant to the business.[115] Nor can the defendant deduct the opportunity cost, that is the profit on alternative products (*Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, Mason CJ, Deane, Dawson and Toohey JJ at 114-115). Similarly, in a breach of intellectual property rights context, an argument that the defendant's pricing policy or superior skill and intelligence contributed to the success of the relevant article and should be taken into account, is not likely to succeed.[116]

111 *Leplastrier & Co Ltd v Armstrong-Holland Ltd* (1926) 26 SR (NSW) 585.

112 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 38.

113 *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, Mason CJ, Deane, Dawson and Toohey JJ at 114-120 (distinguishing *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25).

114 *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 407 (FC); affd in *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101 (in not permitting an allocation to allow the defendants to retain an unallocated proportion of profits in relation to the non-offending base of canisters, where the press-button lids breached a patent, the costs of material allowed were to be at the cost price and not at a price including the defendant's profit).

115 In *Leplastrier & Co Ltd v Armstrong-Holland Ltd* (1926) 26 SR (NSW) 585, Harvey CJ at 593 said that in no circumstances could a deduction be made.

116 See *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 406-407 (FC); affd *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101.

However, this rule is not inflexible. In some cases, the defendant has been allowed a portion of the profit for her or his own skill and labour.[117]

Apportionment of profits

[2627] Whether profits can be apportioned is often a key issue in taking accounts. Where there has been a simple breach of trust, an account of profits is likely to include all profits flowing from the use of trust property. However, where profits have been enhanced by an innocent but defaulting fiduciary's skill or business enterprise, profits may be apportioned.[118] Apportionment may not be available to a fraudulent fiduciary.[119]

[2628] Where a fiduciary mixes trust moneys with the fiduciary's own property and the property acquired by the mixed fund is specifically severable, the beneficiary is entitled to the same proportion of the property as the proportion that the trust money was of the purchase price (*Brady v Stapleton* (1952) 88 CLR 322).[120] Where the property purchased is not specifically severable, the fiduciary is liable to account for profit made on resale of the property.[121] In *Scott v Scott* (1963) 109 CLR 649, the High Court upheld an order[122] that the beneficiary was entitled to share in the same proportion to the total increase as the amount of misapplied gain, employed in the purchase, bore to the total purchase price. This was on the basis that the beneficiary made no greater claim in respect of the profit. However, the High Court left open the issue of whether the beneficiary was entitled to more extensive relief than was granted by the order appealed from. Whether apportionment is available

117 *Redwood Music Ltd v Chappell & Co Ltd* [1982] 99 RPC 109, Sir Robert Goff J at 132 (QB) (copyright); *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 (CA) (fiduciary had contributed to the plaintiff's change from being an unknown composer and performer to an internationally renowned pop star. It was held that it would be inequitable for the beneficiary to take the profit without paying for the skill and labour which produced it): see Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), pp 195-198.

118 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 560-562; *Docker v Somes* (1834) 2 My & K 655; 39 ER 1095.

119 See *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Mason J at 109-110; *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, Moffitt P, Hope and Samuels JJ at 242.

120 On tracing, see generally above, Chapter 23: "Tracing".

121 Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 198.

122 *Scott v Scott* [1964] VR 300.

where a fiduciary acquires property by a mixed fund depends upon whether the fiduciary has so mixed the gain with her or his own property as to render it impracticable to appropriate to the fiduciary a specific severable part of the mixed property.[123]

[2629] In the context of intellectual property and confidential information, if a defendant makes profits solely by the use or sale of something and that whole thing comes into existence by reason of the wrongful use of another person's property (such as patents, design and copyright) or in the sale of an article which could only be made by the use of confidential information, the infringer must account for all the profits made (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 43).[124] However, often the whole thing does not come into existence by the infringement alone, and apportionment will be necessary between profits attributable to infringing and non-infringing items "so that neither party will have what justly belongs to the other".[125] While taking an account of profits is an inquiry into the detail of a defendant's net gain, a reasonable approximation may suffice when an apportionment is made.[126]

[2630] Examples of the application of the principles of apportionment of profits in the contexts of trade marks, patents, copyright, passing off and confidential information are as follows:

- Where a statutory trademark is infringed, the property is in the trade mark in the goods, and not the goods themselves. The profit from the wrongful use of a trade mark is not necessarily the same as profit made by sale of goods bearing the mark (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 42). It can be difficult to establish how much of a total net profit from the sale of goods is to be attributed to selling under another person's mark (Windeyer J at 43).

123 See *Hagan v Waterhouse* (1991) 34 NSWLR 308, Kearney J at 354-357; see Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), p 199. See also *Paul A Davies (Aust) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440, where the New South Wales Court of Appeal did not limit a constructive trust over the relevant property and its proceeds by any apportionment rule. However, even though that case involved the remedy of declaration of constructive trust rather than an account of profits, the reasoning would be equally applicable to the calculation for a personal account of profits remedy.

124 While passing off is not specifically referred to in the relevant passage, it is clear from 37-38 that the same principle applies to passing off.

125 *My Kinda Town Ltd v Soll* [1982] FSR 147, Slade J at 159 (Ch); revd [1983] RPC 407 (CA, no passing off).

126 *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101, Mason CJ, Deane, Dawson and Toohey JJ at 119; *My Kinda Town Ltd v Soll* [1982] FSR 147 (Ch); revd [1983] RPC 407 (CA, no passing off); *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 46; *Leplastrier & Co Ltd v Armstrong-Holland Ltd* (1926) 26 SR (NSW) 585, Harvey CJ at 590.

If a word is well known as indicative that goods of a particular kind are the product of a particular manufacturer or seller and they have acquired a reputation under that name, all profits made by the infringer may in some cases be attributable to use of mark (Windeyer J at 38, 44).

- The infringer of a patent is accountable for profits made from the use of a patent which is not that of the defendant. If the infringer of a patent sells an article made wholly in accordance with the invention, and obtains more than it cost the infringer to make or acquire the article, the infringer is accountable for the difference as profit (Windeyer J at 37). Where only part of a complex machine is protected by a patent (such as if a patented brake is wrongfully used in the construction of a motor car), the infringer will not be liable for the aggregate profit made from the entire machine as if the profit had been made by the use of the patent.[127] However, if the patent relates to the essential feature of a single item, the infringer will be liable for the whole profits from the sale of that item.[128]
- The infringer of copyright may be accountable for the whole of net profits from an article only infringing copyright in part, where the article could not be produced or sold without the inclusion of the copyright material.[129]
- In a passing off case, the infringer may be required to account for the whole profits made by selling an article under a spurious description on the basis that the goods were sold by a false representation that they were goods of the plaintiff.[130]

127 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 42; *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 407 (FC); affd *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101.

128 *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, Sheppard, Burchett and Heerey JJ at 407-408 (FC); affd in *Dart Industries Inc v Decor Corp Pty Ltd* (1993) 179 CLR 101 (all profits from sale of open-mouthed containers held attributable to infringement of patent for press-button lids for such containers).

129 See *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 (Ch) (infringement of copyright in drawings of the style of a house; houses had been sold). On the issue of apportionment when copyright is infringed by the publication of copyright material as part only of a larger work, see also *Baily v Taylor* (1829) 1 Russ & My 73; 39 ER 28; *Blackie & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396.

130 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, Windeyer J at 38; *My Kinda Town Ltd v Soll* [1982] FSR 147, Slade J at 157-158 (Ch) (comparison made between profits actually made during improper behaviour and profits which would have been made if there had been no infringement. Where customers were deceived, plaintiff entitled to entire profit without further inquiry); revd [1983] RPC 407 (CA, no passing off).

- With confidential information, the issue may be whether any profits are attributable to the information. If the information is of the nature and quality which could have been obtained for a fee from any competent consultant, then equitable compensation or damages may be an adequate remedy.[131] Conversely, where the information used in breach of a duty of confidence has materially contributed to the defendant's profits, an account may be ordered.[132]

131 See above, Chapter 22: "Equitable Compensation". See also *Seager v Copydex Ltd* [1967] 2 All ER 415 (CA); *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402 (Ch); *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257, Nicholls V-C at 271-272 (Ch) referring to the "user principle". For criticism of the use of damages rather than equitable compensation in describing the relief given for breach of equitable duties of confidence, see Davidson I E, "The Equitable Remedy of Compensation" (1982) 13 *Melbourne University Law Review* at 392-396. See also Kearney J B, "Accounting for a Fiduciary's Gains in Commercial Contexts" in Finn P D (ed), *Equity and Commercial Relationships* (Law Book Co, Sydney, 1987), pp 206-207; Beatson J, "Damages for Breach of Confidence" (1991) 107 *Law Quarterly Review* 209; Gronow M, "Damages for Breach of Confidence" (1994) 5 *Australian Intellectual Property Journal* 94.

132 See *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402 (Ch).

CHAPTER TWENTY-SEVEN

RECTIFICATION

David Wright

DEFINITION

[2701] Rectification is available to correct most instruments which do not reflect accurately the continuing common intention of the parties. This remedy does not vary the agreement itself; it only varies instruments that do not reflect accurately the continuing common intention. James V-C identified this by stating:[1]

> "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts" (*Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375).

The remedy of rectification traditionally has been stated not to extend to where the parties are mistaken about the meaning or effect of their chosen words.[2]

Generally, rectification must be pleaded[3] but occasionally a court has ordered it without a claim having been pleaded.[4] Rectification can only be sought by a party to the mistake. Therefore a company director who signed a company's cheque cannot seek rectification of the cheque as the director is not a party to the cheque. The party to the cheque is the company.[5]

1 To similar effect, see Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 at 461.

2 *Bacchus Marsh Concentrated Milk Co Ltd v Joseph Natham & Co Ltd* (1919) 26 CLR 410, Higgins J at 451; *Issa v Berisha* [1981] 1 NSWLR 261, Powell J at 264; *Frederick E Rose (London) Ltd v William H Pim & Co Ltd* [1953] 2 QB 450; *Wiluna Road Board v Bonola*, noted in (1936) 10 ALJ 288; *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 11 ALR 305, Barwick CJ at 309-310. But see the decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329.

3 *Blay v Pollard* [1930] 1 KB 628.

4 *Butler v Mountview Estates Ltd* [1951] 2 KB 567; *Re Butlin's Settlement Trusts* [1976] Ch 251 at 255.

5 *Blum v OCP Reparation SA* [1988] BCLC 170; *Rafsanjan Pistachio Producers Co-Operative v Reiss* [1990] BCLC 352.

Following a court order granting this remedy, a new instrument does not need to be executed as the original instrument will be indorsed with the court order.[6] The rectified instrument has retrospective operation in that the instrument is to be read "as if it had been drawn in its rectified form" (*Craddock Bros v Hunt* [1923] 2 Ch 136, Lord Sterndale MR at 151).[7] The rectified instrument retrospectively makes valid a transaction.[8]

RECTIFICATION AND SIMILAR CONCEPTS

Rectification and construction[9]

[2702] Rectification is not available when the instrument involves an error which may be corrected by construction. Lord St Leonards made this clear:

> "Both courts of law and equity may correct an obvious mistake on the face of an instrument without the slightest difficulty" (*Wilson v Wilson* (1854) 5 HLC 40 at 66).

Obvious typographical errors and deletions or insertions may be corrected as a matter of construction.[10] For example, an erroneous "not" has been ignored,[11] an omitted "shall appoint" has been included,[12] "£1000" has been treated as "£100"[13] and "7700" has been read as "£7700".[14] Such cases involve the construction of the instrument rather than its rectification. Certainty of intention is necessary for rectification (*Doe d Spencer v Godwin* (1815) 4 M & S 265; 105 ER 833).

6 *White v White* (1872) LR 15 Eq 247; *Hanley v Pearson* (1879) 13 Ch D 545.

7 See also Powell J in *Issa v Berisha* [1981] 1 NSWLR 261 at 265; *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560.

8 *Earl of Malmesbury v Countess of Malmesbury* (1862) 31 Beav 407 at 418; 54 ER 1196; *Issa v Berisha* [1981] 1 NSWLR 261.

9 See Clarke J in *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740 for a thorough discussion of the two concepts.

10 *Fitzgerald v Masters* (1956) 95 CLR 420; *Watson v Phipps* (1985) 60 ALJR 1.

11 *Bache v Proctor* (1780) 1 Doug KB 382, Buller J at 384; 99 ER 247.

12 *Kirk v Unwin* (1851) 6 Exch 908.

13 *Elliott v Freeman* (1863) 7 LT 715.

14 *Coles v Hulme* (1828) 8 B & C 568.

Rectification and construction are similar in that the court is being asked to give effect to the parties' intention. It is easy to distinguish the power of the courts regarding the construction of an instrument from its power to rectify an instrument. With rectification, what the court examines are the parties' subjective intentions, whereas construction of an instrument involves an objective exercise. This theoretical distinction can be difficult to maintain[15] and therefore the courts accept that both may be argued and that they are not mutually exclusive (*Standard Portland Cement Pty Ltd v State Rail Authority of New South Wales* (1983) 57 ALJR 151).

Rectification and implied terms

[2703] The concept of rectification is also distinguishable from the idea of the implication of terms into a contract.[16] Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346 distinguished the two by stating that

> "The implication of a term is to be compared, and at the same time contrasted, with the rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it … it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention."

Thus it is where the actual intentions of the parties are not reflected in the instrument that rectification is available.

15 As shown in the two decisions given by the High Court in *Hooker Town Development Pty Ltd v Jilba* at (1973) 47 ALJR 320 and (1974) 48 ALJR 213.

16 Treitel G H, *The Law of Contract* (10th ed, Sweet & Maxwell, London, 1999), pp 297-298 suggests that rectification of a document can be had to incorporate an implied term based upon *Caraman, Rowley & May v Aghis* (1923) 40 TLR 124, but with this area's focus on subjective intention this is an unsustainable proposition.

ESSENTIAL ELEMENTS OF RECTIFICATION

Rectifiable instrument

[2704] Rectification has its greatest operation in contracts, but this is not its sole area. It can operate on most instruments. These have included a policy of marine insurance,[17] a policy of life insurance,[18] a policy of fire insurance,[19] a voluntary settlement,[20] a trust deed,[21] a bill of exchange[22] such as a cheque,[23] a bill of quantities,[24] a share transfer,[25] a conveyance,[26] a disentitling deed,[27] a marriage settlement,[28] a lease[29] and a consent order.[30] Although a company register may be rectified,[31] rectification will not be available to alter the articles of association of a company[32] because it would conflict with the statutory policy for the registration of such instruments.[33] A deed poll has been held unsuitable for rectification (*Phillipson v Kerry* (1863) 32 Beav

17 *Motteux v London Assurance Co* (1739) 1 Atk 545; 26 ER 343; *Spalding v Crocker* (1897) 2 Com Cas 189 at 193.

18 *Collett v Morrison* (1851) 9 Hare 162; 68 ER 458; *Braund v Mutual Life Citizens Assurance Co Ltd* [1926] NZLR 529.

19 *O'Loan v Yorkshire Insurance Co Ltd* [1926] St R Qd 177, although rectification was not ordered on the facts; *Trans-Continental Bolt Co Ltd v Canadian Sprinklered Risk Pool* (1970) 11 DLR (3d) 292.

20 *Re Butlin's Settlement Trusts* [1976] Ch 251.

21 *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329.

22 *Druiff v Lord Parker* (1868) LR 5 Eq 131.

23 *Blum v OCP Repatriation SA* [1988] BCLC 170; *Rafsanjan Pistachio Producers Co-Operative v Reiss* [1990] BCLC 352.

24 *Neill v Midland Railway* (1869) 17 WR 871.

25 *Re International Contract Co* (1872) 7 Ch App 485.

26 *White v White* (1872) LR 15 Eq 247; *Beale v Kyte* [1907] 1 Ch 564; *Craddock Bros v Hunt* [1923] 2 Ch 136. Rectification can operate even if the instrument involves a conveyance of Torrens title land and the conveyance has been registered: *Zdrojkowski v Pacholczak* (1959) 59 SR (NSW) 382 at 389-390.

27 *Hall-Dare v Hall-Dare* (1885) 31 Ch D 251; *Meeking v Meeking* [1971] 1 Ch 77.

28 *Cogan v Duffield* (1876) 2 Ch D 44; *Maunsell v Maunsell* (1877) 1 LR Ir 529; *Johnson v Bragge* [1901] 1 Ch 28.

29 *Murray v Parker* (1854) 19 Beav 305; 52 ER 367; *Downie v Lockwood* [1965] VR 257; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505. The English cases dealing with leases are examined by Williams in (1984) 270 *Estates Gazette* 1012.

30 *Huddersfield Banking Co v Henry Lister & Son Ltd* [1895] 2 Ch 273.

31 *Whitehorse v Carlton Hotel Pty Ltd* [1983] Qd R 336.

32 *Evans v Chapman* (1902) 86 LT 381; *Scott v Frank Scott (London) Ltd* [1940] 1 Ch 794; *Santos Ltd v Pettingell* (1979) 4 ACLR 110.

33 *Scott v Frank Scott (London) Ltd* [1940] 1 Ch 794 at 802; *Santos Ltd v Pettingell* (1979) 4 ACLR 110.

628).[34] A binding settlement made by a court order cannot be rectified (*Mills v Fox* (1887) 37 Ch D 153). Nor is rectification available to correct a will,[35] unless there has been fraud. A statutory provision may expressly or impliedly prohibit rectification.

Mutual mistake

[2705] Rectification looks to the intention that the instrument adopt a certain form, but it does not apply to the intention that an instrument would have a certain effect.[36] Consequently, there needs to be a literal disparity between the language of the parties' intention and the instrument. Where the parties intended to deal with "horsebeans" and the instrument that was executed involved "horsebeans", rectification was denied, even though the parties mistakenly believed that "horsebeans" were the same as feveroles (*Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450).[37] However there does exist authority which questions this traditional limitation.[38] Brightman J in *Re Butlin's Settlement Trusts* [1976] Ch 251 at 260 said:

> "[R]ectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction."

34 But this has been questioned: see Treitel G H, *The Law of Contract* (10th ed, Sweet & Maxwell, London, 1999), p 301.

35 *Harter v Harter* (1873) LR 3 P & D 11; *Morrell v Morrell* (1882) 7 PD 68; *Rhodes v Rhodes* (1882) 7 App Cas 192; *Collins v Elstone* [1893] P 1; *Osborne v Smith* (1960) 105 CLR 153. But see *Re Bacharach's Will Trusts* [1959] Ch 245 at 249 and at 224; citing *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64, Lord Hatherley LC at 73. See also *Ivanof v Phillip M Levy Pty Ltd* [1971] VR 167, McInerney J at 170; *Academy of Health & Fitness Pty Ltd v Power* [1973] VR 254, Crockett J at 259 (both citing *Alati v Kruger* (1955) 94 CLR 216, Dixon CJ, Webb, Kitto and Taylor JJ at 224).

36 But see the the decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 which challenges this understanding of the law.

37 This decision was not applied by Hodgson J in *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390 and see the decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, particularly at 336.

38 *Re Butlin's Settlement Trusts* [1976] Ch 251; *Winks v W H Heck & Sons Pty Ltd* [1986] 1 Qd R 226; *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390. See also the observation of Mahoney JA in *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740 at 748 that this distinction is one which is very difficult to maintain. With regard to this issue attention must now be directed towards the decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, which also included Mahoney JA.

Although the case before Brightman J involved a voluntary settlement, there have been indications that this approach extends to contracts.[39] The traditional limitation upon the operation of rectification has been held to apply even where the parties would have selected different words if they had known the true facts.[40] There is also a temporal element in the doctrine of rectification. The necessary mutual mistake must relate to a presently existing fact and not something which may become a fact in the future. Asquith J in *Pyke v Peters* [1943] KB 242 at 250 has indicated this by holding that:

> "[I]f there is a common intention of the parties, the fact that a statute, passed later, in effect provides that that intention shall be frustrated and that the instrument shall not operate according to its tenor, seems to afford no ground for rectification."

Generally, rectification is ordered where the terms of an instrument do not correspond to the common intention of the parties. But rectification is also available where a person who intends to sign a document in one capacity does so in another (*Druiff v Parker* (1868) LR 5 Eq 131).

Continuing common intention

[2706] Historically, there was a need for an outward expression of accord, so that the relevant intention was objective not subjective. In *Joscelyne v Nissen* [1970] 2 QB 86 at 98, the English Court of Appeal required that there be some outward expression of intention. In *Re Streamline Fashions Pty Ltd* [1965] VR 418 at 420, Hudson J expressed the requirement in these terms:

> "It must be taken, therefore, that the common intention which it is necessary to establish as a basis for rectification is an intention that has been manifested in the words or conduct of the parties and not merely an intention which was not disclosed in the course of the negotiations."

This statement was expressly approved by Crockett J in *Johnstone v Commerce Consolidated Pty Ltd* [1976] VR 463 at 467. There is a line of high Australian authority that required some outward

39 *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365, Kennedy J at 387-388; *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390.

40 *Pukallus v Cameron* (1982) 56 ALJR 907; *Barrow v Barrow* (1854) 18 Beav 529; 52 ER 208; *Tucker v Bennett* (1887) 38 Ch D 1.

expression of intention.[41] The High Court in *Pukallus v Cameron* (1982) 43 ALR 243[42] left the issue unresolved. However, Bromley[43] has suggested that this need for an outward expression of intention cannot be supported by the early authorities, which are cited as the foundations of this requirement, nor by principle, and that the relevant consideration is the subjective intentions of the parties. Thus the ancient equitable remedy of rectification is an application of the maxim that "equity looks to the intent, rather than to the form".[44]

This subjective approach advocated by Bromley was adopted in *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429. Further, the Bromley article was considered and approved by Clarke J in *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740. In that case, words were used in the instrument which failed to express the true intention of the parties. Clarke J held that rectification would be permitted if the plaintiff could satisfy the court that the parties had a common intention which continued until the execution of the instrument that did not embody the intention. There was no need to establish some outward expression of accord,[45] but there must be a common intention. If the dealings prior to the execution of the instrument were inconclusive, it is not possible to say that there was a common intention.

[2707] The prior agreement does not need to be a contract. Previously, it was a requirement that there be an antecedent contract.[46] This

41 *Australasian Performing Right Association Ltd v Austrarama Television Pty Ltd* [1972] 2 NSWLR 467, Street J at 473; *Hooker Town Developments Pty Ltd v Director of War Service Homes* (1973) 47 ALJR 320, Menzies J at 323-324; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, Mason J at 349-350.

42 Wilson J at 247, with whom Gibbs CJ and Murphy J agreed.

43 Bromley P, "Rectification in Equity" (1971) 87 *Law Quarterly Review* 532.

44 This maxim was demonstrated by Lord Romilly MR in *Parkin v Thorold* (1852) 16 Beav 59 at 66; 51 ER 698: "Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and, if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."

45 See also *Elders Trustee & Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, Gummow J at 253-254.

46 *Mackenzie v Coulson* (1869) LR 8 Eq 368, James V-C at 375; *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85 at 88; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436, Younger J at 438; *W Higgins Ltd v Northampton Corp* [1927] 1 Ch 128, Romer J at 136; *Schofield v W C Clough & Co* [1913] 2 KB 103; *Craddock Bros v Hunt* [1923] 2 Ch 136; *United States v Motor Trucks Ltd* [1924] AC 196 at 200-201; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, Denning LJ at 461.

has been rejected in both England[47] and in Australia.[48] Further, in a contractual setting, the High Court has decided that rectification may be used not simply where the parties agree that there is a contract but dispute what are its terms; it can also be used where there is argument about whether a contract exists at all (*Sindel v Georgiou* (1984) 154 CLR 661). To obtain rectification, the party seeking it must show that the parties intended to give effect to those aspects of the continuing common intention in respect of which rectification is sought.[49]

[2708] As the remedy is based upon common intention, this common intention must continue unaltered until the instrument is executed.[50] This can be seen to be the basis of the High Court's refusal to grant rectification in *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336. At an auction, certain terms were read out. The successful bidder signed a contract which he knew did not include the terms which were read out. The successful bidder was refused rectification as he knew that the earlier intentions based on the read-out terms had changed.[51] However, it has been suggested that the need for the outward expression of intention is partially justified by the contractual requirement for objective intention.[52] This brings into focus the question of the intersection of equity, which examines subjective factors, and the law of contract, which looks to objective conditions. However, there is no convincing argument that, when applying an equitable remedy, such as rectification, equity's traditional focus[53] on subjective intentions should be altered. In light of the demanding evidentiary requirements associated with this area, the lack of any outward expression of

47 *Shipley Urban District Council v Bradford Corp* [1936] Ch 375; *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, Simonds J at 664-665; *Joscelyne v Nissen* [1970] 2 QB 86; *Olympic Pride* [1980] 2 Lloyd's Rep 67, Mustill J at 72; *Pina* [1991] 1 Lloyd's Rep 146, Evans J at 250.

48 *Slee v Warke* (1949) 86 CLR 271, Rich, Dixon and Williams JJ at 280; *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* [1972] 2 NSWLR 467, Street J at 472-475; *Hooker Town Developments Pty Ltd v Director of War Service Homes* (1973) 47 ALJR 320, Menzies J at 323-324; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, Mason J at 350; *Pukallus v Cameron* (1982) 43 ALR 243, Wilson J at 247; Brennan J at 250; *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740; *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365.

49 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336; *RACV Investment Co Pty Ltd v Silbury Pty Ltd* (1986) 13 ACLR 555, Beach J at 558-559.

50 *Breadalbane v Chandos* (1837) 2 My & Cr 711; 40 ER 811; *Fowler v Fowler* (1859) 4 De G & J 250; 45 ER 97.

51 For a contrast to the High Court's decision in *Maralinga*, see *Winks v W H Heck & Sons Pty Ltd* [1986] 1 Qd R 226.

52 Heydon J D, and Loughlan P L, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 2002), para [42.5] n 12.

53 As evidenced by the trusts case of *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178.

intention would constitute a difficult barrier for a plaintiff to argue successfully for rectification on the basis of only subjective intentions,[54] but this practical problem should not prevent the test for the necessary intention being subjective.

[2709] As rectification involves the alteration of an instrument, and not its cancellation, it is not enough simply to show that the instrument does not embody what was intended. What the parties did intend must be proven. For example, it is not enough for the parties to show that they did not intend the written contract of sale to include property D. The parties must also be able to show that they intended the written contract of sale to cover properties A, B and C.[55]

UNILATERAL MISTAKE[56]

[2710] Usually the mistake must be shared by the parties to the bargain[57] which the instrument embodies.[58] This usual situation has been the one that has been dealt with so far. Generally rectification will not be ordered where the mistake has been made by only one party.[59] But exceptionally the mistake of one party will suffice. The Victorian Court of Appeal has established a test for rectification when unilateral mistake is involved (*Leibler v Air New Zealand Ltd* [1999] 1 VR 1 at 14). Stuart-Smith LJ in *Commission for The New Towns v Cooper (Great Britain) Ltd* [1995] 2 WLR 677[60] attempted to unify the grounds for rectification based on a unilateral mistake. His Lordship did this by citing, with approval (at 692), Spry's[61] comment that the court will

54 Bromley P, "Rectification in Equity" (1971) 87 *Law Quarterly Review* 532 at 538 and Yeldham J in *Bishopgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429 at 431 both recognised this problem.

55 *Australian Gypsum Ltd & Australian Plaster Co Ltd v Hume Steel Ltd* (1930) 45 CLR 54, Rich, Starke and Dixon JJ at 64; *Slee v Warke* (1949) 86 CLR 271, Rich, Dixon and Williams JJ at 281; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, Mason J at 349; *Pukallus v Cameron* (1982) 51 ALJR 907, Wilson J at 909.

56 The New Zealand position is examined in detail, particularly the decision of the New Zealand Court of Appeal in *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33, in McLauchlan D W, "Rectification For Unilateral Mistake" (1999) 18 *New Zealand Universities Law Review* 360.

57 Where there is no bargain, traditionally rectification is unavailable: *Phillipson v Kerry* (1863) 32 Beav 628 at 637; 55 ER 247.

58 There will be generally no rectification if one party is mistaken and the other party has no actual knowledge of the mistake: *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353.

59 *Sells v Sells* (1860) 1 Dr & Sm 42; *Mortimer v Shortall* (1852) 2 Dr 7 War 363 at 372.

60 This decision is examined in Mossop D, "Rectification for Unilateral Mistake" (1996) 10 *Journal of Contract Law* 259.

61 Spry I C F, *The Principles of Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 613.

intervene if there are "additional circumstances that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms".[62] However, there remain several distinct grounds for seeking rectification for a unilateral mistake.

Fraud

[2711] An area where unilateral mistake will suffice is fraud. This fraud may be actual, constructive or equitable.[63] Apart from the usual fraud cases, this exception also includes where a person under a strict duty, such as a fiduciary or a party to a contract requiring the utmost good faith, fails to make full disclosure to the party to whom the strict duty is owed.

Mistake

[2712] This exception is an application of the fact that equity will prevent unconscionable reliance on an agreement. It has been contended that the basis of this exception is estoppel[64] but this contention has neither been accepted nor rejected in Australia.[65] Rectification is permitted upon a unilateral mistake if the mistaken party believed that a particular term was contained in the contract but the other party permitted the contract to be executed knowing[66] of the belief and that the term was not in the contract.[67] Rectification may be sought upon a unilateral

62 This has been given indirect support by the New South Wales Court of Appeal decision in *Tutt v Doyle* (1997) 42 NSWLR 10, which relied upon the High Court's decision in *Taylor v Johnson* (1983) 151 CLR 422.

63 *Houlon v Houlon* (1889) 41 Ch D 200; *Corley v Lord Stafford* (1857) 1 De G & J 238; 44 ER 714; *Clark v Girdwood* (1877) 7 Ch D 9; *Lovesy v Smith* (1880) 15 Ch D 655; *McCausland v Young* [1949] NI 49.

64 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, Eveleigh LJ at 1090; *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, Pennycuick J at 570.

65 Greig D W and Davis J C R, *The Law of Contract* (Law Book Co, Sydney, 1987), p 930.

66 It appears that this must be actual knowledge: *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353, Slade LJ at 362; suspicion of the mistaken belief is not enough: *Olympic Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd* [1985] 2 Lloyd's Rep 364, Bingham J at 371; *Commission for The New Towns v Cooper (Great Britain) Ltd* [1995] 2 WLR 677, Evans LJ at 706. However, Young J in *Misiaris v Saydels Pty Ltd* (unreported, Supreme Court of New South Wales, Young J, 10 May 1989) at 14 indicated that all that is required is strong suspicion by the defendant that the plaintiff has made a mistake of a fundamental nature of the contract. Stuart-Smith LJ in *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] 2 WLR 677 at 694 did not require actual knowledge on the facts of that case.

67 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555; *Johnstone v Commerce Consolidated Pty Ltd* [1976] VR 463. Mason J in *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 351 certainly thought that this exception to the mutual mistake requirement did exist, but it did not apply to the facts of that case.

mistake if the mistaken party did not know that the contract contained a particular term but the other party intended both that this term be included in the contract and that the first party not know of the inclusion of this term (*Commission for New Towns v Cooper (Great Britain) Ltd* [1995] 2 WLR 677). There is no need that there be any more than knowledge of this mistake and silence.[68] In England, it was a requirement that the party who knew of the mistake also was involved in "a degree of sharp practice" (*Riverlate Properties Ltd v Paul* [1975] Ch 133 at 140).[69] This proposition has been rejected in *Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505.[70] In that case, Buckley LJ also required that the mistake must benefit the non-mistaken party (at 516).In the same case, Eveleigh LJ held (at 521) that there is no need for the mistake to benefit the non-mistaken party, by holding that:

> "It is enough that the inaccuracy of the instrument as drafted would be detrimental to the other party and this may not always mean that it is beneficial to the one who knew of the mistake."

There is no reason why it would be any less unconscionable for the non-mistaken party to silently stand by and allow the mistaken party to act to their detriment than if the party's mistake benefited the non-mistaken party.

Voluntary transactions

[2713] Where the transaction is not part of a bargain,[71] the mistake may be unilateral. Examples of this include a voluntary

68 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555; *Riverlate Properties Ltd v Paul* [1975] Ch 133; *Johnstone v Commerce Consolidated Pty Ltd* [1976] VR 463, Crockett J at 468-469; affd on appeal [1976] VR 724 at 731-732; *Johnston v Arnaboldi* [1990] 2 Qd R 138, Connolly J at 144, with whom Carter and Moynihan JJ agreed.

69 This was followed in *Saanich Police Association v District of Saanich Police Board* (1983) 43 BCLR 132; *Commerce Consolidated Pty Ltd v Johnstone* [1976] VR 274 and *Leighton v Parton* [1976] 1 NZLR 165. Evans LJ in *Commission for The New Towns v Cooper (Great Britain) Ltd* [1995] 2 WLR 677 at 705 described the behaviour of the party resisting rectification as "dishonest" and "disgraceful".

70 In Australia see *Taylor v Johnson* (1983) 151 CLR 422, Mason ACJ, Murphy and Deane JJ at 432-433. Young J in *Misiaris v Saydels Pty Ltd* (unreported, Supreme Court of New South Wales, Young J, 10 May 1989) at 14 denied the need for there to be "sharp practice". In order to obtain rectification for unilateral mistake, there must exist some aspect of the non-mistaken party's behaviour in the circumstances which makes it unconscientious for that party to resist rectification: Marks J in *Commonwealth of Australia v V L Investment* (unreported, Supreme Court of Victoria, Marks J, 18 December 1987).

71 In *Re Butlin's Settlement Trusts* [1976] Ch 251, Brightman J at 261-262 referred to there being no actual "bargain" between the parties. An example of this is that the transaction between the settlor and trustee may be voluntary; as it is not supported by valuable consideration, the voluntary settlement may be part of a larger bargain. If the voluntary transaction is part of a larger "bargain", there must be a mutual mistake.

settlement[72] and a unilateral transaction.[73] In such cases, it is the settlor's intention which is crucial. This is because a person who makes a voluntary settlement will not be compelled to alter the grant (*Lister v Hodgson* (1867) LR 4 Eq 30, Lord Romilly MR at 34). If the settlor has died or has become incapacitated, rectification can still be ordered if it can be proved that the settlement was inconsistent with the settlor's intention.[74] This is true even if the party before the court is merely a volunteer.[75] If there was no bargain between the settlor and the other party, such as in the case of a trustee in a voluntary settlement, the intention of the other party does not need to be examined (*Re Butlin's Settlement Trusts* [1976] Ch 251).

NATURE OF THE RIGHT TO RECTIFICATION

[2714] The right to obtain rectification has been described as a personal equity in *Smith v Jones* [1954] 2 All ER 823[76] and by Handley JA in *Tutt v Doyle* (1997) 42 NSWLR 10. However, *Smith* has been distinguished in *Downie v Lockwood* [1965] VR 257 and the remedy was identified as an equitable estate. In that case, Tovell leased property to the plaintiff. The written lease did not reflect accurately the intention of Tovell and the plaintiff. Before rectification was sought, Tovell died and the defendant purchased the leased property. The plaintiff went to court to obtain rectification of the written lease. The Supreme Court of Victoria had to decide if the plaintiff's right to rectification could be enforced against the defendant. Smith J held that the plaintiff had a right against the defendant because he had a full equitable estate which was the equitable lease in rectified form. Smith J (at 260) distinguished but did not disapprove *Smith v Jones*. His Honour did this by the use of a distinction based on notice. In the case before him, his Honour held that the plaintiff gave notice to the defendants of his equitable interest with all its incidents, including those relating to rates and premiums, and the defendants, when the purchaser purchased the property, took

72 *Re Butlin's Settlement Trusts* [1976] Ch 251.

73 *Bonhote v Henderson* [1895] 1 Ch 742; *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087; *Killick v Gray* (1882) 46 LT 583; *Maunsell v Maunsell* (1877) 1 LR (Ir) 529; *Van der Linde v Van der Linde* [1947] Ch 306.

74 *Lister v Hodgson* (1867) LR 4 Eq 30, Lord Romilly MR at 34-35; *Re Slocock's Will Trusts* [1979] 1 All ER 358, Graham J at 361.

75 *Christie v Public* (1921) 22 SR (NSW) 148; *Kent v Brown* (1942) 43 SR (NSW) 124.

76 Upjohn J at 827.

subject to that equitable interest. Smith J held that this was different to *Smith v Jones*, where Upjohn J expressed the view that the tenant being in possession did not give notice to the purchaser. So the facts of these two cases indicate what will and what will not constitute notice and would appear[77] to convert the equitable interest to one which is capable of transmission.

Blacklocks v JB Developments (Godalming) Ltd [1981] 3 All ER 392 indicated that this equity of rectification is a "mere" equity as it is ancillary to or dependent on an equitable estate or interest when it is required to be of an enduring character so that it may be transmissible. The court relied on *Stump v Gaby* (1852) 2 De GM & G 623; 42 ER 1015, *Dickinson v Burrell* (1866) LR 1 Eq 337 and Taylor J in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265.

Taylor J in *Latec* relied upon *Stump v Gaby* (1852) 2 De GM & G 623; 42 ER 1015 to arrive at the conclusion that the right to rectify an instrument generates an equitable estate. However, Kitto J only found the right to be a mere equity. To reach this conclusion, his Honour relied upon the judgment of Lord Westbury LC in *Phillips v Phillips* (1862) De GF & J 208; 45 ER 1164, however it needs to be stressed that both Kitto and Taylor JJ held that this equitable right survived transfer. In *Blacklocks v JB Developments (Godalming) Ltd* [1981] 3 All ER 392 at 400, the court explicitly recognised that the equity of rectification may be classified according to the purpose it is to serve. Menzies J in *Latec* indicated the exact same possibility of the multiple classification of equitable rights. The right to rectification does survive transfer, but another important aspect of its nature is how it is classified for priority disputes. In *Blacklocks* (at 400), the court indicated that, in a priority dispute, the right is a personal equity and would generally lose such a dispute against an equitable estate. Taylor[78] and Menzies[79] JJ in *Latec* suggested the same conclusion. However, a comment of Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376 at 387-388 implicitly denied the inferior status of the mere equity. The Chief Justice held that, if the claim of the original owners in that case was described as a mere equity, it should be decided upon usual equitable priority rules. The cases cited by his Honour concerned the temporal order of the creation of the equitable interests and

77 The term "would appear" is used here as Smith J never expressly held this, but his Honour made several comments which indicate clearly that the equitable right he was dealing with was different in nature from the equitable right that was being dealt with in *Smith v Jones*.

78 *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 280ff.

79 (1965) 113 CLR 265 at 290-291.

the actions or the lack thereof by the early equitable interest holder. No reference or allusion was made to the inferior status of the mere equity.

DEFENCES

[2715] Rectification will not be successfully sought if the result of the remedy could be conveniently achieved by other means, such as a collateral contract[80] or by voluntary rectification. To obtain rectification, there must be an absence of alternative remedies. Defences to rectification include both the general equitable defences and defences specific to this remedy.

General equitable defences

[2716] The usual general equitable defences apply to orders seeking rectification. Below are some general equitable defences which have been applied in cases involving this remedy.

Bona fide purchaser

If a bona fide purchaser for value without notice[81] has acquired an interest in the property, the subject of an instrument sought to be rectified, then rectification may be denied.[82] In an appropriate case, a successor in title may have rectification granted (*Boots the Chemist Ltd v Street* (1983) 268 EG 817).

Laches or acquiescence

Mere delay by itself has not barred rectification (*Burroughes v Abbott* [1922] 1 Ch 86). It has been suggested that delay must be coupled with some other element in order to become laches so as to be a defence to an application for rectification.[83] However, it is well established that laches or acquiescence will constitute a valid defence to rectification.[84] There is some dispute as to when

80 *Walker Property Investments (Brighton) Ltd v Walker* (1947) 177 LT 204.

81 If the purchaser had notice of the mistake at the time of the purchase, this will not be a defence: see *Craddock Bros v Hunt* [1923] 2 Ch 136; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183.

82 *Bell v Cundall* (1750) Amb 101; 27 ER 63; *Garrard v Frankel* (1862) 30 Beav 445; 54 ER 961; *Coates v Kenna* (1873) 7 IR Eq 113; *Smith v Jones* [1954] 1 WLR 1089; *Thames Guaranty Ltd v Campbell* [1985] QB 210; *J J Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd (No 2)* (1987) 13 ACLR 77.

83 Spry I C F, *The Principles of Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), pp 617-619.

84 *Beaumont v Bramley* (1822) Turn & R 41; 37 ER 1009; *Fredensen v Rothschild* [1941] 1 All ER 430; *Beale v Kyte* [1907] 1 Ch 564; and *McCausland v Young* [1949] NI 49. But see *Dormer v Sherman* (1966) 110 SJ 171.

the time begins and various suggestions have been made,[85] but current judicial and academic thinking indicates that time begins when the mistaken party, by the use of reasonable diligence, should have discovered the mistake (*Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* [1972] 2 NSWLR 467).

Specific defences

[2717] There are also certain specific defences. First, rectification will be denied if it would be futile. Thus it has been suggested that, if a contract is no longer capable of performance, this constitutes a defence to rectification (*Borrowman v Rossell* (1864) 16 CB (NS) 58; 143 ER 1045). However this proposition has been attacked as being too wide[86] and it has been reformulated thus: if a contract is incapable of performance, rectification will be refused if this impossibility of performance would render rectification useless.[87] Kelly J in *Nobleza v Lampl* (1986) 85 FLR 147 indicated why attention must be focused on whether or not rectification would be futile. In that case, the contract could not be performed, not because of prior performance but because the vendor's mortgagee had exercised its right under the mortgage. Rectification was ordered so damages could be sought.

Secondly, rectification will not be ordered if a contract has been completely performed and this performance was based upon the construction of the contract that the court had placed upon it (*Caird v Moss* (1886) 33 Ch D 22).

DISCRETIONARY REMEDY

[2718] As rectification is an equitable remedy, it is axiomatic that it is discretionary. It needs to be remembered when considering the exercise of discretion that generally the plaintiff is not seeking any alternative to rectification. The consequence of this is that the refusal of this remedy results in the plaintiff being forced to adhere to an uncorrected instrument and this may entail great

85 *Beale v Kyte* [1907] 1 Ch 564 said it began from the time the mistake was discovered. *Bloomer v Spittle* (1872) LR 13 Eq 427 said it began from the time when the instrument was executed.

86 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2619].

87 Heydon J D and Loughlan P L, *Cases and Materials on Equity and Trusts* (6th ed, Butterworths, Sydney, 1997), para [42.5] n 8; *Trawl Industries of Australia v Effem Foods Pty Ltd* (1992) 27 NSWLR 326; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [2619].

hardship. However, the courts have been traditionally reluctant to make such an order. This is quite apparent from the strength of the evidence which the court requires. This reluctance was expressed by Evershed MR in *Whiteside v Whiteside* [1950] Ch 65 at 71 by stating that the remedy "must be cautiously watched and jealously guarded". One factor that has been influential is that in relation to contracts,

> "certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to precontract negotiations" (*Olympic Pride* [1980] 2 Lloyd's Rep 67, Mustill J at 73).

It has been noted in insurance that there is a presumption that the issued policy is a complete and final record of the contract between the parties.[88] For all this expressed reluctance, the hardship that may be entailed by the refusal of rectification on discretionary grounds has caused legal scholars[89] and the judiciary[90] to note that this remedy will only be refused on discretionary grounds in exceptional cases. For this reason, there are a great number of grounds upon which arguments for the discretionary refusal of rectification have failed. Previously, rectification could not be successfully sought if the purpose of the rectification was to save tax.[91] However, in *Re Slocock's Will Trusts* [1979] 1 All ER 358, Graham J held that, as the parties were entitled to enter any legal transaction and to minimise the impact of taxation legally, there existed no reason why a mistake made in a document designed to minimise taxation legally should be excluded from the remedy of rectification.[92] In a field of constant legislative changes, such as taxation, the comment by Asquith J in *Pyke v Peters* [1943] KB 242 at 250, that subsequent changes to legislation are not a ground for rectification if the parties were not mistaken at the time of drawing the instrument, is highly relevant. Rectification of an insurance policy can be sought after loss has occurred (*Braund v Mutual Life & Citizens Assurances Co Ltd* [1926] NZLR 529). Further, it seems that the party who had the instrument drafted can seek rectification and courts have not exercised their discretion to refuse this equitable remedy even where the error

88 Sutton K C T, *Insurance Law in Australia* (3rd ed, LBC Information Services, Sydney, 1999), p 1013.

89 Spry I C F, *The Principles of Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), pp 616-617; Greig D W and Davis J C R, *The Law of Contract* (Law Book Co, Sydney, 1987), pp 928-930.

90 *Thompson v Hickman* [1907] 1 Ch 550, Neville J at 561-562.

91 *Whiteside v Whiteside* [1950] Ch 65; *Re Colebrook's Conveyances* [1973] 1 All ER 132.

92 Applied in *Lake v Lake* [1989] STC 865.

in the instrument was caused by the negligence of that party's solicitor,[93] although it may be more difficult to obtain rectification where the matter has been dealt with using professional advisers.[94] It is not a defence to rectification that the party seeking rectification has attempted to sue on the unrectified instrument,[95] although it has been suggested that a person who sues on the unrectified instrument, with complete knowledge of the mistake, would be estopped from seeking rectification.[96] Nor is it usually a defence to rectification that precise restitution of the parties to their original positions is impossible.[97]

Finally, it needs to be noted that there is possibly another discretionary consideration which may be taken into account when dealing with a voluntary settlement. In *Re Butlin's Settlement Trusts* [1976] Ch 251,[98] the court acknowledged that it may exercise its discretion to deny rectification on the basis of a protesting trustee to a voluntary settlement advancing reasonable grounds of opposition. In that case, the trustee failed to advance reasonable grounds and so rectification was not denied. Unfortunately *Re Butlin's Settlement Trusts* did not suggest what may be reasonable grounds for a trustee of a voluntary settlement to oppose rectification. No subsequent case has offered any guidance as to what may constitute reasonable grounds for a trustee of a voluntary settlement to protest rectification. In addition, cogent reasons have not suggested why this discretionary factor should be limited to only a protesting trustee and not extend to any protesting party to the voluntary settlement.

EVIDENCE

[2719] The onus of proving that the instrument should be rectified is on the party who alleges that the instrument should be rectified.[99]

93 *Monaghan County Council v Vaughan* [1948] IR 306; *Weeds v Blaney* (1976) EGD 738, affd (1978) EGD 902; *Msiaris v Saydels Pty Ltd* (unreported, Supreme Court of New South Wales, Young J, 10 May 1989).

94 *Hazell, Watson and Viney Ltd v Malvermi* [1953] 2 All ER 58; *Msiaris v Saydels Pty Ltd* (unreported, Supreme Court of New South Wales, Young J, 10 May 1989).

95 *Market Terminal Pty Ltd v Dominion Insurance Co of Australia* [1982] 1 NSWLR 105.

96 Starke J G, Seddon M C and Ellinghaus M P, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, Butterworths, Sydney 1997), para [12.36].

97 *Cook v Fearn* (1878) 48 LJ Ch 63; *Johnson v Bragge* [1901] 1 Ch 28.

98 Brightman J at 262.

99 *Tucker v Bennett* (1887) 38 Ch D 1, Cotton LJ at 9; *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54.

A high degree of proof is required. It has been said that a person seeking rectification must present "strong irrefragable evidence",[100] the party must establish "something more than the highest degree of probability"[101] and the evidence must be "of the clearest and most satisfactory description"[102] and so generate a "high degree of conviction" (*Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68, Greene MR at 71). Lord Russell has concluded that there must be "convincing proof"[103] of the mistake. Wilson J in *Pukallus v Cameron* (1982) 56 ALJR 907 at 909 adopted the need for "convincing proof". In New Zealand, Tipping J of the High Court has held that the evidence must be "convincing" (*West Savings Bank v Hancock* [1987] 2 NZLR 21). But Buckley LJ has stated that this array of formulations is "not very helpful" and "may, indeed, be confusing" (*Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 514). It is fundamental to remember that rectification is being sought in a civil case and so the civil standard of proof applies. The above comments refer to the evidence required to discharge this standard of proof. This was accurately observed by Brightman LJ when his Lordship stated (at 521) that:[104]

> "It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties."

[2720] Evidence of the true intention of the parties can be established by either their acts[105] or by oral evidence (*Murray v Parker* (1854) 19 Beav 305, Romilly MR at 308; 52 ER 367). Proof of common intention can be proved by evidence of facts both before and after the making of the contract.[106] Caution must be exercised when using the acts of the parties which follow the entering of the transaction, as these acts may relate to a later, and hence irrelevant, intention (*Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365, Kennedy J at 388). Discovering the intentions of a corporate entity requires an examination of the "directing mind

100 *Countess of Shelburne v Earl of Inchiguin* (1784) 1 Bro CC 338, Lord Thurlow LC at 341.

101 *Fowler v Fowler* (1859) 4 De G & J 250, Lord Chelmsford LC at 265; 45 ER 97.

102 Lord Chelmsford LC at 265.

103 *Joscelyne v Nissen* [1970] 2 QB 86 at 98.

104 See also *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353, Slade LJ at 359.

105 Acts may prove intentions where, for example, the parties acted in accordance with their alleged intentions rather than the instrument, as in *M'Cormack v M'Cormack* (1877) 1 LR Ir 119.

106 *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740, Clarke J at 751-752;.

and will" of that legal being.[107] In *National Bank v Morland* [1991] 3 NZLR 86, Heron J examined the parties' actions as evidence of what was intended. Although the courts are reluctant,[108] they can order rectification when the evidence is supplied by only the plaintiff.[109] The court has ordered the remedy solely on the evidence gathered by its perusal of the instrument.[110] Oral evidence may be adduced even where legislation requires the transaction to be in writing (*Cowen v Truefitt Ltd* [1899] 2 Ch 309). Rectification creates an accurate written instrument to satisfy the legislation.[111]

In *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, Mason J (at 351) held that:

> "The appellant has not shown that the instrument was intended to record the antecedent oral agreement or by common mistake failed to conform to that agreement."

The intention of the parties was accurately reflected in the instrument and so rectification was refused.[112]

It has also been suggested that the evidence does not need to be of the same compelling quality when it is a voluntary settlement (*Harley v Pearson* (1879) 48 LJ Ch 63).

RECTIFICATION AND FORMALITIES

[2721] Where it is sought to construe a document, parol evidence will not normally be admissible. Rectification obviously is an exception to the parol evidence rule (*Lovell & Christmas Ltd v Wall* (1911) 104 LT 85). Rectification will also be granted even where the agreement would be unenforceable for lack of capacity (*Shipley Urban District Council v Bradford Corp* [1936] Ch 375).

107 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 707, Viscount Haldane LC at 713; *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, Denning LJ at 172-173; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, Lord Reid at 170ff; *Hamilton v Whitehead* (1988) 63 ALJR 80, Mason CJ, Wilson and Toohey JJ at 82.

108 *Tucker v Bennett* (1887) 38 Ch D 1; *Fredensen v Rothschild* [1941] 1 All ER 430; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 514, 521.

109 *Smith v Iliffe* (1875) LR 20 Eq 666; *Bonhote v Henderson* [1895] 1 Ch 742; affd on appeal [1895] 2 Ch 202.

110 *Banks v Ripley* [1940] Ch 719; *Fitzgerald v Fitzgerald* [1902] 1 IR 477.

111 *Re Boulter* (1876) 4 Ch D 241; *Johnson v Bragge* [1901] 1 Ch 28; *Craddock Bros v Hunt* [1923] 2 Ch 136; *United States of America v Motor Trucks Ltd* [1924] AC 196; *Bosaid v Andry* [1963] VR 564 at 568.

112 See *City Westminster Properties (1934) Ltd v Mudd* [1959] 1 Ch 129, which indicates that a deliberate omission will preclude rectification.

Nor is the *Statute of Frauds* 1677 (29 Car II c 3) a bar to receiving oral evidence of intention. The Privy Council has held that:

> "The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the court to rectify being outside the prohibition of the statute." (*United States of America v Motor Trucks Ltd* [1924] AC 196 at 201)

The court's order to rectify the instrument will cause the creation of a memorandum of the true agreement to satisfy the statute (*Bosaid v Andry* [1963] VR 464 at 468). At one time, it was posited that an instrument involving a corporation that lacked the seal of the corporation and so was unenforceable could not be the subject of rectification.[113] But it is now well established that the lack of enforceability for want of a corporation's seal will not prevent rectification.[114] However, Blackburn J in *Coolibah Pastoral Co v Commonwealth* (1967) 11 FLR 173 expressed the view that, in the case before him, non-compliance with a provision of the *Crown Lands Ordinance* 1931 (NT), which resulted in the agreement being void, precluded rectification. *Coolibah* may be distinguished from the *Statute of Frauds* cases in that the relevant legislation in *Coolibah* rendered the agreement void, whereas the *Statute of Frauds* simply makes the valid agreement unenforceable. Additionally, *Coolibah* has been distinguished from the situation where the unrectified instrument is void for uncertainty (*Issa v Berisha* [1981] 1 NSWLR 261). In *Issa v Berisha*, Powell J made a distinction between where an instrument is void because of legislation and an instrument being void because of uncertainty. Rectification is not permissible in the former situation, but it will be available in the latter as rectification would simply give effect to the parties' intention.

A similar difficulty occurs where the intention of the parties, which constitutes the basis of the remedy of rectification, involves an illegality (*DJE Constructions Pty Ltd v Maddocks* [1982] 1 NSWLR 5). One author suggests that if the illegality is limited to a particular provision of the agreement, only that particular provision is void and cannot be the subject of rectification.[115]

113 *Faraday v Tamworth Union* (1916) 86 LJ Ch 436, Younger J at 438; *W Higgins Ltd v Northampton* [1927] 1 Ch 128, Romer J at 136.

114 *Shipley Urban District Council v Bradford Corp* [1936] 1 Ch 375, Clauson J at 395ff; *Montgomery v Beeby* (1930) 30 SR (NSW) 394; *Bosaid v Andry* [1936] VR 465, Sholl J at 468. The Privy Council's comments on this issue in *United States v Motor Trucks Ltd* [1924] AC 196 at 200-201 also support this view.

115 Spry I C F, *The Principles of Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 619.

CHAPTER TWENTY-EIGHT

DELIVERY UP AND CANCELLATION

David Maclean

[2801] Delivery up and cancellation of documents is an equitable remedy granted on equitable principles. It is not a cause of action in itself, but an ancillary remedy designed to lead to the destruction of the document or documents concerned. The point of the remedy may not merely be to protect the individual or individuals directly affected by the document in question, but also to protect the public by bringing to an end the existence of an ineffective document.[1] The jurisdiction to award the remedy depends upon it being shown that the document in question is for some reason illegal, void or voidable. It could be void because it is a forgery,[2] voidable because of misrepresentation,[3] or illegal as contrary to public policy[4] or prohibited by statute.

The nature of the order is that one party is ordered to deliver a document to another party for cancellation. Unlike other equitable remedies, the remedy can even be awarded where the party seeking it has been involved in the conduct that makes the document bad: this is because of the overriding desirability of bringing the existence of the document to an end. Most of the authorities are English and of considerable antiquity.

[2802] Some questions of timing are relevant. Where a party seeks the remedy of delivery up and cancellation, there is no rule that the party must show any risk that the document concerned will be used against her or him, nor need the party seeking the remedy wait until the document is about to be used against that party.

1 *Vauxhall Bridge Co v Earl of Spencer* (1821) Jac 64, Lord Eldon LC at 67; 37 ER 774 (Ch); *Money v Money (No 2)* [1966] 1 NSWLR 348.

2 *Peake v Highfield* (1826) 1 Russ 559; 38 ER 216.

3 *Duncan v Worrell* (1822) 10 Price 31; 147 ER 232.

4 *W v B* (1863) 32 Beav 574; 55 ER 226. An illegal consideration is also a basis for relief: *Hayward v Dimsdale* (1810) 17 Ves Jun 111; 34 ER 43.

The remedy can certainly be obtained prior to its use against the party seeking the remedy (*Bromley v Holland* (1802) 7 Ves Jun 3; 32 ER 2). Similarly, the remedy of delivery up and cancellation can also be obtained in respect of a valid document which has become ineffective and no longer enforceable because of the satisfaction of conditions (which did not appear on the face of the document) attaching to its operation. In *Flower v Marten* (1837) 2 My & Cr 459; 40 ER 714, a bond for a sum of money was sought to be delivered up and cancelled. An improvident and estranged son had his debts paid by his father, and gave his father a personal bond to repay the same. It appeared, however, that the bond had not been intended to operate as a security in all events. It had been given for a collateral purpose, namely, as a form of security for the good behaviour of the son, and was not intended to operate if the conduct of the son became acceptable to the father. The parties had reconciled before the death of the father, and it was apparent that the bond had served its purpose. A question arose between the son and the executors of his father's estate as to the enforceability of the bond, and the son obtained its delivery up and cancellation upon the basis that it was no longer an operative security.[5]

[2803] There are various circumstances in which delivery up will not be ordered. Delivery up of a document will not be ordered merely because there is a good defence to an action on it,[6] unless it constitutes a cloud on title to land (*Onions v Cohens* (1865) 2 H & M 354; 71 ER 501). It will not be ordered of a document that is invalid on its face,[7] or of a document which is only partially void, for example as against creditors only.[8]

[2804] An absence of clean hands on the part of an applicant for delivery up is not an obstacle to obtaining relief where the transaction concerned is contrary to public policy. In *Vauxhall Bridge Co v Earl of Spencer* (1821) Jac 64 at 67; 37 ER 774,[9] Lord Eldon LC stated the following principle:

> "In the view I take of the case, it will not be an obstacle to the plaintiffs that they do not come with clean hands, for it is settled, that if a transaction be objectionable on grounds of public policy, the parties to it may be relieved; the relief not being given for their sake, but for the sake of the public."

5 See also *Frankland v Hampden* (1682) 1 Vern 66; 23 ER 315.

6 *Brooking v Maudslay, Son & Field* (1888) 38 Ch D 636; *Thornton v Knight* (1849) 16 Sim 509; 60 ER 972.

7 *Simpson v Lord Howden* (1837) 3 My & Cr 97; 40 ER 862.

8 *Ideal Bedding Co Ltd v Holland* [1907] 2 Ch 157, Kekewich J at 172-174.

9 See also *W v B* (1863) 32 Beav 574; 55 ER 226. Cf *Franco v Bolton* (1797) 3 Ves 658; 30 ER 1058.

Relief may also be granted where the applicant is an accessory to wrongdoing, or a party to an illegal contract.[10]

[2805] Courts exercising equitable jurisdiction may impose conditions that attach to the grant of the remedy, in order to do equity between the parties and restore them to their original positions. The imposition of terms upon the party obtaining the remedy is an illustration of the equitable maxim that a person who seeks equity must do equity. In *Lodge v National Union Investment Co Ltd*,[11] the plaintiff borrowed money from the defendant moneylender. The loans were contrary to statute and void for illegality. The plaintiff had provided securities for the money lent, and sought to have them delivered up and cancelled. Parker J made it a condition of relief upon the delivery up of the securities that the borrower repay the loan arrears outstanding. In *Kasumu v Baba-Egbe* [1956] AC 539, the Privy Council refrained from imposing conditions to be attached to an order to deliver up a moneylending contract that was unenforceable, as the prevailing statutory provisions removed the discretion of the court to impose terms. *Kasumu's* case has been followed in the area of moneylending contracts,[12] although not without criticism.[13] Where a loan is obtained by undue influence, delivery up of bills may be ordered on terms that the money lent be repaid with interest (*Earl of Aylesford v Morris* (1873) LR 3 Ch App 484 (CA)). Where a declaration that a document is void is obtained, the principles relating to the attachment of terms do not apply (*Chapman v Michaelson* [1909] 1 Ch 238 (CA)).

[2806] Examples of documents that have been ordered to be delivered up include a forged deed of conveyance;[14] a deed of lease improperly granted by trustees of a charity;[15] bills of exchange given for gambling purposes;[16] a guarantee obtained by a misrepresentation;[17] an instrument of transfer for an illegal consideration;[18] and a conveyance made partly in consideration of an immoral purpose, namely a father permitting the seduction of his daughter.[19]

10 *Neville v Wilkinson* (1782) 1 Bro CC 543; 28 ER 1289; *Vauxhall Bridge Co v Earl of Spencer* (1821) Jac 64; 37 ER 774; *Money v Money (No 2)* [1966] 1 NSWLR 348.

11 [1907] Ch 300; approved in *Langman v Handover* (1929) 43 CLR 334.

12 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428; *Barclay v Prospect Mortgages Ltd* [1974] 2 All ER 672.

13 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, Dixon CJ at 448-456.

14 *Peake v Highfield* (1826) 1 Russ 559; 38 ER 216.

15 *Attorney-General v Morgan* (1826) 2 Russ 306; 38 ER 351.

16 *Wynne v Callander* (1826) 1 Russ 293; 38 ER 113.

17 *Cooper v Joel* (1859) 1 De G F & J 240; 45 ER 350.

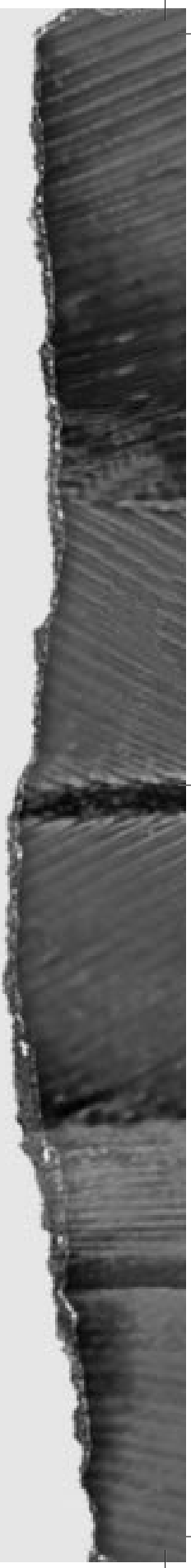
18 *Money v Money (No 2)* [1966] 1 NSWLR 348.

19 *W v B* (1863) 32 Beav 574; 55 ER 226.

[2807] The operation of many of the principles relating to delivery up and cancellation is demonstrated in *Money v Money (No 2)* [1966] 1 NSWLR 348. In 1959, Mr Money executed and delivered a memorandum of transfer of the title to the family home to Mrs Money. This was done pursuant to an agreement that they would separate, that Mrs Money would maintain herself and their children, and that she would make no further claim upon Mr Money. The agreement was contrary to public policy on two grounds: either because it was an agreement in respect of future separation, or because it was an agreement not to claim maintenance and thereby to oust the jurisdiction of the court. The parties separated in 1959, and Mrs Money partly performed the agreement by not claiming maintenance. She later lodged the memorandum of transfer for registration. Mr Money brought proceedings seeking, inter alia, a declaration that his wife had no interest in the home, and orders for the delivery up and cancellation of the memorandum of transfer. The Supreme Court of New South Wales held that Mr Money was entitled to delivery up despite the fact that he was party to the illegal agreement, and notwithstanding that Mrs Money had partly performed the agreement. Delivery up is an equitable remedy, and the court has a discretion to make an order upon terms that there be restitution of benefits received from the agreement concerned, so as to restore the parties to their original positions. However, whilst Mrs Money had received rent from the home, Jacobs J did not order her to repay rent received to her husband as she had partly performed the agreement (at 352).

PART VI

Defences and Set-Off



CHAPTER TWENTY-NINE

EQUITABLE DEFENCES

Michael Spence

INTRODUCTION

[2901] Defences are of two kinds. First, a defendant may demonstrate that not all of the elements of the plaintiff's claim have been made out. Secondly, a defendant may admit that a particular claim is prima facie valid, but may argue that circumstances exist which should qualify or prevent its success.

This chapter is concerned with defences of the second type which apply to claims made on the basis of equitable doctrines or for equitable remedies. In particular, it will examine three groups of defences. These are: (a) defences of "waiver", in which a plaintiff is said to have dispensed with a particular right; (b) defences of "delay", in which a plaintiff is said to have waited too long in bringing suit; and (c) defences of "illegality and unclean hands", in which a plaintiff is said to have been a party to some type of wrongful behaviour. It is important to recognise that these are groups of defences focused on particular things that a plaintiff is said to have done. They are not necessarily defences in themselves. For example, it is submitted that there is no single defence which could be tagged "waiver" or "delay".

WAIVER: RELEASE AND ESTOPPEL

Definition

[2902] "Waiver" is a flexible term (*Mulcahy v Hoyne* (1925) 36 CLR 431, Isaacs J at 53). It is a "vague term, used in many senses"[1] and

1 *Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60, Lord Wright (for the House of Lords) at 70.

certainly "not a term of art";[2] indeed it may be that "waiver" is incapable of comprehensive definition.[3]

Nevertheless, three general conclusions regarding the legal use of the term "waiver" may be drawn. First, the term suggests the conclusion that a right or remedy has been lost or dispensed with. Secondly, at common law "waiver" refers primarily to situations in which this conclusion is reached by application of the doctrines of common law election or estoppel (*Commonwealth v Verwayen* (1990) 170 CLR 394). Thirdly, in equity the term refers to situations in which this conclusion is reached by application of the doctrines of release[4] or estoppel.

It is, therefore, waiver by release and by estoppel that shall be treated in this section. Note that waiver by release and by estoppel shall be considered separately. It has been suggested in the High Court of Australia[5] that the defence of release ought to be explained on the basis of the estoppel doctrine described in cases such as *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. However, no clear authority has emerged for this proposal[6] and release and estoppel remain distinct doctrines.[7] The application of each doctrine ought therefore to be considered in turn.

Waiver by release

[2903] An agreement for valuable consideration affords an effective release of an equitable right. It could also amount to an effective release of a legal right in equity.[8] Under statute, such an agreement may need to be in writing (see below, para [2905]).

2 *Banning v Wright* [1972] 2 All ER 987, Lord Reid at 1000 (HL).

3 *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama (The Mihalios Xilas)* [1979] 2 All ER 1044, Lord Scarman at 1058 (HL). See also Ewart J, *Waiver Distributed* (Harvard University Press, Cambridge, 1917); Turner A K, *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (3rd ed, Butterworths, London, 1977), pp 319-320; Dugdale T and Yates D, "Variation, Waiver and Estoppel — a Re-Appraisal" (1976) 39 *Modern Law Review* 680 at 681.

4 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3508] note that: "In equity, waiver and release may be different names for the same doctrine; to waive an equitable right is to release it."

5 *Orr v Ford* (1989) 167 CLR 316, Deane J at 339 (with whom Mason CJ agreed).

6 As was pointed out in *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539, Hill J at 562-563 (Fed Ct).

7 For a discussion of the distinction between the two doctrines, see below, para [2907].

8 On both points, see *Steeds v Steeds* (1889) 22 QBD 537; *Edwards v Walters* [1896] 2 Ch 157, Lindley LJ at 168; *Berry v Berry* [1929] 2 KB 316.

[2904] An equitable right may be released without consideration by the expression of a present, fixed intention immediately to release it. At general law, this intention could be expressed either by an instrument in writing, orally or even by conduct.[9] However, once again, such a release may need to be in writing under statute (see below, para [2905]).

Three requirements of a release without consideration merit particular attention. First, the intention of the party said to have gratuitously released the right must have been that it be released immediately. A mere voluntary promise to release in the future is not effective.[10] This requirement is often difficult to satisfy because an apparent abandonment of an equitable right usually takes the form of a promise not to rely upon the right in the future.

Secondly, the plaintiff whom it is claimed has gratuitously released an equitable right must have had full knowledge of the circumstances from which the relevant right arose.[11] In *De Bussche v Alt* (1878) 8 Ch D 286, a principal instructed his agent to sell a ship but the agent purchased it himself and sold it on at an enormous profit. Even though the principal did not complain upon discovering that the agent had purchased the ship and sold it on, he was held not to have released his equitable rights against the agent when he subsequently sought to enforce them. This was at least partly because he had not initially known the terms of the subcontract with the purchaser.

9 *Wright v Vanderplank* (1856) 8 De GM & G 133; 44 ER 340, Knight Bruce LJ at 147; *Re Hall; Holland v Attorney-General (UK)* [1942] Ch 140, Morton J at 370; affd on other grounds *Re Hall; Holland v Attorney-General (UK)* [1942] 1 All ER 10 (CA); *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539, Hill J at 567 (Fed Ct). See also Browne D (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933), pp 498-499. For whether delay in enforcing an equitable right can amount to its release, see below, para [2916]. Note that an alternative view is that legal rights could not be released in equity without consideration: *Commissioner of Stamp Duties (NSW) v Bone* (1976) 135 CLR 223, where the Privy Council at 229 stated: "A debt can only be truly released and extinguished by agreement for valuable consideration or under seal." See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3502]-[3505].

10 *De Bussche v Alt* (1878) 8 Ch D 286, Thesiger LJ (for the Court of Appeal) at 314. See also *Stackhouse v Barnston* (1805) 10 Ves Jun 453; 32 ER 921, Grant MR at 466: "A waiver is nothing; unless it amount to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right …".

11 *Burrows v Walls* (1855) 5 De GM & G 233; 45 ER 859, Lord Cranworth LC at 253; *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58; 45 ER 800, Turner LJ at 74; *Farrant v Blanchford* (1863) 1 De GJ & S 107; 46 ER 42, Lord Westbury LC at 119; *Wall v Cockerell* (1863) 10 HLC 229; 11 ER 228, Lord Westbury LC at 242; Lord Chelmsford at 246; *Spackman v Evans* (1868) LR 3 HL 171, Lord Cranworth LC at 191; Lord Chelmsford at 233; Lord Colonsay at 247; *De Bussche v Alt* (1878) 8 Ch D 286, Thesiger LJ (for the Court of Appeal) at 313; *La Banque Jacques-Cartier v La Banque d'Epargne de la Cite et du District de Montreal* (1887) 13 App Cas 111, Lord FitzGerald (for the Privy Council) at 118.

Thirdly, the plaintiff who is said to have released an equitable right gratuitously must have had knowledge or constructive knowledge of the actual equitable right enjoyed.[12] If a plaintiff in fact enjoys an equitable right but deliberately chooses that, whether the right exists or not, it will not be exercised, the decision not to exercise the right will be treated as if it were a release made with full knowledge.[13] For example, in *Mitchell v Homfray* (1881) 8 QBD 587, a patient who had made bequests to her doctor determined that she would not revoke the bequests, despite warnings from friends that the doctor was defrauding her, whether or not the bequests were revocable on grounds of undue influence. The gifts were subsequently upheld by the Court of Appeal. In contrast, in *Rees v De Bernardy* [1896] 2 Ch 437, co-heirs had entered into an unconscionable and champertous agreement to divide their inheritance with a fraudulent third party. The contract was partially executed at the time of the co-heirs' deaths. These women were held not to have released their equitable right to rescind, because being "poor, with no means of their own, of humble position and illiterate" (Romer J at 444), they were not aware of their right to rescind, nor did they ever indicate an absolute intention to abide by the agreement whether or not it was revocable.

It should be emphasised that the courts are extremely wary of claims that a plaintiff has abandoned an equitable right without receiving some type of consideration. There are few cases in which the gratuitous release of an equitable right has been successfully demonstrated and so "a gratuitous release of a legal or equitable right should [in practice] be under seal".[14]

[2905] Whether writing is required for the release of an equitable right will depend upon whether or not the right amounts to an equitable interest in property. At general law, writing was not necessary,[15] and this is still the position in relation to equitable rights which do not amount to interests in property. However, in all the States of Australia and the Australian Capital Territory, legislation requires writing for the "disposition of an equitable

12 *M'Carthy v Decaix* (1831) 2 Russ & M 614; 39 ER 528; *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117; 41 ER 886; *Burrows v Walls* (1855) 5 De GM & G 233; 45 ER 859; *Farrant v Blanchford* (1863) 1 De GJ & S 107; 46 ER 42; *Kempson v Ashbee* (1874) LR 10 Ch App 15; *Rees v De Bernardy* [1896] 2 Ch 437; *Avtex Airservices v Bartsch* (1992) 107 ALR 539, Hill J at 568 (Fed Ct); *KM v HM; Women's Legal Education & Action Fund; Intervener* (1993) 96 DLR (4th) 289, La Forest J at 335.

13 *Mitchell v Homfray* (1881) 8 QBD 587 (CA); *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

14 *Halsbury's Laws of England* (4th ed, Butterworths, London), Vol 16, para [1470].

15 *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539, Hill J at 567-568 (Fed Ct).

interest"[16] in property, and "disposition" is usually taken to include release.[17]

Waiver by estoppel

[2906] Estoppel is the second of the defences usually discussed under the rubric "waiver" in equity, although it is a doctrine of much broader application (see above, Chapter 7: "Estoppel"). Estoppel is a substantive principle of law which operates to preclude a party to legal proceedings from asserting against another party facts, legal rights or the absence of legal obligations, to the extent that it would be unconscionable to do so. The object of estoppel is to preclude the unconscientious departure by a party from an assumption for which he or she bears some responsibility and which has been adopted by another party as the basis of a course of conduct, act or omission, which would operate to that other party's detriment if the assumption were not adhered to.[18]

[2907] Estoppel is distinguished from release on three bases. First, establishing a release requires an examination only of the actions and intentions of the party enjoying the equitable right, while establishing an estoppel also requires an examination of the reliance of the party who has been led to believe that that right will not be exercised. Secondly, in order to establish an estoppel it is never necessary to prove consideration, while release is much easier to establish if consideration can be shown. Thirdly, establishing an estoppel is never dependent upon proof of writing, while a release must often be in writing to be effective.

16 *Imperial Acts (Substituted Provisions) Act* 1986 (ACT), Sched 2, Pt 11, cl 1(1)(c); *Conveyancing Act* 1919 (NSW), s 23C(1)(c); *Property Law Act* 1974 (Qld), s 11(1)(c); *Law of Property Act* 1936 (SA), s 29(1)(c); *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2)(c); *Property Law Act* 1958 (Vic), s 53(1)(c); *Property Law Act* 1969 (WA), s 34(1)(c). The relevant legislation in the Northern Territory, the *Statute of Frauds* 1677 (29 Car II c 3), s 9, probably does not apply to releases.

17 See further the discussion above, paras [1345]-[1347]. In all but the Australian Capital Territory, Northern Territory and Tasmanian legislation, "release" is included in the statutory definition of "disposition". In New South Wales and Queensland "release" is simply included in the statutory definition of "disposition" directly: *Conveyancing Act* 1919 (NSW), s 7(1); *Property Law Act* 1974 (Qld), s 4(1). In Victoria, South Australia and Western Australia "release" is included in the statutory definition of "conveyance" and then "conveyance" is included in the definition of "disposition": *Property Law Act* 1958 (Vic), s 18(1); *Law of Property Act* 1936 (SA), s 7; *Property Law Act* 1969 (WA), s 7. Heydon J D and Loughlan P L, *Cases and Materials on Equity and Trusts* (5th ed, Butterworths, Sydney, 1997), pp 140-141, argue, however, that these statutory definitions have no application to the statutory requirement of writing for a disposition.

18 *Henderson & Co v Williams* [1895] 1 QB 521, A L Smith LJ at 535 (CA); *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, Brandon LJ at 131-132 (CA); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J at 414. For whether delay can ground an estoppel, see below, para [2917].

These distinctions between the doctrines of release and estoppel reveal the difficulty in explaining the doctrine of release on the basis of estoppel in the way that has been suggested in the High Court of Australia.[19] To collapse the two doctrines into one would be to abolish the defence of release in the situation in which the defendant has not relied upon the abandonment of the equitable right. It would also raise the issue of how the statutory requirement of writing for a release might apply if release and estoppel are synonomous terms. These are issues that would need carefully to be worked through by any court eager to sacrifice release to the growing appetite of the estoppel doctrine.

DELAY

Introduction

[2908] There are three types of defence that might apply in the fact situation where a plaintiff has delayed in bringing a claim for equitable relief.[20] First, delay may mean that the plaintiff's claim is barred by a statute of limitations, applied either directly or by analogy. Secondly, delay may give rise to a defence of waiver, either by release or by estoppel. Thirdly, delay may give rise to the defence of "delay with prejudice to the defendant or a third party".

A note concerning terminology is important at this point. First, the term "laches" is used with various meanings in the cases and academic literature. For example, "laches" can denote release by conduct where the relevant conduct consists in delay.[21] For the sake of clarity, the term "laches" is here restricted to meaning the defence of "delay with prejudice to the defendant or a third party". Secondly, the term "acquiescence" is ubiquitous and carelessly used.[22] It is therefore largely avoided in this chapter — it is only used at one point, where it is defined, and it is used there only because it appears in a statutory section (see below, para [2915]).

19 For suggestions that the cases concerning release be treated as examples of estoppel see *Orr v Ford* (1989) 167 CLR 316, Deane J at 339 (with whom Mason CJ agreed).

20 For a classic statement of these three types of defences, see *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir Barnes Peacock at 239-240.

21 Thus this type of laches "might with equal justice be described as waiver, or as equitable release by conduct": Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), at [3603].

22 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3618] list at least three different senses in which the term is commonly used.

Just as with release, it has been suggested[23] that the cases concerning laches ought to be treated as examples of the estoppel doctrine described in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. However, once again clear distinctions exist between the two doctrines (see below, para [2918]) which will here be treated as separate defences.

[2909] Mere delay will probably not bar a claim in equity. Despite some doubts about the point in England,[24] Australian commentators agree that equitable claims (possibly excepting claims for interlocutory relief)[25] do not simply become stale.[26] No clear authority exists for this proposition regarding all types of equitable claim, except for that provided in *Baburin v Baburin* [1990] 2 Qd R 101, Kelly SPJ at 112. However, there is authority that mere delay is not a bar to equitable relief of particular kinds, for example:

23 For the suggestion that the two doctrines ought be unified, see *Orr v Ford* (1989) 167 CLR 316, Deane J at 339 (with whom Mason CJ agreed).

24 See *Halsbury's Laws of England* (4th ed, Butterworths, London), Vol 16, para [1001]; Brunyate J, *Limitation of Actions in Equity* (Sweet & Maxwell, London, 1932), pp 260-261. Regarding rescission of contract for mistake or misrepresentation, see Treitel G H, *The Law of Contract* (10th ed, Stevens & Sons, London, 1999), pp 300-301, 357. There has also been the suggestion that Ashburner saw staleness simpliciter as a defence: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3615]. However, in the relevant passage, Ashburner actually claims that delay will only be treated as evidence of waiver or effective on the basis here discussed as delay with prejudice to the defendant or a third party: see Browne D (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933), pp 515-516. See also *Cluett Peabody & Co v McIntyre Hogg & Co* [1958] RPC 335, Upjohn J at 352 (Ch).

25 It has been suggested that in these cases proof of delay will in itself be enough to bar a remedy: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3606]; Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), p 323. But see *Monsanto Co v Stauffer Chemical Co (NZ)* [1984] FSR 559, Eichelbaum J at 572 (HC NZ). Eichelbaum J stated that, in relation to applications for interlocutory injunctions, it is not enough to show that the plaintiff has delayed unreasonably. An accurate statement of the law may be that, given that claims for an interlocutory injunction are claims for urgent relief, delay is likely to raise questions about the need for, and convenience in granting, interim protection, and that the defence of laches is also more likely to be made out in claims of this type, but that mere delay will not suffice as a defence. Thus, in *CBS Records Australia Ltd v Telmak Teleproducts (Aust) Pty Ltd* (1987) 72 ALR 270, Bowen CJ relied on an absence of prejudice to the respondent to grant an interlocutory injunction notwithstanding a delay of years. In *Cabot Corp v Minnesota Mining & Manufacturing Ltd* (1987) 11 NSWLR 697, delay was treated as just one of the considerations to be taken into account in determining the balance of convenience in granting the injunction. See also *Express Newspapers plc v Liverpool Daily Post & Echo plc* [1985] 3 All ER 680 Whitford J at 686-687 (Ch), in which the lack of prejudice to the defendants was also emphasised.

26 See Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3614]-[3617]; Spry I C F, *The Principles of Equitable Remedies* (6th ed, LawBook Co, Sydney, 2001), p 617; Tilbury M J, *Civil Remedies: Volume One, Principles of Civil Remedies* (Butterworths, Sydney, 1990), p 290.

- claims between a beneficiary and an express trustee;[27]
- claims for the establishment of a constructive trust;[28]
- claims for specific performance;[29]
- claims for the rescission of contract on the basis of undue influence;[30] and
- claims for the rescission of contract on the basis of fraud generally.[31]

In many cases, plaintiffs have been successful notwithstanding remarkable delay.[32]

Delay: Statutes of Limitations

[2910] Few claims to equitable relief are specifically barred by a statutory period of limitation. Undue influence, innocent misrepresentation, rectification and equitable compensation claims are all free of a statutory period of limitation.[33] So too are claims for breach of a fiduciary duty.[34] Indeed, the relevant statutes in New South Wales,[35] the Northern Territory,[36] Queensland,[37] Tasmania[38] and Victoria[39] have sections specifically excluding the operation of many of their provisions to claims for equitable relief.

27 See *Beckford v Wade* (1805) 17 Ves Jun 87; 34 ER 34, Sir William Grant MR at 97; *Dickenson v Teasdale* (1862) 1 De GJ & S 52; 46 ER 21; *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, Cotton LJ at 325 (CA); *Rochefoucauld v Boustead* [1897] 1 Ch 196, Lindley LJ (for the Court of Appeal) at 211.

28 See *Goddard v DFC New Zealand Ltd* [1991] 3 NZLR 580, Gallen J at 592 (HC).

29 See *Fitzgerald v Masters* (1956) 95 CLR 420, Dixon CJ and Fullagar J at 433 (though query whether the majority in this case agreed on this point with Dixon CJ and Fullagar J); *Lamshed v Lamshed* (1963) 109 CLR 440, Kitto J at 453.

30 *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30, Street J at 37.

31 See *Boswell v Coaks* (1884) 27 Ch D 424, Baggallay LJ (for the Court of Appeal) at 456; *Armstrong v Jackson* [1917] 2 KB 822, McCardie J at 830. See also above Chapter 25: "Rescission".

32 In *Pickering v Lord Stamford* (1793) 2 Ves Jun 272; 30 ER 629; *Pickering v Lord Stamford* (1794) 2 Ves Jun 581; 30 ER 787, a delay of 35 years did not preclude equitable intervention. In *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30, a transaction was rescinded for undue influence after a delay of 20 years. For a list of similar cases, see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3614].

33 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3414].

34 *KM v HM; Women's Legal Education & Action Fund; Intervener* (1993) 96 DLR (4th) 289; *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497.

35 *Limitation Act* 1969 (NSW), s 23.

36 *Limitation Act* 1981 (NT), s 21.

37 *Limitation of Actions Act* 1974 (Qld), s 10(6)(b).

38 *Limitation Act* 1974 (Tas), s 9.

39 *Limitation of Actions Act* 1958 (Vic), s 5(8).

However, there are some provisions in the Australian limitations legislation which do apply to equitable claims. These include provisions relating to:

- equitable interests in land;[40]
- actions to recover money or to redeem property under an equitable mortgage;[41]
- actions against trustees;[42]
- actions to account;[43]
- actions against deceased estates;[44] and
- actions for equitable relief against forfeiture of a lease.[45]

Further, even if a statute of limitations does not apply directly to a claim for equitable relief, it may be applied by analogy. Although there are few situations in which equitable relief is specifically time-barred, it is often said that a court of equity will refuse relief if an analogy can be drawn between the relief sought

40 In all States and Territories, these are bound by the same periods of limitation as are actions regarding legal interests in land. In four States, there are specific statutory provisions to the effect that, for limitation purposes, causes of action in respect of equitable interests are deemed to accrue at the same time and in the same manner as they would have had they been legal interests: *Limitation Act* 1969 (NSW), s 36(2); *Limitation of Actions Act* 1974 (Qld), s 16(1); *Limitation Act* 1974 (Tas), s 13(1); *Limitation of Actions Act* 1958 (Vic), s 11(1). Elsewhere, there is no specific statutory provision to this effect, but the same result is achieved by the statutory definition of "land": *Limitation Act* 1985 (ACT), s 8(1); *Limitation Act* 1981 (NT), s 4(1); *Limitation of Actions Act* 1936 (SA), s 3(1); *Limitation Act* 1935 (WA), s 3.

41 See Sykes E I and Walker S, *The Law of Securities* (5th ed, Law Book Co, Sydney, 1993), Ch 19.

42 See Ford H A J and Lee W I, *Principles of the Law of Trusts* (3rd ed, LBC Information Services, Sydney, 1996), Ch 18.

43 These are statute-barred in all States after six years: *Limitation of Actions Act* 1974 (Qld), s 10(2); *Limitation of Actions Act* 1936 (SA), s 35(b); *Limitation Act* 1974 (Tas), s 4(2); *Limitation of Actions Act* 1958 (Vic), s 5(2); *Limitation Act* 1935 (WA), s 38(1)(c). However, in New South Wales, this limitation does not extend to actions founded upon a liability in equity: *Limitation Act* 1969 (NSW), s 15. In the Australian Capital Territory, an action to account, both at law and in equity, is limited by the same period (if any) applicable to the claim which is the basis of the duty to account: *Limitation Act* 1985 (ACT), s 12. In the Northern Territory, actions to account are barred after three years although, once again, the limitation does not extend to actions founded upon a liability in equity: *Limitation Act* 1981 (NT), s 13.

44 These are subject to special statutory periods of limitation in three States. In Queensland (*Limitation of Actions Act* 1974 (Qld), s 28) and Tasmania *(Limitation Act* 1974 (Tas), s 25) no action for a share or interest in a deceased estate may be brought more than 12 years after the date of accrual and no claims for an interest upon a legacy may be brought more than six years after the date upon which the interest becomes due. In Victoria, no action for a share or interest in a deceased estate may be brought more than 15 years after the date at which that interest accrued: *Limitation of Actions Act* 1958 (Vic), s 22.

45 These are subject to statutory limitation in New South Wales alone: *Limitation Act* 1969 (NSW), s 25.

and a legal claim barred by statute.[46] In *Knox v Gye* (1872) LR 5 HL 656, Lord Westbury said (at 674-675):[47]

> "Where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as a rule of procedure regulating the remedy it affords."

[2911] Three issues arise in relation to the process of applying a statute of limitations by analogy. First, there is some question as to whether statutes of limitation will be applied by analogy in equity's exclusive jurisdiction. Although there is recent English authority that they will be,[48] the position is less clear in Australia[49] and in Canada.[50]

Secondly, even in equity's concurrent and auxiliary jurisdictions, care must be taken that the analogy to be drawn is an exact one. Three examples of situations in which a statute of limitations has been held to apply by analogy might be used to illustrate the process of drawing the analogy. In *Urquhart v M'Pherson* (1880) 6 VLR (E) 17, when a plaintiff sought in equity an account of profits of a partnership and when the same action at law would have been time-barred, it was held by analogy that the equitable

46 Some writers have attempted to draw elaborate distinctions between situations in which the statute applies directly, situations in which equity acts "in obedience" to the statute and situations in which equity acts "by analogy" to the statute: see Browne D (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933), p 504, and Spry I C F, *The Principles of Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), p 417. However, a widely-held view is that either a particular statute applies directly or it does not apply at all. If the statute does not apply directly, then equity must be acting by analogy when, with reference to the statute, it refuses relief: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3416]; *Knox v Gye* (1872) LR 5 HL 656, Lord Westbury at 674.

47 See also *Pearson v Pulley* (1688) 1 Ch Cas 102; 22 ER 714; *Marquis of Cholmondeley v Lord Clinton* (1821) 4 Bli 1; 4 ER 721, Lord Eldon LC at 119; *Thomson v Eastwood* (1877) 2 App Cas 215; *Allcard v Skinner* (1887) 36 Ch D 145 (CA); *Molloy v Mutual Reserve Life Insurance Co* (1906) 94 LT 756 (CA).

48 *Companhia de Seguros Imperio v Heath (REBX) Ltd* [2000] Lloyd's Rep PN 795, [2001] Lloyd's Rep IR 109.

49 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, Kirby P at 510.

50 *KM v HM; Women's Legal Education & Action Fund; Intervener* (1993) 96 DLR (4th) 289, La Forest J at 330-333.

action was also barred.[51] In *Metropolitan Bank v Heiron* (1880) 5 Ex D 319, when a company director took a bribe from a debtor of the company, the statutory period limiting actions for money had and received was applied by analogy. The directors initially thought that the charge was unfounded, but later sought to recover the amount of the bribe. The date from which the period was said to run was the date of the discovery of the fraud.[52] In *Re Motor Terms Co Pty Ltd* (1966) 66 SR (NSW) 397, not only was a statutory period of limitation applied by analogy, but so was the legal rule that commencing an action stops the statute running.[53] The court held that an order for the winding-up of a company may be made even on the petition of a creditor whose debt becomes statute-barred between the petition and the order. This approach received some support from the High Court of Australia in *Motor Terms Co Pty Ltd v Liberty Insurance Ltd (in liq)* (1967) 116 CLR 177, Taylor J at 187-188; Menzies J at 195.

Thirdly, the court always retains a discretion to refuse to follow the statute, even within its concurrent and auxiliary jurisdictions and even when an analogy can be drawn. In *Graf v Hope Building Corp* 171 NE 884 (1930) Cardozo J stated (at 887): "Equity follows the law, but not slavishly nor always." Indeed, in some situations equity will almost always exercise its discretion to refuse to draw an analogy with a statute of limitations. It has been held, for example, that equity will rarely (if ever) apply by analogy a statutory bar upon interest owing to a mortgagee by a mortgagor seeking to exercise an equity of redemption (*Holmes v Cowcher* [1970] 1 All ER 1224). This is because "the omission of the mortgagor to pay the interest which he ought to have paid [is no] less culpable than the omission of the mortgagee to demand and enforce payment of it" (*Edmunds v Waugh* (1866) LR 1 Eq 418, Kindersley V-C at 421).

[2912] The doctrine of concealed fraud provides a further circumstance in which a statute of limitation will not be applied by analogy.

51 *Urquhart v M'Pherson* (1880) 6 VLR (E) 17, Molesworth J at 22: "I rather think that a Court of Equity, in cases where a plaintiff has a choice of tribunal, would not have a different period of limitation." An interesting question which this quotation raises is whether claims for specific performance of a contract are limited to a six-year period by analogy with the statutory period pertaining to common law damages: see *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282; *Firth v Slingsby* (1888) 58 LT 481, Stirling J at 483 (Ch), which would suggest that they are. But see *Talmash v Mugleston* (1826) 4 LJ Ch 200, which would suggest that they are not. In practice, however, the question will not arise because a claim for specific performance is likely to be barred by laches after a period of six years: see below, para [2920].

52 But see *Cohen v Cohen* (1929) 42 CLR 91 (no precise legal analogy could be found to the equitable relief sought).

53 See also *Solla v Scott* [1982] 2 NSWLR 832.

This doctrine operates to prevent the application of a statute of limitation by analogy in two situations. These are: (a) when fraud is an element of the relevant cause of action; and (b) where the existence of the relevant cause of action has been fraudulently concealed by the defendant.[54]

Fraud in the latter type of case has been held to mean not only deceit, but also the taking of active steps to conceal the existence of a cause of action and even "any unconscionable failure to reveal".[55]

In either category, the period of limitation to be applied by analogy will not begin to run until the defendant's fraud has been, or ought to have been, discovered. The circumstances in which the defendant's fraud ought to have been discovered are not certain. Cases such as *Ecclesiastical Commissioners for England v North Eastern Railway Co* (1877) 4 Ch D 845 and *Urquhart v M'Pherson* (1880) 6 VLR (E) 17, suggest that the period will begin to run from the time when the fraud could with due diligence have been discovered.[56] This is also the rule in relation to statutory concealed fraud.[57] However, it has been suggested in *Rawlins v Wickham* (1858) 3 De G & J 304; 44 ER 1285 and *Betjemann v Betjemann* [1895] 2 Ch 474, that time will not begin to run until suspicions of fraud have been aroused in the plaintiff. It is clear that, at general law, the courts are reluctant to prevent a plaintiff from relying upon the doctrine of concealed fraud. Despite some suggestions to the contrary, this doctrine is available only where the statute applies by analogy,[58] not where it applies directly. The courts have "no power to disregard the words of the statute on the basis of an equitable doctrine".[59]

54 For an explanation of the distinction between these two categories, see Browne D (ed), *Ashburner's Principles of Equity* (2nd ed, Butterworths, London, 1933), p 506.

55 *Tito v Waddell (No 2)* [1977] Ch 106, Megarry V-C at 245. The definition depends for its authority upon a line of English cases decided on the *Limitation Act* 1939 (UK), s 26, though that section was always treated as incorporating general equitable principles: see *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA); *Kitchen v Royal Air Force Association* [1958] 2 All ER 241 (CA); *Clark v Woor* [1965] 2 All ER 353 (QB); *Applegate v Moss* [1971] 1 QB 406.

56 *Ecclesiastical Commissioners for England v North Eastern Railway Co* (1877) 4 Ch D 845, Malins V-C at 860; *Urquhart v M'Pherson* (1880) 6 VLR (E) 17, Molesworth J at 23.

57 See below, para [2914].

58 *Imperial Gas Light & Coke Co v London Gas Light Co* (1854) 10 Ex 39; 156 ER 346; *Hunter v Gibbons* (1856) 1 H & N 459; 156 ER 1281; *R v McNeil* (1922) 31 CLR 76; *Metacel Pty Ltd v Ralph Symonds Ltd* (1969) 90 WN (Pt 1) (NSW) 449. But *Gibbs v Guild* (1882) 9 QBD 59 (CA); *Lynn v Bamber* [1930] 2 KB 72; *KM v HM; Women's Legal Education & Action Fund; Intervener* (1993) 96 DLR (4th) 289, La Forest J at 315-319 (SC); Spry I C F, *The Principles of Equitable Remedies* (6th ed, Lawbook Co., Sydney, 2001), pp 423-425.

59 *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853, Pincus J at 49,196, summarising *R v McNeil* (1922) 31 CLR 76, Knox CJ and Starke J at 97; Isaacs J at 100.

[2913] Concealed fraud may also provide a statutory defence. Although the general law doctrine of concealed fraud only operates when a statute of limitations is applied by analogy, in all States and Territories there are statutory provisions that operate in a manner similar to the doctrine of concealed fraud to prevent the direct application of the statute. These sections apply whether the action which is subject to the limitation is legal or equitable.

The legislation in the Australian Capital Territory,[60] New South Wales,[61] and the Northern Territory[62] differs in expression, but not in effect, from the provisions in Queensland,[63] Tasmania[64] and Victoria.[65] These provisions apply in the same situations as the equitable doctrine of concealed fraud (that is, to causes of action based upon, or the existence of which has been concealed by, fraud) and to causes of action under which relief is sought from the consequences of a mistake. In each instance, it is provided that the statutory period of limitation does not begin to run until the relevant fraud or mistake was either known or could with reasonable diligence have been discovered. The South Australian[66] and Western Australian[67] provisions re-enact the *Real Property Limitation Act* 1833 (3 & 4 Will IV c 27), s 26. The legislation provides that, in proceedings to recover land or rent, where there has been concealed fraud, the statutory period will not begin to run until the fraud was known or could with reasonable diligence have been discovered. "Reasonable diligence" probably means that the plaintiffs could not have discovered the fraud without measures that they could not have been expected to take.[68]

The House of Lords has held that statutory concealed fraud under the *Limitation Act* 1980 (UK), s 32(1) applies both where a right of action has from its accrual been concealed and where it could have been discovered at the time of its accrual but is subsequently concealed (*Sheldon v R H M Outhwaite (Underwriting Agencies) Ltd* [1995] 2 WLR 570). There is no reason why this ought not also to be the position under the Australian legislation.

60 *Limitation Act* 1985 (ACT), ss 33, 34.

61 *Limitation Act* 1969 (NSW), ss 55, 56.

62 *Limitation Act* 1981 (NT), ss 42, 43.

63 *Limitation of Actions Act* 1974 (Qld), s 38.

64 *Limitation Act* 1974 (Tas), s 32.

65 *Limitation of Actions Act* 1958 (Vic), s 27.

66 *Limitation of Actions Act* 1936 (SA), s 25(1).

67 *Limitation Act* 1935 (WA), s 27.

68 *UCB Home Loans Corporation Ltd v Carr* [2000] Lloyd's Rep PN 754, Crane J at 757, relying on *Paragon Finance plc v D B Thakerar & Co. (a firm)* [1999] 1 All ER 400, Millett LJ at 418

[2914] There is an important respect in which at least the New South Wales section has been held to be narrower in its scope than the general law doctrine of concealed fraud has to date been thought to be. In *Hamilton v Kaljo* (1987) 17 NSWLR 381, it was held that the concealed fraud sections do not apply in the absence of proved dishonesty or moral turpitude. This was decided in the face of a long line of English cases to the contrary regarding the relevant section of the English legislation.[69] It has also been held in Queensland that proof of moral turpitude is not required for the application of the sections, it being sufficient to prove that the conduct of the defendant has been such that it would be inequitable for her or him to rely upon the statutory limitation.[70] Although the *Hamilton v Kaljo* position is the most natural reading of at least the New South Wales provisions, there must be little to recommend it in principle. Dishonesty and moral turpitude are difficult to establish. There must often be situations in which they cannot be proved and yet, in the circumstances of the case, the defendant has effectively prevented the plaintiff from bringing the relevant action before the end of the statutory period and allowing it to be brought after the end of the statutory period would cause the defendant no real hardship. In at least these circumstances there is no reason why the statutory period ought to apply.

[2915] The limitation legislation of all the States and Territories provides that nothing in the relevant Acts shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence or otherwise.[71] This preserves the position at general law which may be summarised in two propositions. First, where a statutory period applies directly (and, perhaps, by analogy),[72] delay up until the end of the statutory period for bringing the action will not be taken as evidence of the plaintiff having abandoned an equitable right. Accordingly, until the statutory period has elapsed, delay will not of itself give rise to the defence of release. Secondly, however, it will be possible even before the end of the statutory period for bringing the action to rely upon the defences

69 *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA); *Kitchen v Royal Air Forces Association* [1958] 2 All ER 241 (CA); *Clark v Woor* [1965] 2 All ER 353 (QB); *Applegate v Moss* [1971] 1 QB 406 (CA); *Tito v Waddell (No 2)* [1977] Ch 106, Megarry V-C at 245; *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515.

70 *Graham v Denning No 440 Pty Ltd* (unreported, Supreme Court of Queensland, Williams J, 15 September 1994).

71 *Limitation Act* 1985 (ACT), s 6; *Limitation Act* 1969 (NSW), s 9; *Limitation Act* 1981 (NT), s 7; *Limitation of Actions Act* 1974 (Qld), s 43; *Limitation of Actions Act* 1936 (SA), s 26; *Limitation Act* 1974 (Tas), s 36; *Limitation of Actions Act* 1958 (Vic), s 31; *Limitation Act* 1935 (WA), s 28.

72 See McGhee J (ed), *Snell's Equity* (30th ed, Sweet & Maxwell, London, 2000), pp 34-35.

of estoppel or even laches.[73] "Acquiescence" in this context seems to stand for the doctrines of estoppel and laches.

Delay operative as waiver

[2916] Delay has sometimes been taken as evidence of a present, fixed intention to release an equitable right.[74] This possibility was affirmed by Deane J (at 338) in *Orr v Ford* (1989) 167 CLR 316 (in dissent on the facts in the case)[75] who approved the following passage from Brunyate's *Limitation of Actions in Equity*:[76]

> "Lapse of time can … be an element in a more general defence … Thus a plaintiff who has released his right of action, or waived his rights, may be debarred from asserting those rights. The defence of release or waiver does not in general involve lapse of time. But conduct may amount to a release or waiver and standing by for a long time will be a significant part of a man's conduct. Hence standing by may be an element in the more general defence of release or waiver."

For example, in *Wright v Vanderplank* (1856) 8 De GM & G 133; 44 ER 340, where a daughter had made a gift to her father which, after her death, her husband sought to have set aside, a delay of ten years in bringing the suit was taken by the court as evidence of a "fixed, unbiased and deliberate"[77] decision not to impeach the gift. The court concluded that the equitable right to have it set aside had been released.

However, in order for delay to amount to a release, all the requirements of a valid release must be met. If, under statute, these are taken to include a requirement of writing, then conduct including delay will not be operative as a release (see below, para [2905]).

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73 *Rochdale Canal Co v King* (1851) 2 Sim (NS) 78; 61 ER 270, Lord Cranworth V-C at 89; *Archbold v Scully* (1861) 9 HLC 360; 11 ER 769; *Re Baker* (1881) 20 Ch D 230; *Re Maddever* (1884) 27 Ch D 523 (CA); *Penny v Allen* (1857) 7 De GM & G 409; 44 ER 160; *Moors v Marriott* (1878) 7 Ch D 543; *Re Birch* (1884) 27 Ch D 622; *Glasson v Fuller* [1922] SASR 148, Poole J at 161-163.

74 *Wright v Vanderplank* (1856) 8 De GM & G 133; 44 ER 340; *Clarke v Hart* (1858) 6 HLC 633; 10 ER 1443, Lord Chelmsford LC at 655; *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58; 45 ER 800, Lord Campbell LC at 77; *Blake v Gale* (1886) 32 Ch D 571, Cotton LJ at 579-580 (CA).

75 See also *Avtex* Airservices Pty Ltd v Bartsch (1992) 107 ALR 539, Hill J at 567-568 (Fed Ct); *KM v HM; Women's Legal Education & Action Fund; Intervener* (1993) 96 DLR (4th) 289, La Forest J at 335-336.

76 Brunyate J, *Limitation of Actions in Equity* (Stevens & Sons, London, 1932), pp 188-189.

77 *Wright v Vanderplank* (1856) 8 De GM & G 133; 44 ER 340, Turner LJ at 151.

[2917] Delay might also form a part of the factual basis upon which a defence of estoppel is built.[78] Thus, *Mitchell v Homfray* (1881) 8 QBD 587 has been regarded as a case in which delay amounted to "a representation by silence of a type which may found an estoppel by conduct".[79] Meagher, Gummow and Lehane[80] treat *Mitchell v Homfray* as an example of delay evincing a release, and this seems to be a better classification of the decision, given that no relevant representation by silence can be found in the case. Nevertheless, an estoppel by silence (see above, Chapter 7: "Estoppel") may be available as a defence in many situations of delay.

Delay with prejudice to the defendant or a third party: laches

[2918] Laches should be distinguished from estoppel. The delay with prejudice defence operates where there has been such a change in the position of the defendant or a third party during the plaintiff's delay that it would be inequitable for the plaintiff to be granted relief. The defence will operate where the plaintiff has:[81]

> "[B]y his conduct or neglect … put the other party [or a third party] in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted".

Initially, it may appear that this defence resembles the defence of estoppel and its characteristic concept of unconscionable conduct, and there have been suggestions that the laches may be explained on the basis of estoppel.[82] Indeed, where the relevant prejudice to the defendant has been caused by reliance upon the plaintiff's delay in circumstances such that the delay could also be treated as a representation that the plaintiff's accrued rights would not be enforced, both estoppel and laches may well be available.[83]

78 Of course, as with delay which amounts to a release, where delay constitutes the factual matrix upon which an estoppel is built, the relevant defence does not flow from the delay in itself. Rather, delay is one of the factual circumstances upon which the defence is built. This distinction was emphasised in *Glasson v Fuller* [1922] SASR 148, Poole J at 161.

79 *Orr v Ford* (1989) 167 CLR 316, Deane J at 337.

80 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3603].

81 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir Barnes Peacock at 240.

82 *Orr v Ford* (1989) 167 CLR 316, Deane J at 339.

83 Thus, in *Orr v Ford* (1989) 167 CLR 316, Deane J at 339 affirmed that the doctrine of delay with prejudice "overlaps the areas of operation of other more specific defences" such as release and estoppel and considered that both laches and estoppel ought to have been pleaded. That estoppel might have been pleaded was also noted by the majority judges: Wilson, Toohey and Gaudron JJ at 329-330.

However, the two defences can be distinguished on a number of important bases. First, it is clear that laches has a different focus to that of estoppel. Estoppel is focused upon protecting reasonable reliance upon representations or induced assumptions, while laches is concerned to check unjust consequences, howsoever arising, from delay in bringing legal proceedings. Thus, secondly, estoppel by silence only arises where a deliberate silence on the part of the plaintiff can be said to have amounted to a representation upon which the defendant has relied.[84] In contrast, laches does not depend on the proof of such a representation. That is, where the prejudice which the defendant is seeking to establish for laches results from acts of reliance upon the plaintiff's delay, the defendant can point to reliance upon the delay without needing to show that it amounted to a representation concerning the plaintiff's rights. Thirdly, demonstrating reliance is only one of the ways in which laches can be established, but is crucial in raising an estoppel. Fourthly, estoppel by silence can only apply in circumstances in which the plaintiff had knowledge of her or his particular rights during the delay. It has been suggested by Meagher, Gummow and Lehane[85] that there is no reason why this should also be true of laches. This has been approved in at least one decision.[86] This final basis for distinguishing estoppel and laches could have enormous practical importance.

[2919] Whether laches is operative as a defence depends upon the circumstances of the case. Notwithstanding the danger of uncertainty,[87] the application of the defence rests upon the balancing of several different considerations, a "balance of justice or injustice in taking the one course or the other".[88] The defence is, in this sense, clearly a discretionary one and the burden of proving that it would be inequitable to allow the claim to proceed is on the defendant (*Neylon v Dickens* [1987] 1 NZLR 402, Cooke P at 407 (CA)).

The courts have been reluctant to spell out the precise considerations which they should take into account in deciding whether or not to apply the defence. In *Orr v Ford* (1989) 167 CLR 316, Deane J said (at 340-341):

84 Wilson, Toohey and Gaudron JJ at 330; Deane J at 339.

85 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3617].

86 *Baburin v Baburin* [1990] 2 Qd R 101, Kelly SPJ at 112. But see *Orr v Ford* (1989) 167 CLR 316, Deane J at 341, where the opposite position was taken.

87 The danger is that outcomes will depend upon "the turn of mind of those who have to decide": *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1279.

88 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir Barnes Peacock at 240. See also *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1279; *BM* Auto Sales Pty Ltd v Budget Rent A Car System Pty Ltd (1976) 51 ALJR 254, Gibbs J at 259 (HC).

> "[A]ny attempt to specify exhaustively combinations of circumstances [which might lead to the application of the defence] would be likely to introduce an inappropriately arbitrary and technical element into an area of equity doctrine which has traditionally been kept free of arbitrary and technical constraints. On balance, the preferable approach is to treat the phrase 'gross laches' as an intentionally imprecise one which involves not merely considerations of the period of the relevant delay but which invokes the traditional notions of equity and good conscience which are the general elements of whether a plaintiff should be refused relief by reason of laches in the circumstances of a particular case."

Considerations which the courts have always seen as relevant to their balancing of justice or injustice include:

- the nature of the claim;
- the nature of the property to which the claim relates;
- the identity of the party against whom the defence is claimed;
- the length of the delay;
- whether the delay has affected the defendant's ability to resist the claim; and
- the acts of each party during the delay.

Each of these considerations is discussed separately in the following paragraphs.

[2920] The nature of the claim must be considered when a defence of laches is raised. Some types of claim are less amenable to the defences of laches. Thus suits by the beneficiary of an express trust against the trustee for the recovery of trust property will not often be subject to the defence.[89] In cases of fraud, delay will not be operative until the fraud is, or ought to have been, discovered.[90] In cases of undue influence, delay will not be operative until the influence no longer subsists and the donor has become aware of her or his rights.[91]

89 *Orr v Ford* (1989) 167 CLR 316, Deane J at 340-341 and the cases there cited.

90 *Charter v Trevelyan* (1844) 11 Cl & Fin 714; 8 ER 1273; *Rolfe v Gregory* (1865) 4 De GJ & S 576; 46 ER 1042; *Oelkers v Ellis* [1914] 2 KB 139; *Armstrong v Jackson* [1917] 2 KB 822. The same is perhaps also true in cases of mistake: *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614, Davison CJ at 627 (HC).

91 *Allcard v Skinner* (1887) 36 Ch D 145, Kekewich J at 163 (CA). Indeed, even delay after a plaintiff has become aware of her or his right to have a transaction rescinded for undue influence will not automatically give rise to a defence of laches. In one case, a gift was set aside for undue influence even though the donor had known for four years of its potential invalidity: *Bullock v Lloyds Bank Ltd* [1955] Ch 317.

On the other hand, some types of claim have traditionally been thought to require a particular promptness. For example, claims for interlocutory relief are especially susceptible to the defence of laches (see above, para [2909]). There is authority that claims for the establishment of a constructive trust and for the rescission of a contract[92] must also be brought promptly.[93] There is also authority that applications for specific performance of contract must be brought quickly,[94] although doubt has been expressed whether, at least in Australia, applications for specific performance are actually treated any differently from the general class of claims.[95] It is also difficult to see why, in terms of principle, they should be.

The fact that special promptness is seen as requisite in particular classes of case does not mean that long delays will automatically bar relief in those cases. Rather, the nature of the claim is one particular consideration for a judge to take into account in determining whether laches will be available as a defence.

[2921] The nature of the property to which the claim relates must be considered when a defence of laches is raised. Thus, a plea of delay will more often be successful where the plaintiff seeks to set aside or enforce a transaction regarding, or establish a trust of, property which is speculative in nature, for example, mining property or the profits of a retail business. Equity will not allow a plaintiff to stand by and watch fluctuations in the value of such property while deciding what action to take in regard to it.[96] The

92 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir Barnes Peacock at 242; *Leaf v International Galleries* [1905] 2 KB 86, Denning LJ at 92 (CA); *Fitzgerald v Masters* (1956) 95 CLR 420, Dixon CJ and Fullagar J at 433.

93 *Beckford v Wade* (1805) 17 Ves Jun 87, Sir William Grant MR at 97; 34 ER 34. See also *Goddard v DFC New Zealand Ltd* [1991] 3 NZLR 580, Gallen J at 592 (HC), in which it is taken to be a point worthy of consideration whether a delay of ten days could defeat a claim for a constructive trust. See also *McLean v McErlean* [1983] NI 258, Gibson LJ at 268 (CA).

94 *Milward v Earl of Thanet* (1801) 5 Ves Jun 720n; 31 ER 824n; *Eads v Williams* (1854) 4 De GM & G 674; 43 ER 671, Lord Cranworth LC at 691; *Pollard v Clayton* (1855) 1 K & J 462; 69 ER 540; *Oriental Inland Steam Co (Ltd) v Briggs* (1861) 4 De GF & J 191; 45 ER 1157; *Huxham v Llewellyn* (1873) 21 WR 766 (Ch); *Barclay v Messenger* (1874) 43 LJ Ch 449, Jessel MR at 456; *Glasbrook v Richardson* (1874) 23 WR 51 (Ch); *Hickey v Bruhns* [1977] 2 NZLR 71, Quilliam J at 76-77.

95 Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3606], arguing on the basis of *Fitzgerald v Masters* (1956) 95 CLR 420 and *Mehmet v Benson* (1965) 113 CLR 295.

96 *Clegg v Edmondson* (1857) 8 De GM & G 787; 44 ER 593; *Clements v Hall* (1858) 2 De G & J 173; 44 ER 954; *Norway v Rowe* (1812) 19 Ves Jun 144; 34 ER 472; *Turner v Trelawny* (1841) 12 Sim 49; 59 ER 1049; *Re Jarvis; Edge v Jarvis* [1958] 2 All ER 336 (Ch); *Huxham v Llewellyn* (1873) 21 WR 766 (Ch); *McEwing v Auld* (1873) 4 AJR 49 (SC Vic); *Cushing v The Lady Barkly Gold Mining Co* (1883) 9 VLR (E) 108; *Rowe v Oades* (1905) 3 CLR 73; *Plummer v Murray* (1911) 7 Tas LR 45; *Foley v Farrell* (1933) 36 WALR 46; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, Dixon J at 679; *Boyns v Lackey* (1958) 58 SR (NSW) 395 and the authorities therein cited; *Wilson v Winton* [1969] Qd R 536.

courts are unwilling to allow the plaintiff to "play a game in which he alone risks nothing".[97]

The nature of the relevant property is, however, once again merely one matter to be taken into account in determining the applicability of laches as a defence. In *Turner v* Trelawny (1841) 12 Sim 49; 59 ER 1049, a trust was established in relation to certain mining property notwithstanding a delay of 15 years.

[2922] The identity of the party against whom the defence is raised must be considered when a defence of laches is raised. Laches will operate more readily as a defence against a plaintiff suing in an individual capacity than it will against a plaintiff suing as a representative for a class.[98] In particular, laches will less readily be available against the Attorney-General suing on behalf of the public.[99]

Laches will also operate as a defence more readily against a plaintiff suing as an individual than it will against a company. For example, when undue influence has been exercised on the governing body of a company, a change of governing body will usually be required before the company is fully in a position to bring a claim for equitable relief.[100] Similarly, laches will less readily be available when large numbers of people are necessarily involved in the preparation of the plaintiff's case.[101]

Finally, the delay on which the defence of laches is based must be shown to be the delay of the particular plaintiff bringing the suit.[102] Thus, the delay of a predecessor will not bind successors in title (*Nwakobi v Nzekwu* [1964] 1 WLR 1019 (PC)).

[2923] The length of the relevant delay must be considered when a defence of laches is raised.[103] It has already been pointed out that

97 *Clegg v Edmondson* (1857) 8 De GM & G 787, Knight Bruce LJ at 814; 44 ER 593.

98 *Evans v Smallcombe* (1868) LR 3 HL 249, Lord Cairns LC at 257; *Boswell v Coaks* (1884) 27 Ch D 424, Baggallay LJ (for the Court of Appeal) at 457; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, the Privy Council at 470.

99 *Attorney-General (UK) v Johnson* (1819) 2 Wils Ch 87, Lord Eldon LC at 102; 37 ER 240; *Attorney-General (UK) v Sheffield Gas Consumers Co* (1853) 3 De GM & G 304, Turner LJ at 323; 43 ER 119; *Attorney-General (UK) v Proprietors of the Bradford Canal* (1866) LR 2 Eq 71, Sir William Page Wood V-C at 81-82; *Attorney-General (UK) v Newry No 1 Rural District Council* [1933] NI 50, Andrews LJ at 71 (Ch D); *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, the Privy Council at 470.

100 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1280.

101 *Legg v Inner London Education Authority* [1972] 3 All ER 177, Megarry J at 191 (Ch).

102 *Schulze v Tod* [1913] AC 213; *Wright v Morgan* [1926] AC 788 (PC); *O'Connor v Hart* [1983] NZLR 280, McMullin J (for the Court of Appeal) at 292-293.

103 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir Barnes Peacock at 240.

equitable claims have been allowed after sometimes remarkable delays. Nevertheless, in cases of longer delay, the courts are more reluctant to intervene. Courts are reluctant to expose defendants to doubt and uncertainty for an extended period of time.[104]

[2924] Whether or not the relevant delay has affected the defendant's ability to resist the claim, must also be considered when a defence of laches is raised. It would be unjust to allow a plaintiff to succeed in bringing a claim where the plaintiff's delay robbed the other party of the means of defending the suit. There is, therefore, considerable authority that a plaintiff's delay may be operative as laches where evidence has been lost which would be important to the defendant's case,[105] or where for some other reason the defendant's ability to resist the plaintiff's claim has become prejudiced (*Neylon v Dickens* [1987] 1 NZLR 402, Cooke P at 408-409 (CA)). For example, such considerations have been given considerable weight in a series of recent Australian cases concerning claims brought by adults for their mistreatment during childhood by those who, it was claimed, owed them a fiduciary duty.[106] Indeed, so important are such considerations, that laches based upon loss of evidence has been held even to bar the claim of a plaintiff having only recently discovered some fraud of which he or she has been the victim.[107]

[2925] The acts of each party during the delay must be considered when a defence of laches is raised. Thus laches will more often be found where either the defendant[108] or a third

104 *Southcomb v Bishop of Exeter* (1847) 6 Hare 213; 67 ER 1145; *Parkin v Thorold* (1852) 16 Beav 59; 51 ER 698; *Fitzgerald v Masters* (1956) 95 CLR 420, Dixon CJ and Fullagar J at 433-434.

105 *Attorney-General (UK) v Fishmongers' Co* (1841) 5 My & Cr 16; 41 ER 278{CE}, Lord Cottenham LC at 18; *Bright v Legerton (No 1)* (1861) 2 De GF & J 606; 45 ER 755, Lord Westbury LC at 617; *Matthew v Brise* (1851) 14 Beav 341; 51 ER 319, Sir John Romilly MR at 346; *Watt v Assets Co Ltd* [1905] AC 317, Earl of Halsbury LC at 329, 333; *Miller's Executrix v Miller's Trustees* [1922] SC 150; *Hourigan v Trustees Executors & Agency Co Ltd* (1934) 51 CLR 619, Rich J at 629; Dixon J at 648, 651; *Hughes v Schofield* [1975] 1 NSWLR 8; *Hodges v Smith* [1950] WN 455 (Ch); *Crago v McIntyre* [1976] 1 NSWLR 729; *Baburin v Baburin* [1990] 2 Qd R 101.

106 See *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, (1999) 25 FamLR 86, [2000] NSWCA 255; *Johnson v Department of Community Services* [1999] NSWSC 1156; *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97; *'SD' v Director General of Community Welfare Services* [2001] NSWSC 441.

107 *Charter v Trevelyan* (1844) 11 Cl & Fin 714; 8 ER 1273, Lord Campbell at 740, but see *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97, O'Loughlin J at 546; "Before an equitable remedy will be refused by reason of delay, it is usually necessary that the applicant has sufficient knowledge of the facts that constitute his or her entitlement to relief."

108 *Evans v Smallcombe* (1868) LR 3 HL 249, Lord Cairns LC at 255; *Turner v Collins* (1871) LR 7 Ch App 329; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, Lord Blackburn at 1279; *Watson v Commercial Bank of Australia* (1879) 5 VLR (M) 36; *Allcard v Skinner* (1887) 36 Ch D 145, Bowen LJ at 192 (CA); *Fysh v Page* (1956) 96 CLR 233; *Re Jarvis; Edge v Jarvis* [1958] 2 All ER 336 (Ch); *Shaw v Applegate* [1978] 1 All ER 123 (CA); *McMahon v Ambrose* [1987] VR 817 (FC); *KM v HM; Women's Legal Education & Action Fund; Intervener* (1993) 96 DLR (4th) 289, La Forest J at 334 (SC). But see *BM Auto Sales Pty Ltd v Budget Rent A Car System Pty Ltd* (1976) 51 ALJR 254 (HC).

party[109] has relied upon the status quo during the plaintiff's delay. This is particularly so where the plaintiff has knowingly stood by and failed to warn against such reliance. For example, there are many company law cases in which invalid allotments of shares have not been rescinded because third parties may have acted to their detriment in reliance upon the company's share register.[110]

However, reliance is not the key to this defence as it is to estoppel. Thus any act (not only acts of reliance), of either party during the delay which would lead to the defendant being prejudiced will be relevant.

[2926] Laches will be available where the court determines that it would be inequitable for the plaintiff to proceed with the relevant claim, having considered all the matters discussed in the preceding paragraphs. Laches will not be available where any prejudice which the defendant may have suffered can be remedied in the form of the relief granted.[111]

It is always open to the court to determine that it should allow the defence in relation to one type of remedy but not in relation to another in the same case.[112] Thus, in *Shaw v Applegate* [1978] 1 All ER 123, laches was held to bar the grant of an injunction to prevent the defendant from operating an amusement arcade in breach of a restrictive covenant in his conveyance. It would not, however, have barred the award of *Lord Cairns' Act* damages,[113] had they been able to be assessed.

109 *Bonney v Ridgard* (1784) 1 Cox 145; 29 ER 1101; *Hourigan v Trustees Executors & Agency Co Ltd* (1934) 51 CLR 619, Dixon J at 649-651; *Lamshed v Lamshed* (1963) 109 CLR 440; *Agbeyegbe v Ikomi* [1953] 1 WLR 263 (PC).

110 *Re Cachar Co; Ex parte Lawrence* (1867) LR 2 Ch App 412; *Re Scottish Petroleum Co* (1882) 23 Ch D 413 (CA); *Whittlesea Land Co v Gutheil* (1892) 18 VLR 557; *Re Freshfood & Preserving Co Ltd* [1903] St R Qd 162; *Civil Service Co-operative Society of Victoria Ltd v Blyth* (1914) 17 CLR 601; *Re Lucks Ltd* [1928] VLR 466.

111 On remedying potential inequity in the form of the grant, see *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, Sir James Peacock at 239; *Mehmet v Benson* (1965) 113 CLR 295, Barwick CJ at 307.

112 See *Eastwood v Lever* (1863) 4 De GJ & S 114; 46 ER 859; *Senior v Pawson* (1866) LR 3 Eq 330; *Sayers v Collyer* (1884) 28 Ch D 103 (CA); *Shaw v Applegate* [1978] 1 All ER 123 (CA).

113 *Chancery Amendment Act* 1858 (21 & 22 Vict c 27), s 2: see above, Chapter 22: "Equitable Compensation".

ILLEGALITY AND UNCLEAN HANDS

Illegality

Illegal transactions

[2927] Equity may refuse to grant relief with respect to an illegal transaction. A transaction may be illegal in at least three ways. First, it may be illegal because it consists in the formation of a prohibited contract or trust. Secondly, it may be illegal because it entails the commission of a prohibited act; for example, equity will not allow a claim in respect of an agreement to recover illegal gambling debts (*Quarrier v Colston* (1842) 1 Ph 147; 41 ER 587). Thirdly, a transaction may be illegal because, although entailing neither the formation of a prohibited contract or trust nor the commission of a prohibited act, it is "associated with or in furtherance of illegal purposes".[114] It is identifying and responding to this third type of illegality that the courts find most difficult and the law in relation to this third type is in a state of flux.

[2928] Two conservative approaches to this third type of illegality are represented by the majority and minority positions adopted in the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340, the leading English authority. The majority in that case argued that a party will be prevented from obtaining relief if it is necessary to that party's claim to plead or rely upon the illegal purpose.[115] An example arises because an illegal transaction can be effective for passing property.[116] While, on this approach, property transferred for an illegal purpose can be recovered if no presumption of advancement applies, it cannot be recovered if a presumption of advancement does apply because it would be necessary for the plaintiff to show the illegal purpose for which the transfer was made in order to rebut the presumption. The minority in *Tinsley v Milligan* argued that equity ought not to intervene where a transaction is tainted by an illegal purpose, allowing the loss to lie where it falls as a deterrent to unlawful behaviour.[117] Thus, in the example just given, equity would rarely provide for the

114 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, Jacobs J at 432, cited in *Nelson v Nelson* (1995) 132 ALR 133, Deane and Gummow JJ at 144.

115 *Tinsley v Milligan* [1994] 1 AC 340, Lord Jauncey of Tullichette at 366, Lord Lowry at 367 and Lord Browne-Wilkinson at 374-375.

116 *Scarfe v Morgan* (1838) 4 M & W 270; 150 ER 1430.

117 Lord Goff of Chieveley at 354-357, Lord Keith of Kinkel at 351.

restoration of property transferred for an illegal purpose. This position was said to rest on the authority of both Lord Mansfield[118] and Lord Eldon.[119]

[2929] Despite the claimed antiquity of these more conservative approaches to illegality, it is clear that *Tinsley v Milligan* [1994] 1 AC 340 does not represent the law in Australia. Both the majority and minority approaches in *Tinsley v Milligan* [1994] 1 AC 340 potentially impose a sanction upon a plaintiff for illegal activity that far exceeds the sanction provided for by Parliament in the relevant legislative scheme. Further, either of those approaches means that the defence of illegality is one "whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation".[120] The case was therefore rejected by the High Court in *Nelson v Nelson* (1995) 184 CLR 538.[121] This case deals specifically with the situation in which the relevant illegal purpose is the commission of a statutory wrong: on the facts, the making of a false declaration to obtain government funding for a house purchase. The majority argued that the approach that the courts should adopt is to consider the underlying policy of the relevant Act to determine whether or not the grant of relief would frustrate that policy. If the grant of relief would not frustrate that policy, and particularly if the statute provides some alternative mechanism for dealing with the relevant illegality, the courts ought not to refuse relief on the basis of the illegal purpose. Moreover, if there is a danger that the grant of relief might frustrate the statutory policy, but that danger might be met by the fashioning of appropriate discretionary relief in equity, the courts ought to grant relief of that type. This latter was, in fact, the approach adopted by the majority in *Nelson v Nelson* (1995) 184 CLR 538 at 618-619 itself.

[2930] Even under the English approach to illegality, the defence will not succeed where the illegal transaction is entered into as a result of fraud, duress or oppression;[122] where for some other

118 (1775) 1 Cowp 341; 98 ER 1120.

119 (1801) 6 Ves Jun 52; 31 ER 934.

120 *Tinsley v Milligan* [1994] 1 AC 340, Lord Goff of Chieveley at 355. Though Lord Goff was actually speaking of only the minority approach in *Tinsley v Milligan* his comment can be equally well applied to the majority approach.

121 *Nelson v Nelson* has also been applied in the contractual sphere in *Fitzgerald v F J Leonhardt* (1997) 189 CLR 215.

122 *Bosanquett v Dashwood* (1734) Cas t Talb 38; 25 ER 648; *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317; 27 ER 1055; *Osborne v Williams* (1811) 18 Ves Jun 379; 34 ER 360; *Williams v Bayley* (1866) LR 1 HL 200; *Whitmore v Farley* (1881) 29 WR 825 (CA); *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482 (CA); *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91.

reason the parties are not equally at fault (in pari delicto);[123] and where the transaction is illegal on the basis of a purpose that has not been substantially carried out.[124] The courts generally take a broad view when applying this last exception.[125]

Equitable coercive relief

[2931] Coercive relief in equity will be unavailable where there is a substantial risk that carrying out the relevant order will involve unlawful conduct.[126] Thus, an agreement to create an interest in land in breach of a perpetuities rule, though not illegal at law and incapable of giving rise to an action for damages, will in equity not be specifically enforced (*Worthing Corporation v Heather* [1906] 2 Ch 532). Coercive relief will, however, be available in circumstances in which the order could be followed either in a legal or an illegal manner,[127] especially if the relevant order can be framed to ensure that it is carried out lawfully.[128]

Unclean hands

[2932] The equitable concept of "unclean hands" has a somewhat uncertain relationship to the defence of illegality. It flows from the maxims, "a person who comes to equity must come with clean hands" and "no court of equity will aid a man to derive advantage from his own wrong" (*Meyers v Casey* (1913) 17 CLR 90, Isaacs J at 124). However, although the concept is arguably wider than the defence of illegality, it may be that it cannot be invoked in situations in which the illegality defence can be.

123 For example, where the defendant is a member of a class which the rule establishing the illegality was designed to protect. See *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91, Knox CJ at 101; *Automobile & General Finance Co Ltd v Hoskins Investments Ltd* (1934) 34 SR (NSW) 375, Long Innes J at 389.

124 *Ward v Lant* (1701) Prec Ch 182; 24 ER 88; *Birch v Blagrave* (1755) 1 Amb 264; 27 ER 176; *Platamone v Staple* (1815) G Coop 250; 35 ER 548; *Symes v Hughes* (1870) LR 9 Eq 475; *Hermann v Charlesworth* [1905] 2 KB 123 (CA); *Payne v MacDonald* (1908) 6 CLR 208; *The Perpetual Executors & Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185; *Clegg v Wilson* (1932) 32 SR (NSW) 109; *Money v Money (No 2)* [1966] 1 NSWR 348; *Tribe v Tribe* [1995] 4 All ER 236.

125 *Money v Money (No 2)* [1966] 1 NSWR 348 (contract for transfer of property interest in exchange for promise not to seek maintenance illegal for public policy reasons, since it sought to oust the jurisdiction of the court. The parties were restored to their original positions).

126 Thus, "no court … is empowered to direct any breach of a statute": *Norton v Angus* (1926) 38 CLR 523, Isaacs J at 534; and a "court will not impose … an obligation to do something which is … unlawful": *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, Evershed MR at 181. See also *Johnson v Shrewsbury & Birmingham Railway Co* (1853) 3 De GM & G 914; 43 ER 358, Knight Bruce LJ at 923; *Pottinger v George* (1967) 116 CLR 328, Barwick CJ, McTiernan and Taylor JJ at 337.

127 *Langley v Foster* (1906) 4 CLR 167; *Robertson v Admans* (1922) 31 CLR 250, Starke J at 262.

128 *Brady v Brady* [1989] AC 755, Lord Oliver at 785.

Deane and Gummow JJ (at 550-551) argued in *Nelson v Nelson* (1995) 184 CLR 538 that, where a defendant's claim is essentially that the plaintiff is relying upon an unlawful transaction, the doctrine of illegality ought to be allowed to do the work of determining whether or not the plaintiff is to be precluded from relief. If Deane and Gummow JJ are right, then the equitable concept of "unclean hands" ought only to be invoked in situations outside those essentially involving a claim of illegality. It will, of course, also only apply to a claim made on the basis of an equitable doctrine or for an equitable remedy.

To establish the defence of unclean hands a defendant[129] must point to some type of impropriety on the part of the plaintiff which is "depravity in a legal as well as in a moral sense"[130] and bears an immediate and necessary relation to the equity sought.[131] The defence is a discretionary one, and in applying it the court must take into account all the circumstances of the case.[132] At least this last feature of the defence distinguishes it from the defence of illegality.

[2933] Unclean hands relevant to a claim for one type of relief will not prevent a plaintiff from being granted another type of relief, if that second type has no sufficient connection to the relevant legal depravity (*Argyll v Argyll* [1967] Ch 302, Ungoed-Thomas J at 331-332).

[2934] It is difficult to define with precision the types of impropriety which may be said to amount to "depravity in a legal as well as in a moral sense".[133] It has been said that "[e]quity does not demand that its suitors have led blameless lives".[134] There are, however, four clusters of cases in which such impropriety has often been found. The first of these is where the plaintiff has been guilty of some type of misrepresentation, even if that misrepresentation has not been operative at law. For example,

129 Note that only defendants may rely on the maxim. Thus, misrepresentations which would prevent certain defendants from relying upon their trademark as plaintiffs will not prevent them from relying upon the trademark in defence to a passing-off action: see *Weingarten Bros v G & R Wills & Co* [1906] SALR 34, Way CJ at 80-86.

130 *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184, Eyre LCB at 320.

131 *Moody v Cox* [1917] 2 Ch 71 (CA); *Argyll v Argyll* [1967] Ch 302, Ungoed-Thomas J at 331-332; *Meyers v Casey* (1913) 17 CLR 90; *Dewhirst v Edwards* [1983] 1 NSWLR 34, Powell J at 51. See also *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501 (SC NSW).

132 *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC), Tipping J at 331; *Tinsley v Milligan* [1994] 1 AC 340. See also Stowe H, "The `Unruly Horse Has Bolted': Tinsley v Milligan" (1994) 57 *Modern Law Review* 441.

133 *Dering v Earl of Winchelsea* (1787) 1 Cox 318; 29 ER 1184, Eyre LCB at 320.

134 *Loughran v Loughran*, 292 US 216 (1934); Brandeis J (for the court) at 229.

specific performance of a contract has been denied on the basis of misrepresentation even though in the circumstances the defendant has not rescinded the contract.[135] Minors fraudulently claiming to be adults have been denied equitable relief notwithstanding their disability.[136] A plaintiff was refused an injunction to restrain a suit undertaken by the Stock Exchange, notwithstanding a promise on behalf of the Exchange not to sue, because he had told lies to Stock Exchange representatives investigating his affairs.[137] Even misrepresentations to the public at large have amounted to "unclean hands". For example, in *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd*,[138] the manufacturers of certain kettles were denied protection in passing-off because they had fraudulently stamped their kettles "Patented. Copyrighted", thereby attempting to deceive the public.

Secondly, equitable relief may be refused in situations in which it can be shown that the plaintiff has materially misled the court or otherwise attempted to abuse its processes.[139]

Thirdly, equitable relief may also be refused where fraud, in its broad sense, is said to amount to "legal depravity". Thus, a beneficiary who procures a breach of trust and thereby obtains money will not be able to sue upon the breach (*Nail v Punter* (1832) 5 Sim 555; 58 ER 447). Similarly, copyright will not be protected where a book has been written in breach of a fiduciary duty.[140] Where a mortgagor has destroyed a part of the security for a loan before a mortgagee has taken possession, an order for accounts will not be granted.[141]

Fourthly, "legal depravity" may also relate to gross sexual immorality. Accordingly, copyright will not be protected in an immoral book (*Glyn v Weston Feature Film Co* [1916] 1 Ch 261).

135 *Cadman v Horner* (1810) 18 Ves Jun 10; 34 ER 221; *Viscount Clermont v Tasburgh* (1819) 1 Jac & W 112; 37 ER 318.

136 *Cory v Gertcken* (1816) 2 Madd 40; 56 ER 250; *Re Lush's Trusts* (1869) 4 Ch App 591; *Overton v Banister* (1844) 3 Hare 503; 67 ER 479. But see *Nelson v Stocker* (1859) 4 De G & J 458; 45 ER 178, Turner LJ at 465. There is a sense in which these cases resemble the principle of estoppel in that the plaintiff is being prevented from asserting a position inconsistent with that which he or she has previously asserted. See also *Greater Sydney Development Association Ltd v Rivett* (1929) 29 SR (NSW) 356, Long Innes J at 360-361 (the maxim was used to prevent a plaintiff from enforcing a covenant restrictive of user which the plaintiff had earlier promised would not be enforced).

137 *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSWR 224.

138 (1934) 35 SR (NSW) 108. See also *Chocosuisse union des fabricants Suisse de chocolat v Cadbury Ltd* (1998) RPC 117, Laddie J at 144-149.

139 *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384, Lord Evershed MR at 397.

140 *A-G (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109.

141 *Meredith v Davis* (1933) 33 SR (NSW) 334, Long Innes J at 338.

Relief against forfeiture of a lease will be denied to a tenant using the premises for immoral purposes (*Gill v Lewis* [1956] 2 QB 1, Jenkins LJ at 14). In one American case the applicant was denied a decree of nullity on the grounds of premarital fornication (*Donovan v Donovan* 263 NYS 336 (1933) (SC)). However, with changes in moral standards, "at the present day the difficulty is to identify what sexual conduct is to be treated as grossly immoral".[142] Moreover, the recognition of such a defence raises interesting juristic questions. Some jurists have been very concerned that the imposition of sanctions for sexual immorality poses a threat to individual liberty.[143] This "unclean hands" defence is interesting because it does not involve the state's intervening in an individual's affairs on the basis of sexual immorality, but rather the state's refusing to do so. Whether such a refusal constitutes a "sanction" and a threat to individual liberty is a juristically complex question.

Beyond these four situations outlined it is difficult to identify when a defence of "unclean hands" might be found. A more exact definition of legal impropriety would minimise the danger that "unclean hands" might simply act as a net to catch situations which fail to attract redress on bases such as misrepresentation, fraud or estoppel, but which nevertheless arouse the judges' sympathy.

[2935] Situations in which the defence of "unclean hands" will not operate are:

- in suits for the cancellation and delivery up of documents in which the continued existence of the documents could itself be a possible source of fraud;[144]
- in suits for merely declaratory relief;[145]
- in suits for purely statutory relief;[146]
- in suits to prevent multiplicity of actions;[147] and

142 *Stephens v Avery* [1988] Ch 449, Sir Nicolas Browne-Wilkinson V-C at 453 (case concerning the protection of confidential information in a relationship).

143 For an introduction to this debate see Lee S, *Law and Morals: Warnock, Gillick and Beyond* (New York: Oxford, 1986).

144 *St John v St John* (1805) 11 Ves Jun 526; 32 ER 1192; *Money v Money (No 2)* [1966] 1 NSWR 348.

145 *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300.

146 *Re the Will of FB Gilbert (decd)* (1946) 46 SR (NSW) 318 (FC).

147 *Angelides v James Stedman Hendersons Sweets Ltd* (1927) 40 CLR 43; *Hewson v Sydney Stock Exchange Ltd* [1968] 2 NSWR 224, Street J at 233; *Dow Securities Pty Ltd v Manufacturing Investments Ltd* (1981) 5 ACLR 501 (SC NSW).

- wherever the court considers that the principles which would lead to relief in the given case outweigh the public policy that equity ought not to assist a wrongdoer.[148]

It is not possible, however, to oust the discretion of the court to refuse relief on the basis of unclean hands by contractual agreement.[149]

148 *Money v Money (No 2)* [1966] 1 NSWR 348, Jacobs J at 351-352; *New South Wales Dairy Corp v Murray Goulburn Co-Operative Co Ltd* (1990) 171 CLR 363.

149 *Quadrant Visual Communication Ltd v Hutchinson Tepehone (UK) Ltd* [1993] BCLC 442.

CHAPTER THIRTY

SET-OFF

Gregory Burton

INTRODUCTION

Definition

[3001] Set-off is a form of countervailing (opposing) claim which is made by one person (B) against another (A) where A has made a claim on B. It can arise in litigation or in non-litigious contexts, such as insolvency. In some circumstances, the legal rules about set-off can be altered by private agreement.

This chapter concentrates on rules of set-off outside the law of insolvency, namely:

- legal set-off — which arose out of old statutes in the law of procedure dealing with some claims recognised by the common law (such as mutual debts);
- analogous equitable set-off — which the equity courts originally allowed to operate, on claims recognised by courts of equity, in a similar fashion to the rules of legal set-off; and
- classical equitable set-off — which were rights given by courts of equity where it would be unconscionable or unconscientious for the plaintiff's claim to be pursued without dealing with the opposing claim of the defendant. An example of classical equitable set-off is where a defendant claims damages for negligent misrepresentation in response to the plaintiff's claim for a debt.

There appears to be no uniform terminology to describe set-off, other forms of countervailing claim and the parties involved. The terms are used in this chapter in the following way. A countervailing claim is the generic term for all claims which can be made by the opposing claimant against the originating claimant.

A counterclaim is a form of countervailing claim which does not have the essential characteristic of set-off as described below.[1] The originating or initiating claimant is the person making the claim against which a countervailing claim is made. The opposing claimant is the person subject to the originating or initiating claim who raises a countervailing claim. "Counterclaim" has been used in preference to "cross-claim" because the latter term has been used in New South Wales as the generic term for all countervailing claims, including equitable set-off which remains the only form of set-off in existence in that jurisdiction outside of the insolvency context.[2]

The terms "cross-action" or "cross-demand" are sometimes used to mean the same as counterclaim and cross-claim. "Cross-action" is mostly found in older statutes.[3]

[3002] Principles similar to set-off operate in some areas of the law. For instance:

- In the law of succession, a personal representative may be able to adeem an inter vivos transaction[4] between the deceased and a beneficiary against a legacy to that beneficiary, to set off a debt owed by a beneficiary against a legacy owed to that beneficiary and to retain property or otherwise insist that benefits under the will do not get distributed until the intended recipient fulfils obligations to the estate, such as to contribute money to a fund.[5]
- In the law of trusts, a trustee claiming against a third party may be met with a right of set-off claimed against a beneficiary of the relevant trust; a trustee claimed against by a third party may raise the beneficiary's alleged rights of set-off against the third party; a beneficiary enforcing rights of the trust against a third party may be met by a right of set-off alleged against the trustee.
- In banking law, a bank may have the right to combine credit and debit accounts of a customer.
- In the law governing sale of goods and in leases, the purchase price or rent may abate by the amount of damage which the purchaser or tenant suffers as a consequence of a breach of warranty or covenant by

1 See below, para [3003].

2 This follows from the repeal of the statutes which gave rise to set-off rights at common law: see *Supreme Court Act* 1970 (NSW), s 78; *Supreme Court Rules* 1970 (NSW), Pt 6. See below, paras [3007], [3016].

3 *Common Law Procedure Act* 1857 (NSW); *Common Law Procedure Act* 1899 (NSW), s 79.

4 A transaction between the beneficiary and the deceased when the deceased was alive.

5 The last two rights are known respectively as a right of retainer and the Rule in *Cherry v Boultbee* (1839) 4 My & Cr 442; 41 ER 171.

the seller or landlord. In contrast, rights of set-off between the parties to an underlying contract are not available, in most circumstances, to the issuer of a documentary letter of credit, performance bond, standby credit, bank guarantee or similar document or to the parties to a charter party (in respect of claims for freight) or to a bill of exchange or other negotiable instrument. This is the case even if those parties on the bill or other instrument are in an immediate relationship.

Set-off as a defence

[3003] Set-off is distinguishable from other forms of countervailing claim because it operates as a *defence* to an originating or initiating claim.[6] All countervailing claims are capable of standing on their own as initiating claims.[7] The essential distinguishing characteristic of a set-off from other countervailing claims is its defensive operation. For example, while an unconditional and unlimited covenant not to sue amounts to a release which can be used as a defence, a limited or conditional covenant not to sue can be raised only by way of counterclaim.[8]

Set-off is a defence which can operate independently as an originating or initiating claim. It can be used offensively as well as defensively, as a "sword" as well as a "shield". Set-offs do not need to arise in all cases out of the same matters which generated the originating or initiating claim. In some cases, they operate as an admission of components of, or the entirety of, the originating claim but provide a ground for reducing or eliminating liability in respect of the originating claim.[9]

Set-off may be contrasted with other forms of defence which derive from the originating or initiating claim itself. Such defences aim to destroy the basis for liability, either by requiring

6 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50, Dixon J at 57; *Re KL Tractors Ltd* [1954] VLR 505; *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VR 445; *Fong v Cilli* (1968) 11 FLR 495 (SC NT); *Re Dalco; Ex parte Dalco v Deputy Commissioner of Taxation (NSW)* (1986) 67 ALR 605 (Fed Ct); *Westwind Air Charter Pty Ltd v Hawker de Havilland Ltd* (1990) 3 WAR 71. The distinction is implicit in most of the authority on types and components of set-off.

7 See also *Re Dalco; Ex parte Dalco v Deputy Commissioner of Taxation (NSW)* (1986) 67 ALR 605 (Fed Ct) (assertion of invalidity of debt not sufficient to constitute a set-off able to be raised against a bankruptcy notice founded on the debt).

8 *B R Meadows & Sons v Rockman's General Store Pty Ltd* [1959] VR 68.

9 This was referred to in older forms of pleading as confession and avoidance, if the entire originating claim was admitted: see *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50, Dixon J at 57; *Re KL Tractors Ltd* [1954] VLR 505; *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VR 445; *Fong v Cilli* (1968) 11 FLR 495 (SC NT); *Re Dalco; Ex parte Dalco v Deputy Commissioner of Taxation (NSW)* (1986) 67 ALR 605 (Fed Ct); *Westwind Air Charter Pty Ltd v Hawker de Havilland Ltd* (1990) 3 WAR 71.

that the facts necessary to be proved in order to give rise to the claimed legal liability should be proved to the appropriate standard, or by showing that the facts (if proved) would not attract that liability. Showing that the contract on which the claim is based would be too uncertain, contrary to public policy or time-barred would be examples of the latter situation. Such defences may also seek to show that the type or quantum of remedy is inappropriate.[10]

Like other defences, set-off operates directly to defeat or reduce the validity or amount of the originating or initiating claim. When set-off operates as a substantive defence, as in classical equitable set-off, it destroys the validity of the claim. This is so even if a determination of the availability of the defence by a court is required.[11]

Where the set-off operates as a procedural defence, the originating claim and the countervailing claim giving rise to a set-off maintain a separate existence until judgment. This is in common with other procedural defences.[12] However, there is only one judgment, which is on the originating claim.[13]

As with other forms of counterclaim, any balance of the set-off which exceeds the judgment can be the subject of separate proceedings. Such proceedings may be consolidated or heard together with the proceedings in which the set-off is raised, if the rules of court so allow, or if the court in its discretion permits this course.[14]

10 Such defences can be personal or proprietary: see *Good Motel Co Ltd (in liq) v Rodeway Pacific International Ltd* (1988) 94 FLR 84 (SC ACT); *Duke Group Ltd (in liq) v Arthur Young (Reg)* (1991) 4 ACSR 355 (FC SA); *Buttrose v Versi* (unreported, Supreme Court of New South Wales, Young J, 14 May 1992).

11 See below, para [3014].

12 Contrast procedural defences such as time bars to action under a limitation statute and requirements that there be written evidence of a transaction under the local equivalent of the *Statute of Frauds* 1677 (29 Car II c 3). These operate when a claim is sought to be enforced by the initiation of proceedings, although there may need to be findings of fact on a full hearing to determine if the defence is available. The distinction between procedure and substance should not be overstated: see Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 337, 339-340.

13 See below, para [3008].

14 *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10, Woodward J at 15; *Covino v Bandag Manufacturing Pty Ltd* [1983] 1 NSWLR 237, Hutley JA at 238 (CA); Derham S R, *Set-Off* (2nd ed, Oxford: Clarendon Press, 1996), pp 124ff; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3703]. See also *Pearse v Trenchard* (1901) 18 WN (NSW) 135; *Reis v Carling* [1906] St R Qd 38; *Robinson v Vale* [1905] VLR 405. But see *Freehold Investment & Banking Co of Australia Ltd v Thompson* (1884) 6 ALT 65 (SC Vic); *Paterson v Clarton* (1885) 7 ALT 15 (SC Vic); *Reynolds v Taylor* (1886) 8 ALT 13 (SC Vic). See further below, para [3008].

Distinction between set-offs and counterclaims

[3004] In contrast with set-offs, counterclaims are independent at all times until the effect of judgments on the originating claim and the counterclaim are determined.[15] A counterclaim must be brought in separate proceedings from the originating claim unless the rules of court enable the claims to be consolidated or to be heard together, or the court allows this in the exercise of its discretion.[16] Hearing all counterclaims together may be appropriate in proceedings involving the administration of the same trust.[17]

Unless the proceedings are fully consolidated, so that in reality the two sets of claims become one, there will be two judgments. If the rules so provide or the court exercises discretion under its inherent jurisdiction to control its own procedure, there may be judgment or execution only for the balance if the judgments are unequal in amount.[18]

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15 See, for example, *Duke Group Ltd (in liq) v Arthur Young (Reg)* (1991) 4 ACSR 355 (FC SA). Thus, the counterclaim can be proceeded with even if the originating claimant withdraws or discontinues: see, for example, *Leithead v Hely* (1889) 15 VLR 417; *Reis v Carling* [1906] St R Qd 38.

16 For examples of joint hearing of counterclaims, see *Peninsular & Oriental Steam Navigation Co Ltd v Britnell* (1892) 18 VLR 580; *O'Dea v Scott* (1912) 14 WALR 198. On stay of execution of judgment on the originating claim pending judgment on the counterclaim, see *Caltex Oil (Australia) Pty Ltd v Miles* [1958] QWN 12, case no 7; *Joskovitz v Bonnick* [1964] VR 654; *Grant v Banque Franco-Egyptienne* (1878) 3 CPD 202; *Attorney-General (UK) v Emerson* (1889) 24 QBD 56 (CA); *Re a Debtor; Ex parte Petitioning Creditors v The Debtor* [1951] Ch 612. See also *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 1)* [1983] 2 Qd R 243; *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255. The relevant procedural provisions are: *High Court Rules*, O 22 r 16; *Federal Court Rules* (Cth), O 5 r 12, O 20 r 4, O 37 r 10; *Supreme Court Act* 1933 (ACT), s 20(1); *Supreme Court Rules* (ACT), O 15 r 6, O 43 r 25. *Supreme Court Act* 1970 (NSW), ss 61(4), 78; *Supreme Court Rules*, 1970 (NSW), Pt 6 r 4, Pt 13 r 3(2), Pt 26 r 1, Pt 42 r 12, Pt 44 r 5. *Supreme Court Act* 1979 (NT), s 64; *Supreme Court Rules* (NT), O 15 r 6. *Supreme Court Rules* (Qld), O 17 r 4, O 18 r 3, O 47 r 18. *Supreme Court Act* 1935 (SA), s 23; *Supreme Court Rules* 1987 (SA), O 14 r 6, O 16A r 7, O 42 r 26. *Supreme Court Civil Procedure Act* 1932 (Tas), s 10(3); *Rules of the Supreme Court* 1965 (Tas), O 15 r 4, O 18 r 62, O 47 r 28. *Supreme Court Act* 1958 (Vic), s 61(3); *General Rules of Procedure in Civil Proceedings* 1986 (Vic), O 14 r 6, O 42 r 27. *Supreme Court Act* 1935 (WA), s 24(3); *Rules of the Supreme Court* 1971 (WA), O 14 r 4, O 19 r 4, O 47 r 13. For resolving, in one new hearing, two separate hearings of claims involving the same questions of law and fact on which there have been conflicting findings, see *Australasian Steam Navigation Co, Owners of SS "Birksgate" v William Howard Smith & Sons, Ltd, Owners of SS "Barrabool"* (1889) 14 App Cas 321; 10 LR (NSW) 150 (PC).

17 See *Herbert v Badgery* (1893) 14 LR (NSW) Eq 321.

18 *Tubbs v Equitable Co-operative Co Ltd* (1885) 7 ALT 46 (SC Vic); *Box v Attfield* (1886) 8 ALT 54 (SC Vic); *Bank of New South Wales v Preston* (1894) 20 VLR 1; *Mitcham v Flood* (1896) 17 LR (NSW) 375 (FC); *Carroll v Jensen* (1900) 10 QLJ 60; *Butcher v Colonial Wholesale Meat Co Ltd* (1920) 38 WN (NSW) 24; *Brown v Beatton* (1927) 27 SR (NSW) 84 (FC); *Kostka v Addison* [1986] 1 Qd R 416. See *High Court Rules* (Cth), O 22 r 16. But see *Paterson v Clarton* (1885) 7 ALT 15 (SC Vic). See also below, para [3008].

Advantages of set-off over counterclaim

[3005] There are numerous advantages which set-off has over counterclaims. The economic consequences of set-offs and counterclaims may be similar if a counterclaim is permitted to be litigated in the same proceedings as the originating claim, and execution is issued only for the balance of the judgments on each claim. The economic effect may also be similar if the competing claims are not litigated in the same proceedings, but execution of the judgment in the originating claim is stayed so as to permit litigation of the counterclaim. However, these are matters of discretion in respect of counterclaims.

In contrast, set-offs have procedural and substantive advantages from their status as true defences. The fundamental advantage is that the countervailing claim is certain of being dealt with simultaneously with the originating claim, at least to the extent of the amount of the originating claim. The opposing claimant may suffer liquidity difficulties or other commercial problems if he or she has to pay a judgment on the originating claim and wait for determination and enforcement of a judgment on the countervailing claim.[19] By setting off the countervailing claim against the originating claim, this problem is avoided.

Other advantages relate to limitation periods, costs, disputed debts, assignments subject to "equities", and arbitration proceedings.

First, in respect of a set-off, the limitation period is assessed as at the date of the commencement of proceedings on the initiating claim.[20] In contrast, the limitation period under the general law in respect of counterclaims must be measured from the time the counterclaim was commenced.[21] This position may be varied by statute.[22] Furthermore, a set-off can still be raised as a defence even if it would be time-barred in separate proceedings, so long as the time bar is procedural only; that is, if a limitation statute

19 See the discussion in *Commissioner for Railways v Australian Hardwoods Pty Ltd* [1961] NSWR 27.

20 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50, Dixon J at 57-58; *Sidney Raper Pty Ltd v Commonwealth Trading Bank of Australia* [1975] 2 NSWLR 227, Moffitt P at 236 (CA); Glass JA at 254-256 (CA); *Webster Ltd v Roberts* (1989) 11 ATPR (Digest) 46-050 (SC Tas).

21 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50; *Sidney Raper Pty Ltd v Commonwealth Trading Bank of Australia* [1975] 2 NSWLR 227 (CA); *Webster Ltd v Roberts* (1989) 11 ATPR (Digest) 46-050 (SC Tas).

22 The Limitation Acts are as follows: *Limitation Act* 1985 (ACT), s 51; *Limitation Act* 1969 (NSW), s 74; *Limitation Act* 1981 (NT), s 8; *Limitation of Actions Act* 1974 (Qld), s 42; *Limitation of Actions Act* 1936 (SA), s 44; *Limitation Act* 1974 (Tas), s 35; *Limitation of Actions Act* 1958 (Vic), s 30; *Limitation Act* 1935 (WA), s 46.

prevents the bringing of an action but does not extinguish the substantive legal rights.[23] However, where a debt was rendered unenforceable by moratorium legislation, a set-off was denied even though that legislation did not operate to extinguish the substantive legal rights.[24]

Secondly, if successful, a set-off usually entitles an opposing claimant to her or his costs in the proceedings on the originating claim; the same rules apply as to any other defence. The entitlement to costs is in addition to the claimant's costs on the claim constituting the set-off if that is brought as a counterclaim for any amount exceeding the originating claim.[25]

Thirdly, set-off may remove the foundation on which a creditor's petition or winding-up application is based. In insolvency law, an unsatisfied debt exceeding a certain amount may be a jurisdictional prerequisite for a creditor's petition or winding-up application.[26] A right of set-off in respect of a genuine and substantive countervailing claim may in effect extinguish the originating creditor's debt or reduce it below the jurisdictional threshold, and thus indicate that there has been no failure to pay the debt.

If the set-off is of the classical equitable form which constitutes a substantive set-off,[27] it is arguable that the applicant or petitioner is not even entitled to be called a "creditor" (thereby removing another jurisdictional prerequisite) because, while circumstances exist which support the equitable set-off, the debt, though still owing at law, has no entitlement to be collected in equity and does not entitle the claimant to treat the "debtor" as "indebted".[28]

23 See *McKain v R W Miller & Co (South Australia) Pty Ltd* (1991) 66 ALJR 186. For limitation provisions under the *Trade Practices Act* 1974 (Cth), see *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

24 *R v Ray; Ex parte Chapman* [1936] SASR 241 (FC).

25 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50; *Empire Motor & Cycle Co Ltd v Bartlett* (1906) 8 WALR 205; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10. But see *Dwyer v Smith* (1907) 25 WN (NSW) 12; *Stock Motor Ploughs Ltd v Southgate* (1931) 48 WN (NSW) 118; *Garner v Rohanna Pty Ltd* [1999] WASCA 178.

26 *Bankruptcy Act* 1966 (Cth), ss 44, 52(1)(c); *Corporations Act* 2001 (Cth), Pt 5.4, ss 459A, 459C(2)(a) (formerly s 462).

27 See below, paras [3014]-[3016].

28 *Stewart v Latec Investments Ltd* [1968] 1 NSWR 432; *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514, Hutley JA at 517-518 (CA); Derham S R, *Set-Off* (2nd ed, Oxford: Clarendon Press, 1996), pp 57, 129-130. But see *Re KL Tractors Ltd* [1954] VLR 505, O'Bryan J at 507 and the cautionary note sounded in Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 337, 339-340. For set-off or counterclaim as a basis for setting aside a bankruptcy notice, see *Bankruptcy Act* 1966 (Cth), ss 40(1)(g), 41(7).

In a winding-up context, if a company can show prima facie that it has a genuine and substantive set-off equal to or greater than the debt on which a creditor's winding-up application is founded, it can obtain an injunction to prevent advertising of the application and have the application stayed as an abuse of process. The disputed indebtedness means that there has been no failure to pay the applicant's debt or that the applicant has no locus standi as a creditor. The applicant is therefore attempting to use the winding-up mechanism for the improper purpose of pressuring payment of genuinely disputed indebtedness. By contrast, other forms of counterclaim may only move the court to dismiss a winding-up application after a full hearing, or to stay the hearing or the operation of a winding-up order pending the determination of the counterclaim. Even if it is ultimately successful, the company's commercial viability might be damaged by the advertising.[29] In New South Wales, where the forms of set-off as a procedural defence have been abolished,[30] it appears that any form of cross-claim will give rise to an injunction provided it is genuine and substantive.[31]

Fourthly, a set-off is an "equity" to which the assignee (transferee) of a debt will potentially be subject. Prior to the availability of a statutory procedure for assignment at law of choses in action,[32] an assignee could sue at law only by power of attorney from the assignor and in the assignor's name as a party. As a consequence, even under the statutory procedures now

29 See, for example, *Re KL Tractors Ltd* [1954] VLR 505; *Re Horizon Pacific Ltd* (1977) 2 ACLR 495 (SC NSW); *Medi Services International Pty Ltd v Jarson Pty Ltd* (1978) 3 ACLR 518 (SC NSW); *Re Nickel Mines Ltd* (1978) 3 ACLR 686 (SC NSW); *Re Jeff Reid Pty Ltd and the Companies Act* (1980) 5 ACLR 28 (SC NSW (Eq)); *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 61 FLR 108 (FC); *L & D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180 (SC NSW); *Irani v Asian Boutique Pty Ltd* (1983) 7 ACLR 755 (SC NSW); *Novasonic Corp Pty Ltd v Hagemeyer (A/asia) BV (No 2)* (1983) 9 ACLR 385 (Fed Ct); *Re Julius Harper Ltd; Ex parte Winkler & Co (Hong Kong) Ltd* [1983] NZLR 215 (HC); *Anglican Sales Ltd v Southern Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249 (CA); *Brinds Ltd v Offshore Oil NL* (1985) 60 ALJR 185 (PC); affg (1983) 10 ACLR 229; *Ron Pritchard Pty Ltd v Horwitz Grahame Pty Ltd* (1988) 6 ACLC 258 (SC NSW). See also Keay A, *McPherson: The Law of Company Liquidation* (4th ed, LBC Information Services, Sydney, 1999), pp 91-117, 134.

30 See below, para [3007].

31 *Buying Systems (Aust) Pty Ltd v Tien Mah Litho Printing Co (Pte) Ltd* (1986) 5 NSWLR 317; *CVC Investments Pty Ltd v P & T Aviation Pty Ltd* (1989) 18 NSWLR 295; *Just Juice Corp Pty Ltd v Murrayland Fruit Juice Pty Ltd* (1990) 2 ACSR 541 (SC NSW); *Re Kolback Group Ltd* (1991) 4 ACSR 165 (SC NSW); *Nickel Rim Mines Ltd v Horizon Pacific Ltd* (1991) 4 ACSR 750 (SC NSW); *Graeme Webb Investments Pty Ltd v Kypreos Civil Engineering Pty Ltd* (unreported, Supreme Court of New South Wales (Equity Division), Powell J, 21 May 1992). See also below, para [3016].

32 ACT: *Conveyancing Act* 1919 (NSW), s 12 as applied by *Law of Property (Miscellaneous Provisions) Act* 1958 (ACT), s 3; *Conveyancing Act* 1919 (NSW), s 12; *Supreme Court Act* 1979 (NT), s 70; *Property Law Act* 1974 (Qld), s 199; *Law of Property Act* 1936 (SA), s 15; *Conveyancing and Law of Property Act* 1884 (Tas), s 86; *Property Law Act* 1958 (Vic), s 134; *Property Law Act* 1969 (WA), s 20: "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed". See above, Chapter 13: "Equitable Assignments".

available a debtor or fundholder can raise against an assignee all "equities" which he or she could have raised against the assignor. The rule also applies in respect of equitable assignments.[33]

However, statutory provisions[34] protect holders in due course of a negotiable instrument against all remote prior equities. All holders of the instrument appear to be protected against personal equities between immediate parties unless those equities are personal defences available on the instrument or liquidated claims giving rise to a legal set-off by force of statute. In extraordinary circumstances, a stay of execution may be granted pending resolution of a cross-claim for unliquidated damages which gives rise to a classical equitable set-off.[35] A holder for value who did not qualify as a holder in due course would still be protected against remote personal equities unless the party concerned is a restricted indorsee, an agent for collection or a trustee for the prior party to whom those equities were immediate. The principle has been held to apply when there is no value given by the indorsee and when the indorsee has taken the bill deliberately to defeat a personal equity such as a right of set-off.[36] The rules do not apply in respect of set-offs where the remedy under the general law (such as relief from unconscientious transactions) or statute (such as *Trade Practices Act* 1974 (Cth), s 87) permits the setting aside of the negotiable instrument itself.[37]

"Equities" means defects of title, strict personal defences and rights of set-off which meet the test for classical equitable set-offs and legal set-offs and their equitable analogues which arise prior to the debtor or fundholder receiving notice of the assignment.

33 See above, Chapter 13: "Equitable Assignments".

34 *Bills of Exchange Act* 1909 (Cth), s 34; *Cheques Act* 1986 (Cth), s 50.

35 See *Eversure Textiles Manufacturing Co Ltd v Webb* [1978] Qd R 347, Connolly J at 349, 351; *Mobil Oil Australia Ltd v Caulfield Tyre Service Pty Ltd* [1984] VR 440, Young CJ at 443; *Kendra v Everest Enterprises Pty Ltd* (1984) 2 SR (WA) 103; *Buying Systems (Aust) Pty Ltd v Tien Mah Litho Printing Co (Pte) Ltd* (1986) 5 NSWLR 317; *Rigg v Commonwealth Bank of Australia* (1989) 97 FLR 261, Gleeson CJ at 267-268 (CA NSW); *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 (HL); appd in *K D Morris & Sons Pty Ltd (in liq) v Bank of Queensland* (1980) 146 CLR 165, Aickin J at 202-203).

36 See *Oulds v Harrison* (1854) 10 Ex 572; 156 ER 566; *Collenridge v Farquharson* (1816) 1 Stark 259; 171 ER 467; *Burrough v Moss* (1830) B & C 557; 109 ER 558; *Stein v Yglesias* (1834) 1 CM & R 565; 149 ER 1205; *Whitehead v Walker* (1842) 10 M & W 696; 152 ER 652; *Holmes v Kidd* (1858) 3 H & N 89; 157 ER 729; *Re Overend, Gurney & Co; Ex parte Swan* (1868) LR 6 Eq 344, Sir Richard Malins V-C at 360; *Merchants Bank of Canada v Thompson* (1911) 23 OLR 502. See also Burton G K, "Negotiability: Set-offs and Counter-claims", in Burton G K (ed), *Directions in Finance Law* (Butterworths, Sydney, 1990), p 33.

37 *Ferro Corp (Aust) Pty Ltd v International Pools Aust Pty Ltd* (1993) 30 NSWLR 539, applied in *John Shearer Ltd v Gehl Co* (1995) 60 FCR 136 at 139-143 (could be offsetting claim within the statutory demand regime in *Corporations Act* 2001 (Cth) Pt 5.4 (ss 459E-459N)).

A widely-held view is that other counterclaims are not relevant "equities".[38]

Fifthly, a set-off may bring the countervailing claim within the scope of an arbitration agreement, thereby enabling a stay of judicial proceedings in respect of the originating claim.[39]

TYPES OF SET-OFF

[3006] There are three major types of set-off which may be available outside the insolvency jurisdiction. These are legal set-off, analogous equitable set-off and classical equitable set-off.

Legal set-off

[3007] Legal set-off has a statutory origin. The common law provided no means by which countervailing claims could be used as a defence.[40] The *Insolvent Debtors Relief Act* 1728 (8 Geo II c 22)[41] provided for limited rights of set-off as a procedural means of avoiding circuity of action. It was made permanent by the *Set-off Act* 1735 (8 Geo II c 24).[42] Together these have become known as the *Statutes of Set-off*.

The *Statutes of Set-off* continue to have direct force in each Australian jurisdiction except New South Wales, Queensland and Victoria.[43] In New South Wales the *Statutes of Set-off* were repealed by the *Imperial Acts Application Act* 1969 (NSW), s 8.

38 *Tooth v Brisbane City Council* (1928) 41 CLR 212, Isaacs J at 223-224; *Provident Finance Corp Pty Ltd v Hammond* [1978] VR 312. See also Derham S R, *Set-Off* (2nd ed, Oxford: Clarendon Press, 1996), pp 567ff; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [699]ff, [846]-[847], [3703]; Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 332-337. See also *W Pope & Co Pty Ltd v Edward Souery & Co Pty Ltd* [1983] WAR 117.

39 See *Commercial Arbitration Act* 1986 (ACT), s 53; *Commercial Arbitration Act* 1984 (NSW), s 53; *Commercial Arbitration Act* 1985 (NT), s 53; *Commercial Arbitration Act* 1990 (Qld), s 53; *Commercial Arbitration Act* 1986 (SA), s 53; *Commercial Arbitration Act* 1986 (Tas), s 53; *Commercial Arbitration Act* 1984 (Vic), s 53; *Commercial Arbitration Act* 1985 (WA), s 53. See also *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 (HL); *SL Sethia Liners Ltd v Navigaro Maritime Corp (The "Kostas Melas")* [1981] 1 Lloyd's Rep 18.

40 *Re KL Tractors Ltd* [1954] VLR 505. But see account stated, which depends on contract: see below, para [3012].

41 Section 13.

42 Sections 4, 5.

43 *Australian Courts Act* 1828 (9 Geo IV c 83), s 24, in respect of Tasmania; see *Phillips v Mineral Resources Developments Pty Ltd* [1983] 2 Qd R 138 (FC) for the historical position in Queensland. In the Northern Territory, South Australia and Western Australia they appear to be part of received law. In the Australian Capital Territory, the *Statutes of Set-off* are amended and applied by the *Imperial Acts Application Act* 1986 (ACT), s 5.

The result of this repeal has been to remove in that jurisdiction the right of legal set-off, leaving only classical equitable set-offs.[44] The *Imperial Acts Application Act* 1984 (Qld) repealed the *Statutes of Set-off* in a similar manner to that in New South Wales.[45] In Victoria, the Statutes were repealed by the *Imperial Acts Application Act* 1922 (Vic). The legislation provided that repeal of the statutes was not to affect any jurisdiction, principle, or rule of law or equity established or confirmed.[46]

[3008] Legal set-off is a procedural defence. It is not a denial of the originating claim; rather, it admits the existence of the originating claim (possibly as an alternative defence) and is a plea in bar, which entitles the defendant to judgment in respect of that claim, on the ground that the defendant has a countervailing claim which excuses payment of the originating claim.[47]

Accordingly, the set-off crystallises at the time of judgment and the originating claim is not extinguished until that time,[48] unless the right of set-off is earlier conceded on an account stated or its equivalent.[49]

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44 *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 (CA); *Leichhardt Emporium Pty Ltd v AGC (Household Finance) Ltd* [1979] 1 NSWLR 701; *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 73 ALR 289 [11 ACLR 616; 5 ACLC 480] (SC NSW), Smart J at 292; *Buttrose v Versi* (unreported, SC NSW, Young J, 14 May 1992, 3568 of 1990) at 8. The New South Wales Law Reform Commission, in *Discussion Paper No 40* (1998), recommended that "a plain English restatement of the law of set-off as established by the Statutes of Set-Off be enacted in New South Wales".

45 See See *Walker v Secretary, Department of Social Security* (1995) 129 ALR 198 at 216-217; McDermott P M, "Imperial statutes in Australia and New Zealand" (1990) 2 *Bond Law Review* 162 at 164-166; Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 344; for the application of the *Statutes of Set-off* in Queensland prior to repeal, see *Phillips v Mineral Resources Developments Pty Ltd* [1983] 2 Qd R 138 (FC).

46 *Imperial Acts Application Act* 1922 (Vic), s 7. See also *Imperial Acts Application Act* 1980 (Vic). The precise scope of the Victorian saving provision appears not to have been the subject of authority: see *Edward Ward & Co v McDougall* [1972] VR 433. See also *General Rules of Procedure in Civil Proceedings* 1986 (Vic), r 13.14, which was held, in *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168, Beach J at 175, not to permit a set-off by a tenant against a claim for rent by the mortgagee in possession of the landlord of an arbitral award obtained by the tenant against the landlord, although the mortgagee had adopted the lease; the tenant's claim was personal against the landlord, so there was no mutuality. For a discussion of whether or not this rule has abolished the distinction between set-off and counterclaim, see Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 340-344. The repeal in English law of the *Statutes of Set-off* by the *Civil Procedure Acts Repeal Act* 1879 (UK) and the *Statute Law Revision and Civil Procedure Act* 1883 (UK) contained a similar saving provision: see Derham S R, *Set-Off* (2nd ed, Oxford: Clarendon Press 1996), p 10.

47 *Re KL Tractors Ltd* [1954] VLR 505. See however, the cautionary note sounded in Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 339-340.

48 *Re KL Tractors Ltd* [1954] VLR 505; *Re John Dillon Ltd (in liq); Ex parte Jefferies* [1960] WAR 30; *Southern Textile Converters Pty Ltd v Stehar Knitting Mills Pty Ltd* [1979] 1 NSWLR 692; affd *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 (CA).

49 *Re John Dillon Ltd (in liq); Ex parte Jefferies* [1960] WAR 30.

Thus, an amount due under a policy of life insurance has been held in its entirety to be an asset in the estate of the insured for death duty purposes, notwithstanding that by agreement between insurer and insured there was to be deducted from the amount payable under the policy at its maturity the amount of a loan to the insured against the policy. The set-off by agreement did not vary the debt due to the insured, but merely reduced to that extent (at time of payment in the future) the amount payable.[50]

If the countervailing claim is for an amount exceeding the originating claim and leave has been granted to litigate it in the same proceedings, there will be a separate judgment for the excess on the counterclaim.

[3009] For an entitlement to a legal set-off to arise, there must be "mutual debts".[51] This has given rise to the following prerequisites:

- The originating claim and the countervailing claim both must be rights of action recognised by the common law.
- The originating claim and the countervailing claim both must give rise to liquidated damages.
- The originating claim and the countervailing claim must be mutual, that is, they must arise between the same parties and in the same right or capacity.

[3010] There must be a liquidated right of action recognised at law. Although the *Statutes of Set-off* refer to "debts", this has been interpreted to mean rights of action recognised by the common law which give rise to a liquidated amount[52] (a definite quantum of compensation in the form of a fixed or ascertainable sum).[53] This will not be the case where the countervailing claim is a claim for account stated or the taking of accounts in equity

50 *Forsyth v Commissioner of Stamp Duties (NSW)* (1965) 114 CLR 194, Kitto J at 200.

51 This is the phrase in the *Statutes of Set-off*.

52 *Set-off Act* 1735 (8 Geo II c 24), s 5, provided that the right of set-off existed "notwithstanding that such debts are deemed in law to be of a different nature": see *National Bank of Australasia v Swan* (1872) 3 VLR (L) 168 (set-off can be pleaded to an action on a guarantee, which is in the nature of a debt); *Ingleton v Coates* (1896) 2 ALR 154; *Hill v Ziymack* (1908) 7 CLR 352; *R v Ray; Ex parte Chapman* [1936] SASR 241, Angas Parsons J at 247 (FC); *West Street Properties Pty Ltd v Jamison* [1974] 2 NSWLR 435. See also the discussion of set-off agreements between members of a corporate group in Everett D, "Multi-party Set-off Agreements" (1993) 4 *Journal of Banking and Finance Law and Practice* 180 at 181-182.

53 See *Victorian Workcover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1520, citing amongst other English authority Lord Hoffmann in *Stein v Blake* [1996] AC 243 at 251; *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436. An amount will be unliquidated where the quantum of compensation can only be determined by inquiry and assessment.

available to the opposing claimant against the originating claimant.[54] Also excluded from the category will be claims which do not give rise to a monetary sum on judgment, such as trade discounts and allowances by agreement.[55]

A claim under an indemnity may not have matured into a liquidated amount entitling the defendant to a legal set-off.[56] However, it has been held in Victoria that a claim which is unenforceable because of non-compliance with a statutory condition precedent may nonetheless be raised as a set-off, provided the statutory condition can be fulfilled by the court hearing the proceedings or the proceedings can be stayed pending fulfilment of the condition.[57]

Both claims must be liquidated. A liquidated claim cannot be raised by way of legal set-off against an originating claim for unliquidated damages.[58]

[3011] The originating claim and the countervailing claim must be mutual. In order to be mutual, the claims must arise between the same parties in the same right or capacity. The *Insolvent Debtors Relief Act* 1728 (2 Geo II c 22) provided:[59]

> "Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require."

54 *Perkins v Cherry* (1872) 3 AJR 51 (no liquidated claim when account between partners not finally settled or stated); *Mills v O'Brien* (1884) 1 WN (NSW) 64 (the plaintiff was able to recover his commission as the defendant's agent even though accounts of the agency had not been settled in respect of moneys held by the agent for the principal). In respect of account stated, see below, para [3012]. But see *MEK Nominees Pty Ltd v Billboard Entertainments Pty Ltd* (unreported, Supreme Court of Victoria, Tadgell J, 14 May 1993), where a claim for possession for non-payment of rent was not subject under the *General Rules of Procedure in Civil Proceedings* 1986 (Vic), r 13.14, to a cross-claim for damages for breach of covenant by the landlord because of the non-pecuniary remedy sought in the possession claim.

55 *R v Morgan; Ex parte Dehnert* (1876) 2 VLR (L) 102.

56 *Kostka v Addison* [1986] 1 Qd R 416.

57 *Robinson v Vale* [1905] VLR 405 (the statutory condition was delivery of a bill of costs prior to a solicitor's ability to sue for the costs). But see *R v Ray; Ex parte Chapman* [1936] SASR 241 (FC), where the debt sought to be set off was rendered unenforceable by moratorium legislation.

58 *McDonnell & East Ltd v McGregor* (1936) 56 CLR 50. See also below, para [3014]-[3016] concerning classical equitable set-off.

59 Section 13: see the discussion of set-off agreements between members of a corporate group in Everett D, "Multi-party Set-off Agreements" (1993) 4 *Journal of Banking and Finance Law and Practice* 180 at 182-183.

The required mutuality will not exist in the case of debts for which a successor in title is personally responsible, even if that debt is incurred in the course of administration of the assets of the predecessor in title.[60]

In the same vein, in *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168, Beach J applied established lines of English authority which held that a tenant with a liquidated personal claim by way of arbitral award for breach of lease covenant against the landlord did not have sufficient mutuality to set off that claim against the landlord's mortgagee who, on the landlord's default, had gone into possession and adopted the current lease. The claim did not constitute part of the tenant's interest in the land. The mortgagee also had registered title and right under the *Transfer of Land Act* 1958 (Vic), ss 42, 78. The Full Court of the Supreme Court of South Australia came to the same conclusion in *Ory v Betamore Pty Ltd (in liq)* (1993) 60 SASR 393. There are several conflicting decisions on differently worded Torrens title legislation[61] and the common law doctrine of abatement may apply in respect of certain breaches of covenant by the lessor.[62]

This may be contrasted with the position where the person in possession of the property is the agent of the legal title holder rather than a successor in title. An example is *West Street Properties Pty Ltd v Jamison* [1974] 2 NSWLR 435. Mainline Investments Pty Ltd (to which the defendant had become receiver) had loaned moneys to West Street (the plaintiff) for the construction of an office building and, on completion of the building, had become a tenant of the plaintiff for part of the building. By equitable assignment, Mainline mortgaged its undertaking and assets to a bank, which appointed the defendant receiver as agent of the mortgagor. The defendant

60 *R v Ray; Ex parte Chapman* [1936] SASR 241 (FC) (the personal representative of the deceased mortgagee was personally responsible under the order for costs awarded against him). There appears to be no distinction in this decision on whether there was a right of reimbursement available to the personal representative. But see *National Bank of Australasia v Swan* (1872) 3 VLR (L) 168. Where the personal representative is sole beneficiary of the estate, there may be an equitable set-off: see *Williams v MacDonald* [1915] VLR 229.

61 See *Re Partnership Pacific Securities Ltd* (unreported, Supreme Court of Queensland, de Jersey J, 12 March 1992), and *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410, discussed by O'Brien S and Cowen R, "Eliminating against Mortgagees the Set-off Defence for Lessees" (1992) 3 *Journal of Banking and Finance Law and Practice* 284 at 285, Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 349-354 and Weir M, "A Tenant's Right of Set-off" (1994) 68 *Australian Law Journal* 857. Cf the *West Street Properties* case, discussed in the text of this paragraph.

62 See *Knockholt v Graff* [1975] Qd R 88 and the discussion of authority by Weir M, "A Tenant's Right of Set-off" (1994) 68 *Australian Law Journal* 857 at 862-865.

receiver was successful in setting off the loan moneys (which, prior to his appointment, had become due and payable to Mainline) against rent due to the plaintiff for a period after the receiver's appointment. One basis for the decision[63] was that, until a company goes into liquidation, a receiver ordinarily is made agent of the mortgagor under the security documents, as happened here. Accordingly, the receiver was setting off mutual obligations between his principal and the plaintiff. The receiver's liability for rent was (on this basis of reasoning in the judgment) seen as a pre-appointment liability of the receiver's principal.[64]

It is submitted[65] that set-off in the *West Street* case in some circumstances might not have been possible in respect of post-appointment liabilities for which the receiver had personal responsibility, for example, if the lease had been forfeited on appointment of a receiver and the receiver continued in occupation with personal liability for rent.

A joint debtor cannot raise by way of legal set-off a debt owed by the creditor to the debtor separately.[66] Similarly, a debtor cannot set off at law a joint claim against the creditor unless the joint claim can be sufficiently apportioned,[67] or unless in law the joint claimants are treated as one.[68]

[3012] The law of legal set-off may be varied by private agreement when insolvency does not intervene. This proposition remains controversial, given the statutory origin of the right of set-off, but it is widely accepted that the rights of legal set-off can be

63 Jeffrey J at 438-440.

64 But see *Cheviot Australia Pty Ltd v Bob Jane Corp Pty Ltd* (1988) 52 SASR 204 (a distinction was drawn between pre-receivership and post-receivership liquidated liabilities and no mutuality was found in the absence of a running account). See also Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2849]-[2867]; *Bulgin v McCabe* (1859) 1 QSCR 83n; *Coghlan v McKay* (1908) 8 ALR 155 (SC Vic). The position is allegedly different for an auctioneer who is meant to sell for cash and cannot set up a debt due from the principal to the buyer of the goods from the auctioneer in reduction of her or his liability to account to the principal: *Knox v Cockburn* (1862) 1 QSCR 80. But see *Bulgin v McCabe* (1859) 1 QSCR 83n (it was admitted that the auctioneer was suing on behalf of the principal). In an action by the principal, the defendant will not be able to set off separate claims which the defendant has against the agent of the principal: *Stevenson v Carpenter* (1904) 4 SR (NSW) 129 (FC); *Busby v MacLurcan & Lane Ltd* (1930) 48 WN (NSW) 2.

65 *R v Ray; Ex parte Chapman* [1936] SASR 241 (FC); *Williams v MacDonald* [1915] VLR 229.

66 *Vale of Clwydd Coal Co v Garsed* (1885) 2 WN (NSW) 14. There may, however, be grounds for a classical equitable set-off: see below, paras [3014]-[3016].

67 *Re Sloss; Ex parte Robison Bros, Campbell & Sloss Ltd* (1893) 19 VLR 710 (FC). There may, however, be grounds for a classical equitable set-off.

68 *R v Bond; Ex parte Woodhead* (1879) 5 VLR (L) 130 (husband and wife). There may, however, be grounds for a classical equitable set-off.

altered by agreement.[69] The situation must be distinguished from rights accruing from an account stated,[70] which depends on agreement rather than on the statutes of set-off. Parties can agree to set off countervailing amounts. The creation of the account stated can raise a defence of payment of the original amounts, and create a right to the balance on the account stated.[71]

Analogous equitable set-off

[3013] Equity recognises rights of set-off which are analogous to legal set-off.[72] Equity recognises that mutuality can exist where the originating claimant and/or the opposing claimant beneficially own the countervailing claims.[73] Thus, a trustee may raise by way of set-off, or have raised against it, matters involving a

69 *Stephen v Doyle* (1882) 3 LR (NSW) Eq 1 (FC); see Wormell M, "Securitisation and Set-off" (1998) 9 *Journal of Banking and Finance Law and Practice* 181 at 188-189. But see *Reis v Carling* [1906] St R Qd 38. For English authority supporting the right of alteration by agreement outside an insolvency context, see *Re Agra & Masterman's Bank; Ex parte Asiatic Banking Corp* (1867) LR 2 Ch App 391, Cairns LJ at 397; *Re Northern Assam Tea Co; Ex parte Universal Life Assurance Co* (1870) LR 10 Eq 458, Lord Romilly MR at 464; *Phoenix Assurance Co Ltd v Earls Court (Ltd)* (1913) 30 TLR 50 (CA); *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514; *BICC Plc v Burndy Corp* [1985] 1 Ch 232 at 248. For contrary English authority, see *Lechmere v Hawkins* (1798) 2 Esp 626; 170 ER 477; *M'Gillivray v Simson* (1826) 2 Car & P 321; 172 ER 145. In *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168, Beach J (at 175) held that the clause in a lease providing for payment of rent without deduction excluded any right of set-off in respect of an arbitral award obtained by the tenant against the landlord for breach of a covenant. Contrast the interpretation of such a clause by Williams J in *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410 at 424, discussed by O'Brien S and Cowen R, "Eliminating Against Mortgagees the Set-off Defence for Lessees" (1992) 3 *Journal of Banking and Finance Law and Practice* 284 at 285 and Weir M, "A Tenant's Right of Set-off" (1994) 68 *Australian Law Journal* 857 at 871-873, where it was held that the words were insufficiently clear to exclude rights granted by operation of law, such as equitable set-off.

70 See above, Chapter 26: "Taking Accounts".

71 See, for example, *Perkins v Cherry* (1872) 3 AJR 51; *Mitcham v Flood* (1896) 17 LR (NSW) 375; *Houston v Donovan* (1902) 28 VLR 418 (FC); *Harris v Sydney Glass & Tile Co* (1904) 2 CLR 227; *Hill v Ziymack* (1908) 7 CLR 352; *Australian Workers' Union v Whitty* (1918) 12 CAR 274; *Fischer & Copley Ltd v Bank of Adelaide* [1938] SASR 489; *Federal Commissioner of Taxation v Steeves Agnew & Co (Vic) Pty Ltd* (1951) 82 CLR 408; *Corio Guarantee Corp Ltd v McCallum* [1956] VLR 755; *Copper Industries Pty Ltd (in liq) v Hill* (1975) 12 SASR 292. But see *Isbester v Thomson* (1879) 2 SCR (NS) (NSW) 222; *Paterson v Clarton* (1885) 7 ALT 15. See also above, para [3010]. The process is analogous to capitalisation of interest. An account stated can also arise from a running account: see *Re Armour; Ex parte Official Receiver v Commonwealth Trading Bank of Australia* (1956) 18 ABC 69, Clyne J at 75; *Re Convere Pty Ltd* [1976] VR 345. In respect of set-off and combination of bank accounts and insurance policies with moneys owed to the bank as insurer, see *Broad v Commissioner of Stamp Duties (NSW)* [1980] 2 NSWLR 40; *Estate Planning Associates (Aust) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1985) 16 ATR 862, Yeldham J at 866 (SC NSW).

72 For the situation with co-trustees and rights available to one only of them, see *Goodwin v Duggan* (1996) 41 NSWLR 158 (NSW Sup Ct CA).

73 *Williams v MacDonald* [1915] VLR 229 (set-off between debt owed to estate and private debt owed by executor who was sole beneficiary); *Clark v Cort* (1840) Cr & Ph 154; 41 ER 449; *Thornton v Maynard* (1875) LR 10 CP 695; *Ex parte Morier; Re Willis, Percival & Co* (1879) 12 Ch D 491; *Tony Lee Motors Ltd v M S MacDonald & Son (1974) Ltd* [1981] 2 NZLR 281 (HC).

beneficiary and the countervailing claimant. The rule has clear similarities to the principles governing set-off in respect of agents.[74]

In contrast, a person sued on behalf of the equitable mortgagee as a debtor of the mortgagor is unable to set off an unsecured claim against the mortgagor. To do so would be to give an unconscionable priority over the secured creditor, with whom there is no mutuality. This applies unless there is some reason which integrates the two transactions, such as a running account or a classical equitable set-off, which would make it unconscionable for the set-off not to be permitted. However, the secured creditor may choose to collect the secured debt by setting it off against an unsecured liability of the mortgagor.[75]

Again by analogy with the statutory rules for legal liquidated claims, equity will apply a set-off if there are two liquidated equitable claims. Thus, trustees ordinarily may set off amounts due by a beneficiary against amounts due to the beneficiary, and may retain trust funds due to a beneficiary or the beneficiary's successor in title against amounts borrowed from the trust by the

74 *Williams v MacDonald* [1915] VLR 229; *Clark v Cort* (1840) Cr & Ph 154; 41 ER 449; *Thornton v Maynard* (1875) LR 10 CP 695; *Ex parte Morier; Re Willis, Percival & Co* (1879) 12 Ch D 491; *Tony Lee Motors Ltd v M S MacDonald & Son (1974) Ltd* [1981] 2 NZLR 281 (HC). See also *Sidney Raper Pty Ltd v Commonwealth Trading Bank of Australia* [1975] 2 NSWLR 227, Moffitt P at 238-240; Glass JA at 254-256 (CA); *Ralston v South Greta Colliery Co* (1912) 13 SR (NSW) 6 (FC); *High v Bengal Brass Co* (1921) 21 SR (NSW) 232 (where payment into court was required to prevent execution on the judgment already obtained on the originating claim, and the countervailing claim was a mixture of liquidated and unliquidated claims, the unliquidated claims were allowed by analogy with the statutory rules on unliquidated cross-actions described below, para [3016]). For English authority on trustees and agents for collection in the context of negotiable instruments, see *Agra & Masterman's Bank Ltd v Leighton* (1866) LR 2 Ex 56, Channell B at 65; *Re Anglo-Greek Steam Navigation & Trading Co, Carralli and Haggard's Claim* (1869) LR 4 Ch App 174; *Churchill & Sim v Goddard* [1937] 1 KB 92, Lord Roche at 103-104; *Hibernian Bank Ltd v Gysin* [1938] 2 KB 384; affd *Hibernian Bank Ltd v Gysin* [1939] 1 KB 483; *Oscar Harris, Son & Co v Vallarman & Co* [1940] 1 All ER 185; *Barclays Bank Ltd v Aschaffenburger Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387 (CA). See also *Opal Maritime Agencies Pty Ltd v Baltic Shipping Co* (1998) 158 ALR 416 (Fed Ct of Aust, Tamberlin J), where equitable set-off between principal and agent was denied because of the special rules involving claims for freight.

75 *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 69 SR (NSW) 311, Sugerman JA at 327 (CA); *West Street Properties Pty Ltd v Jamison* [1974] 2 NSWLR 435, Jeffrey J at 440-441; *Cheviot Australia Pty Ltd v Bob Jane Corp Pty Ltd* (1988) 52 SASR 204; *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168. But see *Re Partnership Pacific Securities Ltd* (unreported, Supreme Court of Queensland, de Jersey J, 12 March 1992), and *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410, discussed in O'Brien S and Cowen R, "Eliminating Against Mortgagees the Set-off Defence for Lessees" (1992) 3 *Journal of Banking and Finance Law and Practice* 284 at 285, Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 349-354 and Weir M, "A Tenant's Right of Set-off" (1994) 68 *Australian Law Journal* 857. In *West Street Properties Pty Ltd v Jamison* [1974] 2 NSWLR 435, an alternative basis for the set-off was said to be classical equitable set-off: see Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), paras [2849]-[2867].

beneficiary.[76] In the absence of misconduct, a trustee is usually entitled to set off an amount due to the trustee from the trust fund against an amount due to the fund from the trustee.[77]

Where the countervailing claim to an originating liquidated claim is a claim to a liquidated amount recognised in equity rather than by the common law, an equitable set-off is permitted by analogy with the statutory right at law. Thus, in *Woodroffe & Co v J W Moss & Co* [1915] VLR 237 (FC), an account of profit gained by alleged breach of fiduciary duty was permitted to be raised in response to a claim for a legal debt.

Analogous equitable set-off is alterable by agreement, in the same way as is legal set-off. This proposition is less controversial than for legal set-off since there is no direct statutory origin.[78] Where there is even slight evidence of an agreement to create a set-off, equity will enforce such an agreement.[79]

The effect of the repeal of the *Statutes of Set-off* is to remove the equitable rule. This is because the equitable rule was analogous to and dependent on legal set-off, and thus ceases to exist where legal set-off is no longer in existence.[80]

Classical equitable set-off

[3014] Classical equitable set-off arose as an expression of the sanctions of equity for unconscionable or unconscientious conduct. It was possibly restricted in its early days to claims recognisable in

76 *Dodson v Sandhurst & Northern District Trustees Executors & Agency Co Ltd* [1955] VLR 100 (FC); *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)* [1984] 1 Qd R 576 (FC) (assignee from beneficiary). See also *Will of Bickerdike (decd); Bickerdike v Hill* [1918] VLR 191; *Parkes Property & Stock Co Ltd v Perpetual Trustee Co Ltd* (1936) 36 SR (NSW) 457. See also *Cain v Watson* (1890) 16 VLR 88. But see *Re Wickham's Will; Grant v Union Trustee Co of Australia Ltd* (1898) 9 QLJ 102 (FC) (a trustee was held unable to set off the moneys owed by a beneficiary against the beneficiary's rights to a share in the body of the trust fund which had been mortgaged to a third party).

77 *Re McGaw; McGaw v McGaw* (1904) 4 SR (NSW) 591; *Re Powell; Permanent Trustee Co of New South Wales Ltd v Powell* (1907) 7 SR (NSW) 874; *Palmer v Permanent Trustee Co* (1915) 16 SR (NSW) 162; *Williams v MacDonald* [1915] VLR 229; *Peel v Fitzgerald* [1982] Qd R 544 (FC).

78 For a contrary English authority, see *Taylor v Okey* (1806) 13 Ves Jun 180; 33 ER 263. This, however, like the contrary authority on legal set-off, is earlier than English and Australian authority permitting alteration of rights of legal set-off by agreement in a non-insolvency context: see above, para [3012].

79 *Jeffs v Wood* (1723) 2 P Wms 128; 24 ER 668, Jekyll MR at 130; *Ex parte Prescot* (1753) 1 Atk 230; 26 ER 147. But see *O'Connor v Spaight* (1804) 1 Sch & Lef 305.

80 *Southern Textile Converters Pty Ltd v Stehar Knitting Mills Pty Ltd* [1979] 1 NSWLR 692; affd *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 (CA). See also *Leichhardt Emporium Pty Ltd v AGC (Household Finance) Ltd* [1979] 1 NSWLR 701.

courts of equity.[81] The equitable jurisdiction in classical equitable set-off predated legal set-off and analogous equitable set-off.

Classical equitable set-off is a substantive defence. If successful, it removes from the start the right of the originating claimant to bring the claim.[82]

The only requirement for a classic equitable set-off to arise in equity is that the countervailing claim must "impeach the title" of the originating claimant to bring the claim. Unlike legal set-off, there is no requirement for mutuality or for liquidated claims. The originating and countervailing claims need not be both legal or both equitable in nature. Indeed, the most common context for equitable set-off is an unliquidated countervailing claim in response to an originating claim for liquidated damages.

The countervailing claim need not be contractual in nature. For example, a claim for payment of a debt may be sought to be met, by way of set-off, by a claim for unliquidated damages for fraudulent or negligent misrepresentation, breach of fiduciary duty or misleading or deceptive conduct.[83] The fact that the originating claim is secured will not affect an otherwise available classical equitable set-off.[84]

The countervailing claim will impeach the title of the claimant to bring the originating claim where it would be unconscientious or unconscionable, in the circumstances, for the originating claim

81 See *Curson v African Co* (1682) 1 Vern 121; 23 ER 358; *Peters v Soame* (1701) 2 Vern 428; 23 ER 874; *Jeffs v Wood* (1723) 2 P Wms 128; 24 ER 668; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3706].

82 *Re KL Tractors Ltd* [1954] VLR 505; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10. See, however, the cautionary note sounded in Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 337. See also the contrast with authority on the effect of legal set-off above, para [3008].

83 *Edward Ward & Co v McDougall* [1972] VR 433; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10; *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 11 ACLR 616 (SC NSW); *Bank of New Zealand v Harry M Miller & Co Ltd* (1992) 26 NSWLR 48. By way of contrast, in *Griffiths v Commonwealth Bank of Australia* (1994) 123 ALR 111 at 124-125, Lee J in the Federal Court of Australia held that a claim for debt did not form, in the circumstances, an equitable set-off to a claim in tort for interference with contractual relations because it did not challenge or question the gist of the tort claim, even if it was the background transaction. The bank had procured the repayment from the customer's account with another bank of a deposit which the bank had released on the customer's application, even though the deposit — while it was with the bank — could be set off against the customer's debt. The deposit was held not to be a security for the debt so could be withdrawn by the customer on demand. Accordingly, there was no relevant link between the debt owed to the bank by the customer and the repayment procured from the third party which gave rise to the tort claim. See also *Christianos v Westpac Banking Corporation* (1991) 5 WAR 336 (WASC FC).

84 *Altarama Ltd v Camp* (1980) 5 ACLR 513 (SC NSW).

to be pursued without dealing with the countervailing claim. The circumstances include the nature of the originating claim and the countervailing claim, and the conduct of the originating claimant and the countervailing claimant. The originating claim may be legal or equitable in nature and liquidated or unliquidated.

The originating and countervailing claims must be closely connected, even if both do not arise from the one transaction. However, not all originating and countervailing claims arising from the same or related transactions will, on the conventional view of the principles, so impeach the title of one claimant to be heard without the other as to be the subject of an equitable set-off.[85] Thus, in *Hill v Ziymack* (1908) 7 CLR 352, the amount of damages ordered to be paid for conversion of certain property was able to be recovered by execution without settling accounts between the parties in respect of dealings affecting the property which had been found to be converted. In respect of deliveries of goods in lots with periodic payment for goods supplied on a running account, it was held in *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VR 445, that a claim for defective goods cannot be set off other than against the payment for the particular delivery alleged to be defective. A similar approach was adopted, in respect of goods on separate consignments, in *W Pope & Co Pty Ltd v Edward Souery & Co Pty Ltd* [1983] WAR 117.[86] In another example, *Lemina Pty Ltd v Phillips Construction*

85 *Re KL Tractors Ltd* [1954] VLR 505; *Fong v Cilli* (1968) 11 FLR 495 (SC NT); *Edward Ward & Co v McDougall* [1972] VR 433; *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10; *United Dominions Corp Ltd v Jaybe Homes Pty Ltd* [1978] Qd R 111; *Leichhardt Emporium Pty Ltd v AGC (Household Finance) Ltd* [1979] 1 NSWLR 701; *AWA Ltd v Exicom Australia Pty Ltd* (1990) 19 NSWLR 705; *Westwind Air Charter Pty Ltd v Hawker de Havilland Ltd* (1990) 3 WAR 71; *M Lambert Pty Ltd v N A & T Papadatos Pty Ltd* (1991) 5 ACSR 468 (SC NSW); *Bank of New Zealand v Harry M Miller & Co Ltd* (1992) 26 NSWLR 48; *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 (FC); *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439, Giles J at 465; *Lord v Direct Acceptance Corp Ltd (recs & mgrs apptd) (in liq)* (1993) 32 NSWLR 362 (CA) (in which *Bank of New Zealand v Harry M Miller & Co Ltd* (1992) 26 NSWLR 48 was doubted as a correct application of principle); *Abignano v Wenkart* (1998) 9 BPR 16,765 (NSW Sup Ct, Cohen J). For leading English authority, see *Rawson v Samuel* (1841) Cr & Ph 161; 41 ER 451, Lord Lyndhurst LC at 178 [ER at 458]; *Beasley v Darcy* (1800) 2 Sch & Lef 403n; *O'Connor v Spaight* (1804) 1 Sch & Lef 305; *Ex parte Stephens* (1805) 11 Ves Jun 24; 32 ER 996; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137. For New Zealand, see, *Popular Homes Ltd v Circuit Developments Ltd* [1979] 2 NZLR 642.

86 See also *Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd* (1992) 11 WAR 40 (FC), where claim for breach of contract was held to arise distinct from accrued rights to progress payments; *Griffiths v Commonwealth Bank of Australia* (1994) 123 ALR 111 at 124-125, where the debt claim was merely background to rather than directly connected with the claim in tort; and *Cheviot Australia Pty Ltd v Bob Jane Corp Pty Ltd* (1988) 52 SASR 204, where refusal of any set-off could be traced to the distinction between pre-receivership and post-receivership liabilities. In *Fused Electrics Pty Ltd (in liq) v Donald* [1995] 2 Qd R 7; 13 ACLC 432, Williams J in the Queensland Supreme Court held that statutory priority (for a costs order as a cost of the winding-up) denied a set-off to an unliquidated claim for breach of fiduciary duty.

Co Pty Ltd (1987) 4 BCL 56, an equitable set-off was denied because the parties intended payments to be made under one set of agreements even though resolution of the position under the earlier building contract between them was still pending.

[3015] The exact scope of the impeachment test is controversial. A view propounded in some mid-20th century English authorities extends equitable set-off to encompass all claims arising from the same contract or even the same transaction or linked transactions.[87] The conventional view, which is the law in Australia,[88] is harder to encapsulate.

However, under the impeachment test, the requirements for an equitable set-off appear to be satisfied if the defendant can show any one of the following:

- that liability under the originating claim arose only because of the originating claimant's breach of duty;[89]
- that the originating claimant's behaviour is hindering or preventing the originating claim from being satisfied;[90] and

87 *Morgan & Son Ltd v S Martin Johnson & Co Ltd* [1949] 1 KB 107; *Hanak v Green* [1958] 2 QB 9 (CA); *Hale v Victoria Plumbing Co Ltd* [1966] 2 QB 746 (CA). *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 is an example of subsequent judicial approval. See also *Grant v NZMC Ltd* [1989] 1 NZLR 8, Somers J (for the Court of Appeal) at 13.

88 This is the position despite the statements in *Newman v Cook* [1963] VR 659, Hudson J at 674 (FC). See also *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VR 445, Sholl J at 449; *Edward Ward & Co v McDougall* [1972] VR 433, Gowans J at 438; *Provident Finance Corp Pty Ltd v Hammond* [1978] VR 312, Lush J at 320. Australian courts, for example, in *West Street Properties Pty Ltd v Jamison* [1974] 2 NSWLR 435, Jeffrey J at 442, have cited the English authority but applied it to find a classical equitable set-off in the conventional circumstances, when the title of the originating claimant is impeached: see the clear restatement of the conventional view in the judgment of Giles J in *AWA Ltd v Exicom Australia Pty Ltd* (1990) 19 NSWLR 705; *Altarama Ltd v Camp* (1980) 5 ACLR 513, McLelland J at 519 (SC NSW); *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 (FC); *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439, Giles J at 465; *MEK Nominees Pty Ltd v Billboard Entertainments Pty Ltd)* (unreported, Supreme Court of Victoria, Tadgell J, 14 May 1993); *Lord v Direct Acceptance Corp Ltd (recs & mgrs apptd) (in liq)* (1993) 32 NSWLR 362 (CA). But see the statements on an "inseparable connection" test by members of the House of Lords in *Bank of Boston Connecticut v European Grain & Shipping Ltd* [1989] 1 AC 1056, Lord Brandon at 1102-1103, 1106 and see the discussion in Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 337.

89 *Petersville Ltd v Rosgrae Distributors Pty Ltd* (1975) 11 SASR 433; *Horrobin v Australia and New Zealand Banking Group Ltd* (1996) 40 NSWLR 89 (NSW CA) (fraudulent or negligent misrepresentation inducing entry into contract on which claim for payment made); *Westpac Banking Corp v Eltran Pty Ltd* (1987) 14 FCR 541 (FC); *Davkot Pty Ltd v Custom Credit Corp Ltd* (unreported, SC NSW, Wood J, 28 March 1991, 12895 of 1986) (mismanagement by fiduciary agent); *James v Commonwealth Bank of Australia* (1992) 37 FCR 445 (claim for indemnity by defaulting receiver); *Tomlinson v Cut Price Deli Pty Ltd* (1992) 38 FCR 490; *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439 (misleading or deceptive conduct constituted by misrepresentations, inducing entry into loan contract on which originating claim was being made). But see *Tooth & Co Ltd v Smith* (unreported, Supreme Court of New South Wales, Clarke J, 5 September 1984).

90 *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd (formerly CEL Home Video Pty Ltd)* (1997) 42 NSWLR 462 (NSW CA). But see *Kock v Kemp* (1867) 6 SCR (NSW) 107 (FC); *Tooth & Co Ltd v Rosier* (unreported Supreme Court of New South Wales, Wood J, 7 June 1985).

- that the originating claimant is in some way responsible for reducing or denying to the opposing claimant the benefit which was the quid pro quo[91] for satisfying the originating claim, or the enjoyment of that benefit.[92]

However, this attempt at categorisation should not be regarded as restricting the fundamental principle.

A guarantor is not able to reduce liability on the guarantee by using set-offs or counterclaims available to the principal debtor against the creditor unless those equities operate directly (by way of reduction or extinction) on the principal debt, or raise a matter of prejudice or material increase of risk to the guarantor. However, the guarantor may have her or his own countervailing claims which the guarantor may share with the principal debtor against the creditor, or on the basis of which the guarantor may seek to join the principal debtor as a party to the proceedings on the guarantee. In this situation, all claims will be resolved in the

91 Translated as: something for something.

92 This is the most numerous category. For a limited number of examples, see *Freehold Investment & Banking Co of Australia Ltd v Thompson* (1884) 6 ALT 65 (SC Vic) (classical equitable set-off for defective work and counterclaim for trespass); *McLaughlin v Vale of Clwydd Coal Mining Co Ltd* (1905) 5 SR (NSW) 590 (indemnity against third-party liability arising out of payment to the plaintiff); *Sun Candies Pty Ltd v Polites* [1939] VLR 132 (purchase price of business determined by its value, which was the subject of the countervailing claim for unliquidated damages for breach of warranty, even though receiver was bringing the claim for purchase price); *Mitchell v Purnell Motors Pty Ltd* [1961] NSWR 165 (delayed work); *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10 (defective work on building contract); *Knockholt Pty Ltd v Graff* [1975] Qd R 88 (breach by lessor of covenant to repair); *General Credits (Finance) Pty Ltd v Stoyakovich* [1975] Qd R 352 (alleged sale by mortgagee at under value); *Kostka v Addison* [1986] 1 Qd R 416 (claim in respect of indemnity concerning claims by third parties); *Argento v Cooba Developments Pty Ltd* (1987) 13 FCR 579 (FC) (defective performance under building contract); *Westwind Air Charter Pty Ltd v Hawker de Havilland Ltd* (1990) 3 WAR 71; *M Lambert Pty Ltd v N A & T Papadatos Pty Ltd* (1991) 5 ACSR 468 (SC NSW); *Australian Mutual Provident Society v Specialist Funding Consultants Pty Ltd* (1991) 24 NSWLR 326; *Bank of New Zealand v Harry M Miller & Co Ltd* (1992) 26 NSWLR 48 (decision distinguished and its correctness doubted in *Lord v Direct Acceptance Corp Ltd (recs & mgrs apptd) (in liq)* (1993) 32 NSWLR 362, Sheller JA (for the Court of Appeal) at 369, 371; *Westmex Operations Pty Ltd (in liq) v Westmex Ltd (in liq)* (1993) 12 ACLC 106, Handley JA (for the Court of Appeal of New South Wales) at 110. But see *Jackson v Crosby (No 2)* (1979) 21 SASR 280, Zelling J at 297-298 (FC). Classical equitable set-off appears to have been an alternative basis for the decision in *West Street Properties Pty Ltd v Jamison* [1974] 2 NSWLR 435, Jeffrey J at 441-442, where the developer/lender to the lessor leased from the borrower part of the premises built with the borrowed money and the mortgagee of the lender, via a receiver, was held entitled to the set-off of rent against loan liabilities. See also *Cheviot Australia Pty Ltd v Bob Jane Corp Pty Ltd* (1988) 52 SASR 204. In *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168, Beach J at 175, no equitable set-off was found to arise where a tenant had an arbitral award for damages for breach of covenant under a previous lease and the mortgagee in possession from the landlord had adopted a subsequent current lease. Cf *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410, where equitable set-off was permitted against the landlord/lessor for a claim for damages for loss of profits allegedly resulting from disruption to the tenant's business caused by the negligence of the landlord of the relevant shopping centre in carrying out renovations. A similar result against the lessor is found in the English cases: see *Beasley v Darcy* (1800) 2 Sch & Lef 403n (damage to land from lessor's clearing operations); *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137 (damages for loss of use of premises due to defective flooring installed by lessor).

one set of proceedings, and the defences available to the principal debtor against the creditor will not be raised against the guarantor exercising the creditor's rights by subrogation once the guarantor's liability has been fully satisfied.[93] In contrast, a claim to an indemnity can be litigated in the same proceedings which establish the liability against which the indemnity is sought.[94]

There is no bar to the alteration of rights of classical equitable set-off by private contract.[95]

[3016] Classical equitable set-off is not affected by procedural reforms and the repeal of the statutory rules of legal set-off in New South Wales, since it is a substantive defence.[96] This means that classical equitable set-off was not impliedly abolished by the amendments in June 1984 to the *Supreme Court Rules* (NSW) to remove all references in the rules to set-off.[97] Classical equitable

93 *Covino v Bandag Manufacturing Pty Ltd* [1983] 1 NSWLR 237, Hutley JA at 238 (CA); (folld in *Indrisie v General Credits Ltd* [1985] VR 251 (FC) (special leave to appeal to High Court refused)); *Doherty v Murphy* [1996] 2 VR 553 (Vic SC FC). See also *Jowitt v Callaghan* (1938) 38 SR (NSW) 512 (FC); *Cellulose Products Pty Ltd v Truda* (1970) 92 WN (NSW) 561; *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; *Bank of New Zealand v Harry M Miller & Co Ltd* (1992) 26 NSWLR 48 (equitable set-off available to both principal debtor and co-sureties). *Bank of New Zealand v Harry M Miller & Co* was distinguished, and the correctness of the decision doubted, in *Lord v Direct Acceptance Corp Ltd (recs & mgrs apptd) (in liq)* (1993) 32 NSWLR 362 (CA), where it was held that a guarantor was not entitled to an equitable set-off of moneys on security deposit with the creditor from a related third party, where the creditor was entitled to hold the security deposit until the amount owed by the principal debtor was paid in full. The reasoning of the court would, it is submitted, lead to the same result whether or not the entitlement to hold the security deposit was so expressly stated, as the court indorsed the view that the principles of classical equitable set-off would not operate to permit a principal debtor to raise against her or his creditor a sum due by the creditor to a guarantor, or to permit a guarantor to raise against the creditor a claim by a co-surety against the creditor in a separate transaction: Sheller JA (for the Court) at 368-369, 371-372. But see *Murphy v Glass* (1869) LR 2 PC 408; applied by the Victorian Supreme Court in *Nisbet v Cox* (1873) 4 AJR 115.

94 See *Australia & New Zealand Banking Group Ltd v Turnbull & Partners Ltd* (1991) 33 FCR 265. However, there would be no entitlement to a legal set-off until a liquidated judgment debt had been established against the person seeking indemnity: see above, para [3010].

95 For set-off by agreement leading to an account stated, see above, para [3012]. For equitable enforcement of an agreement creating a set-off, see above, para [3013]. In *Citibank Pty Ltd v Simon Fredericks Pty Ltd* [1993] 2 VR 168, Beach J at 175 in the Victorian Supreme Court held that the clause in a lease providing for payment of rent without deduction excluded any right of set-off in respect of an arbitral award obtained by the tenant against the landlord for breach of covenant. In *Re Partnership Pacific Securities Ltd* [1994] 1 Qd R 410, Williams J at 424 in the Queensland Supreme Court held that the words were insufficiently clear to exclude rights granted by operation of law, such as equitable set-off. The latter case is discussed on this aspect by Weir M, "A Tenant's Right of Set-off" (1994) 68 *Australian Law Journal* 857 at 871-873; see also O'Brien S and Cowen R, "Eliminating Against Mortgagees the Set-off Defence for Lessees" (1992) 3 *Journal of Banking and Finance Law and Practice* 284 at 285. Clear and unequivocal words will be required to remove a substantive defence: *Morrison Knudsen Corporation of Australia Ltd v Australian National Railways Commission* (1996) 22 ACSR 262 (Fed Ct of Aust, Mansfield J).

96 *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 (CA). The problem arises only in New South Wales, since other jurisdictions have not enacted the same reforms: see above, para [3007].

97 The amendments primarily affected the definition of "cross-claim" in the *Supreme Court Rules* 1970 (NSW), Pt 1 r 8(1), Pt 6 (cross-claims) and Pt 15 r 25 (repealed 29 June 1984).

set-offs are now pleaded as a cross-claim, under the same rules as other counterclaims.[98]

It is controversial whether the effect of the procedural reforms has been to extend the effect of set-off to all countervailing claims. The leading authority in New South Wales on the effect of the repeal[99] did not need to consider the question directly and predated the June 1984 amendments. However, the reforms connected with the repeal have been seen as a consolidation of the piecemeal statutory procedural reforms which were made to the prejudicature system which existed in New South Wales before the *Supreme Court Act* 1970 (NSW) came into operation.[100] If the removal of legal set-off and the associated changes are seen as indorsing the direction of the earlier piecemeal reforms, then arguably this supports the view that all countervailing claims henceforth can be pleaded by way of set-off. This is because the effect of previous procedural reforms was to allow the court to grant leave to a defendant to plead by way of set-off, not just by way of consolidated or joined hearing, a counterclaim (called a cross-action) which did not, on the traditional rules, have the effect of set-off.[101]

Notwithstanding contrary views,[102] it is submitted that the present regime consolidates the procedural liberation of previous reform by permitting prima facie all countervailing claims to be pleaded in one simplified form and with the effect of set-off,

98 *Supreme Court Act* 1970 (NSW), s 78; *Supreme Court Rules* 1970 (NSW), Pt 6.

99 *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 (CA).

100 *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 (CA), Glass JA at 522-523, Hutley JA at 519-520.

101 *Common Law Procedure Act* 1857 (NSW), s 17; repeated in *Common Law Procedure Act* 1899 (NSW), s 79. This was interpreted to encompass unliquidated counterclaims to be raised by way of set-off, but leave would only be granted if both originating claim and counterclaim arose from the same subject matter or transaction (if not necessarily the same contract) and neither was tortious, see *Assets & General Finance Co v Crick* (1911) 28 WN (NSW) 91; *Austral Bronze Co Ltd v Sleigh* (1916) 34 WN (NSW) 143. The same privilege was extended to analogous equitable claims: *High v Bengal Brass Co* (1921) 21 SR (NSW) 232, Harvey J at 238. Aspects of definition in the rules from time to time have also been discussed in other jurisdictions. In the Federal Court, see *Westpac Banking Corp v P & O Containers Ltd* (1991) 30 FCR 320. In South Australia, see *D G Madin Ltd v Gordon* [1964] SASR 64; *Santos Ltd v American Home Assurance Co* (1986) 4 ANZ Insu Cas 60-795 (SC SA). In Victoria, see *Smail v Zimmerman* [1907] VLR 702; *Beaton v Moore Acceptance Corp Pty Ltd* (1959) 104 CLR 107; *Shanks & Co Pty Ltd v Hohne* [1963] VR 198; *Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd* [1975] VR 202. In Western Australia, see *Fryer v Plucis* [1967] WAR 161 (FC).

102 Ritchie A V, *Ritchie's Supreme Court Procedure* (NSW) (looseleaf, Butterworths, Sydney), para 6.0.0; Meagher R P, Gummow W M C and Lehane J R F, *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), para [3713], appear to support the contention. See also Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 332, 338-340, 344. (For discussion of the position in Queensland, where the *Imperial Acts Application Act* 1984 (Qld) repealed the *Statutes of Set-off* in similar terms to the *Imperial Acts Application Act* 1969 (NSW), see above, para [3007].)

without the need for leave of the court to be obtained unless the countervailing claim also requires the joinder of a third party.[103] If a plaintiff wishes to object, there is ample power under the rules and within the court's inherent jurisdiction to direct that the countervailing claim be tried separately if more appropriate.[104]

This view was supported by the continuing vitality of the New South Wales Supreme Court's jurisdiction to injunct advertising of winding-up summonses.[105] Cases such as *Buying Systems (Aust) Pty Ltd v Tien Mah Litho Printing Co (Pte) Ltd* (1986) 5 NSWLR 317 do not appear to have considered the question of whether the cross-claim constitutes an equitable set-off, which would be the only circumstance in which an injunction could be granted if all other forms of set-off had been abolished and cross-claims against the plaintiff did not have the effect of set-off.

103 *Supreme Court Act* 1970 (NSW), s 78.

104 *Supreme Court Act* 1970 (NSW), s 76A; *Supreme Court Rules* 1970 (NSW), Pt 6 r 4, Pt 26 r 1; *Bond v Hongkong Bank of Australia Ltd* (1991) 25 NSWLR 286 (CA). For the width of the court's jurisdiction to give directions, see *Cambridge Credit Corp Ltd v Hutcheson (No 3)* (1983) 8 ACLR 526, Mahoney JA at 537 (CA NSW); *Giorgi v European Asian Bank Aktiengesellschaft* (1986), noted in Ritchie A V, *Ritchie's Supreme Court Procedure (NSW)* (looseleaf, Butterworths, Sydney,), Vol 2, Practice Decisions [13,040] (SC NSW); *Challenge Bank Ltd v Raine & Horne Commercial Pty Ltd* (1989) 17 NSWLR 297, Rogers CJ at 305; *Spedley Securities Ltd (in liq) v Bond Corp Holdings Ltd* (1990) 19 NSWLR 729. For discussion of whether or not this rule has abolished the distinction between set-off and counterclaim, see Derham R, "Recent Issues in Relation to Set-off" (1994) 68 *Australian Law Journal* 331 at 340-344; for a similar argument in relation to the Victorian Rules of Court, see Derham R, "Set-off in Victoria" (1999) 73 ALJ 754. It is however a procedural distortion, against the rationale of s 78 of the *Supreme Court Act* 1970 (NSW), to permit a cross-claim once the main proceedings on the originating claim have been concluded at trial or on appeal: *Gorrino Holdings Pty Ltd v Peart* (unreported, Supreme Court of New South Wales, Equity Division, McLelland CJ in Eq, 26 July 1994); *Carson v Wood* (unreported, Supreme Court of New South Wales, Equity Division, McLelland CJ in Eq, 21 October 1994).

105 See above, para [3005].

INDEX

[References are to paragraph numbers]