Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention

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> [A] general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results; . . . yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock. This temporary intoxication is seldom produced by other general ideas, such as 'equity', 'good faith', or 'justice', for these ideals themselves suggest their own relativity and the complexity of the factors that must enter into judgment. The ideal of preventing enrichment through another's loss has a strong appeal to the sense of equal justice but it also has the delusive appearance of mathematical simplicity. It suggests not merely the need for a remedy but a measure of recovery. It constantly tends to become a 'rule', to dictate solutions, to impose itself on the mind.
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> John P Dawson, *Unjust Enrichment* (Little Brown and Co, Boston, 1951), p 8.

INTRODUCTION

Since 1983 the High Court has greatly extended the scope and application of equitable doctrines in Australia.[1] If a unifying theme can be identified drawing together the varied instances of equitable intervention, the judges have found it in the restraint of unconscionable conduct. For example, in *Legione* v *Hateley*,[2] Mason and Deane JJ referred to:

> the fundamental principle according to which equity acts, namely that a

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[1] See eg *Commonwealth* v *John Fairfax & Sons Pty Ltd* (1980) 147 CLR 39; *Taylor* v *Johnson* (1983) 151 CLR 422; *Hewett* v *Court* (1983) 149 CLR 639; *Legione* v *Hateley* (1983) 152 CLR 406; *Commercial Bank of Australia* v *Amadio* (1983 151 CLR 447; *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; *Heid* v *Reliance Finance Corporation* (1983) 154 CLR 326; *Chan* v *Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd* v *United States Surgical Corporation* (1984) 156 CLR 41; *Moorgate Tobacco Co Ltd* v *Phillip Morris Ltd* (No 2) (1984) 156 CLR 414; *United Dominions Corporation Ltd* v *Brian Pty Ltd* (1985) 157 CLR 1; *Muschinski* v *Dodds* (1985) 160 CLR 583; *AMEV-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170; *Baumgartner* v *Baumgartner* (1987) 164 CLR 137; *Waltons Stores (Interstate) Pty Ltd* v *Maher* (1988) 164 CLR 387; *Stern* v *McArthur* (1988) 165 CLR 489; *Esanda Finance Corporation Ltd* v *Plessnig* (1989) 166 CLR 131; *Foran* v *Wight* (1989) 88 ALR 413; *Commonwealth* v *Verwayen* (1990) 95 ALR 321.

[2] (1983) 152 CLR 406.

> party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct.[3]

Again, in *Commercial Bank of Australia Ltd* v *Amadio*[4] Mason J observed that:

> Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience.[5]

The many different types of conduct, both contractual and non-contractual, which are described as 'unconscionable' cannot comprehensively be classified. Nonetheless, for purposes of this paper, we may conveniently divide unconscionable conduct into four main categories:

1) procuring an unconscionable bargain;
2) exercising harsh and oppressive remedial rights;
3) causing detrimental reliance by representation or conduct; and
4) abusing a consensual relationship.[6]

The categories are diverse, but in each case there has been a breach of standards of fairness and good faith in relational behaviour which attracts the intervention of a court of conscience.[7]

Lately a new principle of adjudication has emerged in High Court judgments: the prevention of unjust enrichment.[8] The existence of such a principle in Australian law was doubted by Deane J in *Muschinski* v *Dodds*.[9] However,

[3] Id, 444, following Story, *Commentaries on Equity Jurisprudence* (12th ed, 1877) vol 2, para 1316. See also *Muschinski* v *Dodds* (1985) 160 CLR 583, 619–20 per Deane J.

[4] (1983) 151 CLR 447.

[5] Id, 461.

[6] Obligations arising under express trusts, fiduciary relations and relationships of confidence will not be discussed in any detail in this paper; these obligations operate upon the conscience, but do not necessarily involve unconscionability in the sense of knowing acts of wrongdoing on the part of the obligee.

[7] The traditional equity idea of judicial 'intervention' in common law rights carries with it the assumption that common law property or contract entitlements are a natural starting-point then subjected to variation and adjustment by an 'interventionist' court; in a wider sense *all* rights, legal and equitable, are equally the artificial creations of judicial decision and enforcement: see R Hale, 'Bargaining, Duress and Economic Liberty' (1943) 43 *Columbia L Rev* 603.

[8] For the Roman origins of the unjust enrichment principle, see Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Presss, 1985) pp 22–32; Dawson, op cit, pp 3–5, 41–63; B Nicholas, *An Introduction to Roman Law* (Oxford, Clarendon Press, 1962) pp 227–233. L L Fuller and W R Perdue in 'The Reliance Interest in Contract Damages' (1936) 46 *Yale L J* 52, 56 go back before the Roman civil law and find a developed unjust enrichment principle in the Aristotelian notion of corrective justice (*Nicomachean Ethics*, 1130b–1134a); the principle is indeed inherent in the Western concept of private property: see eg *Leviticus* V, 21–4.

[9] (1985) 160 CLR 583, 617 (Mason J concurring). A general principle of unjust enrichment was rejected in *Daly* v *Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 379–80 per Gibbs CJ (Wilson and Dawson JJ concurring); and also in *Re Stephenson Nominees* (1987) 76 ALR 485, 502–5 per Gummow J; *Shell Co of Australia* v *Esso Australia Ltd* [1987] VR 317, 329–30 per Murphy J; 342 per Brooking J, 345–6 per Nathan J. In

more recently in *ANZ Banking Group Ltd* v *Westpac Banking Corporation,*[10] a full bench of the High Court has decided that there are:

> categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.[11]

In particular, the common law quasi-contractual actions for quantum meruit[12] and for the recovery of mistaken payments[13] have been identified as actions founded on the principle of restitution or unjust enrichment, rather than implied contract, trust or proprietary right. And on a broader front, unjust enrichment has been described in *Pavey & Matthews Pty Ltd* v *Paul*[14] as an important 'unifying legal concept',

> which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination ... of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

The scope of the unjust enrichment idea as a source of rights and duties remains unclear. It is often linked or related to the established unconscionability principle; in *ANZ Banking Group Ltd* v *Westpac Banking Corporation,*[15] for example, the High Court suggested that:

> contemporary legal principles of restitution or unjust enrichment can be equated with the seminal equitable notions of good conscience.[16]

The Court stressed, however, that a restitutionary action did not arise in equity, but was 'a common law action for recovery of the value of the unjust enrichment'.[17] The notion of unjust enrichment may thus embody a particular concept of good conscience or fairness in the common law,[18] comprising a duty not to retain benefits unjustly at another's expense — a notion drawing

Mason v *New South Wales* (1959) 102 CLR 108, 146, Windeyer J was prepared to recognize unjust enrichment as a basis of obligation, but only for the limited purpose of explaining the common law money had and received actions.

[10] (1988) 164 CLR 662.

[11] Id, 673. The term 'restitution' will be used throughout this paper in the sense of restoration or surrender of the benefit of unjust enrichment. Compare Lord Goff and G Jones, *The Law of Restitution* (3rd ed Sweet and Maxwell, London, 1986), 12ff; P Birks, op cit, pp 9–27.

[12] *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221, 227–8 per Mason and Wilson JJ; 256–7 per Deane J; and see G Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?' (1988) 1 *Journal of Contract Law* 8.

[13] *ANZ Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Full Court).

[14] (1987) 162 CLR 221, 256–7 per Deane J (Mason and Wilson JJ concurring).

[15] (1988) 164 CLR 662.

[16] Id, 673, and see *Muschinski* v *Dodds* (1985) 160 CLR 583, 619 per Deane J (Mason J concurring).

[17] (1988) 164 CLR 662, 673.

[18] Cf PD Finn, 'Commercial Law and Morality' (1989) 17 MULR 87, 89.

on the legacy of Lord Mansfield's broad doctrines of restitution expressed in *Moses* v *Macferlan.*[19]

In *Stern* v *McArthur,*[20] by contrast, Deane and Dawson JJ seemed to merge or integrate unjust enrichment ideas with the generalized equitable concept of unconscionability. They spoke of:

> The general underlying notion . . . which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscionable conduct, namely, 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.[21]

The precise relationship of the unconscionability and unjust enrichment ideas is uncertain and controversial. The judges have not explained how unjust enrichment, a concept developed chiefly by the Civil law to supplement the rules of contract and tort,[22] meshes with the more familiar Chancery concept of exercise of legal rights in breach of conscience.[23] Three points in particular require clarification. First, is the enrichment of the stronger party to a relationship a relevant factor in the determination of unconscionable conduct? For example, does the notion of unconscionable enforcement of a contractual 'benefit' expressed by Mason J in *Amadio* involve the taking of material or economic gain? Second, is the unwarranted enrichment of a party sufficient by itself to ground a finding of unconscionability, in the absence of any other specific conduct by the enriched party, that is, can an unfair outcome — an undeserved 'windfall' or 'retention of benefit' — justify intervention independently of the process by which that outcome was achieved? And finally, is the nascent unjust enrichment principle now established as a general source of obligations in Australian law, supplementing or perhaps superfluously complementing the rules of equity?[24]

The purpose of this paper is to investigate these questions, and attempt to delineate the respective operation of the unconscionability and unjust enrichment principles, focussing especially on recent High Court judgments where one or both of these concepts has been a basis of decision. Also discussed will be some of the restitutionary interpretations of equity doctrine advocated by

[19] (1760) 2 Burr 1005, 1009–12; 97 ER 676, 680–1 (KB). For a discussion of *Moses* v *Macferlan,* see P Birks, 'English and Roman Learning in *Moses* v *Macferlan*' (1984) 37 *Current Legal Problems* 1, 9–25; P Birks, op cit pp 31–9, 77–80; G B Klippert, *Unjust Enrichment* (Toronto, Butterworths, 1983) pp 13–19; J H Baker, *An Introduction to English Legal History* (J H Baker, An Introduction to English Legal History (2nd ed, London, Butterworths, 1979) pp 10–17; J P Dawson op cit pp 10–26 1979) pp 10–17; J P Dawson, London, Butterworths, pp 10–26; B L Shientag, 'Lord Mansfield Revisited — A Modern Assessment' (1941) 10 *Fordham L Rev* 345, 368–72; W A Keener, *The Law of Quasi-Contract* (New York, Baker, Voorhis & Co, 1893); J B Ames, 'The History of Assumpsit' (1888) 2 *Harv L Rev* 53, 66–8.

[20] (1988) 165 CLR 489.

[21] Id, 526–7.

[22] See Birks, *Introduction,* op cit pp 22–32; Dawson, op cit pp 3–5, 41–63; B Nicholas, loc cit pp 227–33.

[23] See RP Meagher QC, WMC Gummow, JRF Lehane, *Equity: Doctrines and Remedies* (2nd ed, Butterworths, 1984) pp 3–10, 323–8.

[24] Cf Birks, op cit 82: 'Occam's maxim rightly says that entities which are superfluous should be eliminated'.

Goff and Jones[25] and Birks,[26] whose academic writings seem to be strongly influencing legal thought both in England and Australia.[27]

UNCONSCIONABILITY IN BARGAINING AND UNJUST ENRICHMENT

Traditionally the English and Australian courts have never viewed the enforcement of a one-sided contract tending to enrich one party at the other's expense as a species of unconscionable conduct in itself. The courts have emphasized not 'substantive' unconscionability or unfair contractual terms and results, but 'procedural' unconscionability or unfairness in bargaining — an unfair manner of bringing a contract into existence such that the weaker party (P) has been induced to enter into the transaction by the stronger party (D) wrongfully exploiting P's vulnerability.[28]

[25] Lord Goff and G Jones, op cit

[26] P Birks, op cit

[27] Goff and Jones, op cit was cited in: *Muschinski* v *Dodds* (1985) 160 CLR 583, 617 per Deane J; *Baumgartner* v *Baumgartner* (1987) 164 CLR 137, 153 per Toohey J; *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221, 227 per Mason and Wilson JJ; 255, 257 per Deane J; *ANZ Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 622, 673 (Full Court); Birks, 'English and Roman Learning in *Moses* v *Macferlan*' (1984) 37 *Current Legal Problems* 1 was cited in *ANZ*; Birks, 'Restitutionary Damages for Breach of Contract *Snepp* and the fusion of law and equity' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 421 was cited in *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107, 145–6 per Deane J. In *Pavey*, supra 255, Deane J refers to Goff and Jones, op cit, as a 'landmark work'; and in (1989) 1 *Journal of Contract Law* 265 at 265, 267, Sir Anthony Mason in a review of Birks, *Introduction*, op cit, states:

> 'Goff and Jones, *The Law of Restitution*, has deservedly established itself as one of the great textbooks of modern times. It lifted the Law of Restitution from relative obscurity to a position of central importance on the legal stage. Professor Birks' work, which has been universally admired, is likely to have an even more enduring influence on the development of the Law of Restitution . . . it may well be that, as a result of Professor Birks' enterprise, unjust enrichment will become an acknowledged sub-set of the Law of Restitution consisting of a series of ordered principles applying to defined categories of situations. The academic debate over the status of Restitution in Anglo-Australian law continues: see P D Finn, (ed) *Essays on Restitution* (1990), esp G Jones, ch 1 'A Typography of the Law of Restitution'; K Mason, ch 2, 'Restitution in Australian Law'; W M C Gummow, ch 3 'Unjust Enrichment, Restitution and Proprietary Remedies'; I M Jackson, 'Restitution for Wrongs' (1989) 48 CLJ 302; J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (1991), esp ch 9, 'Unfinished Business: Integrating Equity'.

[28] See *Hart* v *O'Connor* [1985] AC 1000, 1017–8 (PC). The sharp distinction between procedural and substantive unconscionability was first suggested by A A Leff in 'Unconscionability and the Code: The Emperor's New Clause' (1967) 115 *U Penn L Rev* 485, 487:'some . . . defenses [to contract enforcement] have to do with the *process of contracting* and others have to do with the resulting *contract* . . . to distinguish the two interests, I shall . . . refer to bargaining naughtiness as "procedural unconscionability", and to evils in the resulting contract as 'substantive unconscionability'. In the eighteenth and early nineteenth centuries, equity regarded substantive unconscionability (such as a gross inadequacy of consideration) as good evidence of the likely presence of procedural unconscionability; however, an unequal distribution of contractual benefits by itself could not attract relief: ultimately it was always for the contracting parties to evaluate the justice of their exchange. See *Earl of Chesterfield* v *Janssen* (1751) 2 Ves Sen 125, 157; 28 ER 82, 101 per Lord Hardwicke; *Griffith* v *Spratley* (1787) 1 Cox 383, 388–9; 29

Modern Australian doctrines of unconscionability in bargaining have maintained the basic distinction between procedural and substantive unconscionability. Three types of unconscionability in bargaining will next be examined: (1) where P labours under a contractual mistake; (2) where P is unable adequately to judge his own interests; and (3) where P is dependent on D in some way.

1. Mistake in contract formation

Unilateral mistake.

In *Taylor* v *Johnson*[29] a vendor sought rescission of a sale of land transaction upon discovering that the terms of the written contract stipulated a price ten times less than that actually intended by the vendor. The purchaser was aware of the undervalue appearing on the face of the contract and carefully avoided any mention of the sale price in subsequent negotiations, taking steps to ensure that the vendor did not advert to the low price before completion.

The High Court (Mason ACJ, Murphy and Deane JJ, Dawson J dissenting) held that at common law a mistake infecting the contractual assent of the parties could not nullify the resulting contract. The Court took the view that the objective manifestation of agreement must generally be upheld in order to protect the expectations and reliance of the promisee engendered by the communication and acceptance of the contractual promise.[30] But there was a jurisdiction in equity to give relief for unilateral mistake arising where 'the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage he has obtained'.[31] In the instant case, the purchaser was denied the 'legal advantage' of the contract because his conduct in obtaining his contractual rights amounted to equitable fraud or 'unconscionable dealing'.[32] The Court said:

ER 1213, 1215 per Eyre LCB; *Coles* v *Trecothick* (1804) 9 Ves Jun 234, 236; 32 ER 592, 593 per Lord Eldon; *Underhill* v *Harwood* (1804) 10 Ves Jun 209, 219; 32 ER 824, 828 per Lord Eldon; *Drought* v *Eustace* (1828) 1 Mol 328, 335 per Lord Hart LC; LA Sheridan, *Fraud in Equity* (London, Pitman 1957) pp 125–32; A W B Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 *U Chicago L Rev* 533, 540–2, 561–85. Provocative criticisms of the procedural/substantive fairness split are made by PS Atiyah, 'Contract and Fair Exchange' in Atiyah, *Essays on Contract* (Oxford Clarendon Press 1986) pp 329–54; Duncan Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland L Rev* 563; A T Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale LJ* 472.

29 (1983) 151 CLR 422.

30 Id, 428–9. For a critical discussion of the High Court's 'objective theory' of contract, see P Jamieson, 'Contractual Mistake: The Diverging Analyses of Unilateral Mistake as to the Contents of a Contract' (1987) 3 *Aust Bar Rev* 181; Sir Anthony Mason and SJ Gageler, 'The Contract' in PD Finn (ed), *Essays on Contract* (Sydney, Law Book Co, 1987) pp 3–10. For a general examination of the objective nature of promissory liability, see SJ Stoljar, 'Promise, Expectation and Agreement' [1988] CLJ 193; S J Stoljar, 'Keeping promises: the moral and legal obligation' (1988) 8 *Legal Studies* 258; H Collins, *The Law of Contract* (London, Wiedenfeld and Nelson, 1986), pp 87–95.

31 *Taylor* v *Johnson* (1983) 151 CLR 422, 431 (adopting *Torrance* v *Bolton* (1872) LR 8 Ch App 118, 124 per James LJ).

32 Id, 431, 433.

> [a] party [P] who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party [D] is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension . . . In such a situation it is unfair that the mistaken party should be held to the written contract by the other party whose lack of precise knowledge of the first party's actual mistake proceeds from wilful ignorance because, knowing or having reason to know that there is some mistake or misapprehension, he engages deliberately in a course of conduct which is designed to inhibit discovery of it.[33]

The High Court's conception of unconscionability in the context of unilateral contractual mistake can be divided into three factors.

(1) P must make a serious mistake about the content or subject matter of a term. This requirement is unclear. It suggests that only a mistake with a significant impact on the agreed contractual exchange (such as a mistake about the price or value) will attract intervention, on the ground that bargains should not be disrupted for trivial errors of no economic effect. Alternatively the unspecified notion of a 'serious' mistake may simply create a discretion to deny relief where the court believes that the mistaken party should bear the consequences of his own assumptions.[34]

(2) D must know or have reason to know of P's mistake. Where P's mistake is self-induced, without any initiation by D, the High Court stresses that D's knowledge of the mistake during contract formation is a crucial element establishing unconscionable conduct.[35] D need not have precise knowledge of P's mistake; a knowledge of circumstances reasonably raising a suspicion of mistake will suffice,[36] as exemplified in *Taylor* v *Johnson* where the purchaser was inferred to have suspected an error in the stipulation of price because of his knowledge of the gross inadequacy of consideration.[37] It follows from the

[33] Id, 432–3.

[34] Cf American Law Institute, *Restatement of the Law of Contracts, Second* (1981) para 153, requiring that a unilateral mistake go to a 'basic assumption' on which A made the contract which 'has a material effect on the agreed exchange of performances which is adverse to him'.

[35] Compare the position where P's mistake is induced by D's material misrepresentation; relief is then available without any apparent requirement of knowledge on D's part of P's mistaken assumption: *Taylor* v *Johnson*, (1983) 151 CLR 422, 431, adopting *Solle* v *Butcher* [1950] 1 KB 671; *Gould* v *Vaggelas* (1985) 157 CLR 215, 236ff per Wilson J (Gibbs CJ and Dawson J concurring; Brennan J similar). This principle was established in *Redgrave* v *Hurd* (1881) 20 ChD 1, 12–13, where it was held to be fraudulent for D to claim the benefit of a contract once he became aware that it was induced by his own misleading conduct. In such a case D is held to be responsible for P's error and rescission will be allowed even if the mistake has no material effect on the exchange (cf *Wilson* v *Brisbane City Council* [1931] St R Qd 360; *Leighton Properties Pty Ltd* v *Hurley* [1984] 2 Qd R 534), or the mistake was only a part amongst other factors inducing the contract (*Australian Steel and Mining Corporation Pty Ltd* v *Corben* [1974] 2 NSWLR 202, 207), or if P could have avoided being misled by taking due care to inquire into the facts. See generally Meagher, Gummow and Lehane, op cit para 1301 ff.

[36] *Taylor* v *Johnson* (1983) 151 CLR 422, 433.

[37] Id, 427–8, 433.

knowledge rule that in the absence of the requisite state of mind on D's part, relief will be denied no matter how imbalanced or unjust the mistake-affected contract.[38] The pre-eminent concern of the court is thus not with the enrichment of D (or corresponding loss to P) resulting from the mistake, but the subjective quality of D's conduct in relation to P. The position here may be contrasted with United States law, where at least in the case of tenders P may avoid a mistakenly-calculated contract in the absence of any knowledge or means of knowledge by D of P's mistake, provided that there has been no reliance by D.[39]

The High Court's emphasis on conscious advantage-taking by D perhaps led to a neglect of other important issues of responsibility for unilateral mistake — in particular whether D should be held responsible for P's mistake where the error goes not to the terms recording the contractual intention, but to the underlying assumptions of the contract — for example P's evaluation of the present or potential value of the subject-matter of the contract. Where D knows that the *terms* of the contract do not record an exchange which P actually intends, it is reasonable to describe D's exploitation of that mistake as unconscionable or against good conscience, for D is attempting to acquire rights he knows he was intended not to have. By contrast, where P has made an erroneous assumption concerning the *subject-matter* of the contract such as the quality or value of the benefits exchanged, it cannot so easily be said that P does not 'intend' to make the stipulated exchange, or that D's knowledge of P's inaccurate assumptions ought to affect D's conscience. In a system of free individual bargaining P cannot be allowed to escape the risks of poor information or judgmental error inherent in the contracting process, even if such vulnerability is known to D and exploited for his own benefit or enrichment; and conversely, D should not be penalized simply for possessing superior information or bargaining skills permitting him to strike a favourable deal with a less astute or knowledgeable contracting party.[40] It is arguable that only if P's lack of information or other inability to calculate a fair exchange is so great as to amount to a special vulnerability to exploitation should D be held to act unconscionably in taking advantage of P's assumptions, applying the separate equitable doctrine of unconscionable dealing rather than that of unilateral mistake.[41]

(3) D must deliberately conceal the true position from P. It may be argued

[38] See *Riverlate Properties Ltd* v *Paul* [1975] Ch 133, 140–1 (CA) per Russell LJ (Stamp and Lawton JJ concurring).

[39] *Restatement of Contracts, Second* para 153 (a) Comments (c) (d) (e); AL Corbin, *Corbin on Contracts* (1960) St Paul, Minnesota, West, 609.

[40] See *Laidlaw* v *Organ* 15 US (2 Wheat) 178 (1817); AT Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' (1978) 7 *J Leg Stud* 1, 9–18; RA Posner, *Economic Analysis of Law* (3rd ed, Boston, Little, Brown, 1986) pp 96–101. Where P has made a 'mechanical' error in the calculation of an offer, eg an arithmetical or typographical mistake, which error is known to D, then P may be able to void the contract at common law: cf *Webster* v *Cecil* (1861) 30 Beav 62; 54 ER 812; *Hartog* v *Colin & Shields* [1939] 3 All ER 566; *Belle River Community Arena Inc* v *Kaufmann Co Ltd* (1978) 87 DLR (3d) 761 (Can); *US* v *Braunstein* 168 F 2d 749 (1948); *Corbin on Contracts* op cit para 609; EA Farnsworth, *Contracts* (Boston, Little, Brown, 1982) 94.

[41] See below, text accompanying nn 56ff.

that this factor was merely extant in *Taylor* v *Johnson,* and was not intended as a pre-requisite for a finding of unconscionable conduct in all cases of unilateral mistake.[42] But assuming deliberate or purposive concealment to be a necessary element of unconscionability in this context,[43] the rule means that if P makes an error of judgment or evaluation regarding the contractual subject matter, D will be permitted knowingly to exploit that error at time of contracting without attracting fault. If, however, D goes further and takes positive steps to inhibit P's exercise of contractual judgment, actively preventing P from making a decision in his own best interests on all available information, then such conduct will be unconscionable and justify intervention.

The majority judgment in *Taylor* v *Johnson* left the doctrine of unilateral mistake unsettled at many points, and it is difficult to draw sharp conclusions concerning the nature of unconscionable conduct outlined by the decision.[44] Nonetheless it can be stated that unconscionable conduct on the part of D, the non-mistaken party seeking enforcement of the contract, is firmly tied to conscious wrongdoing by D in the process of bargaining with P. An imbalance of consideration going to D's enrichment and apparent at time of contracting may be good evidence of D's bad conscience, viz. that he suspected and perhaps concealed P's mistake during contract formation.[45] But it does not appear to be required that the bargain itself must materially benefit D in order to establish unconscionability. Thus while *Taylor* v *Johnson* extended equitable notions of fraud in bargaining to include exploitation of unilateral mistake, the decision did not depart from equity's traditional accent on procedural unconscionability as the basis of intervention.

Common mistake.

In *Taylor* v *Johnson*[46] the High Court did not deal specifically with equitable doctrines of common mistake, beyond expressing some approval of Dennings LJ's judgement dealing with common mistake in *Solle* v *Butcher.*[47] In that and succeeding cases[48] in England it was stated that relief from contractual obligations is available where there is a 'fundamental' mistake shared by the parties so that enforcement of the contract would be 'unconscien-

[42] Note that in *Taylor* v *Johnson,* the majority's doctrine of unilateral mistake was 'narrowly stated' as a 'particular proposition of law . . . appropriate and adequate for disposing of the present appeal': (1983) 151 CLR 422, 433; cf PD Finn, 'Equity and Contract', in Finn (ed), *Essays on Contract,* op cit 138.

[43] See *Catt* v *Marac Australia Ltd* (1987) 9 NSWLR 639; *Easyfind (NSW) Pty Ltd* v *Paterson* (1987) 11 NSWLR 98.

[44] See Mason and Gageler, 'The Contract', op cit, 9.

[45] See *Taylor* v *Johnson,* supra 426–8, 433.

[46] Id, 429–31.

[47] [1950] 1 KB 671.

[48] *Leaf* v *International Galleries* [1950] 2 KB 86; *Rose* v *Pim* [1953] 2 QB 450; *Oscar Chess Ltd* v *Williams* [1957] 1 WLR 370; *Grist* v *Bailey* [1967] Ch 532; *Magee* v *Pennine Insurance Co Ltd* [1969] 2 QB 507; *Laurence* v *Lexcourt Holdings Ltd* [1978] 1 WLR 1128.

tious'.[49] The finding of a 'fundamental mistake' seems to depend largely on the impressions of the court in each specific case.[50]

In the leading Australian authority of *Svanosio* v *McNamara,*[51] Dixon CJ and Fullagar J held that relief for common mistake was available only in two circumstances: (1) where an express or implied intention to excuse performance in the event of falsified assumptions could be discerned; and (2) in a conveyance of land, where there had been a total or practically total failure of consideration so that the contract could be said to have completely misfired leaving not even a rudimentary quid pro quo.[52] Dixon CJ and Fullagar J carefully avoided describing the enforcement of a contract informed by common mistake as 'unconscionable'; they preferred to investigate which of the parties should reasonably be allocated the risk of adverse consequences flowing from a mistake, as a question both of contractual intention and of judicial policy.[53] It was decided in that case that the risk of a shared misapprehension concerning title to conveyed land was to be borne by the purchaser who had ample means and opportunity to search title and was thus responsible for his own misapprehension.

A risk-allocation approach to common mistake leaves little room for the application of either unconscionability or unjust enrichment principles: the non-mistaken party is not denied the contract because of his own wrongdoing but because the nature of the contractual relationship requires that the mistaken party should not be detrimented by that particular shared mistake;[54] the relative enrichment of the non-mistaken party may be relevant in justly allocating the burden of the mistake but is not a central or dominant consideration.[55]

2. Unconscionable Dealing

In *Commercial Bank of Australia Ltd* v *Amadio,*[56] a majority of the High Court held that knowing exploitation of another's special vulnerability in order to procure contractual rights amounted to unconscionable conduct. The facts of the case were as follows: an elderly couple executed a mortgage in

[49] [1950] 1 KB 671, 692–3, based on the equitable rule expressed in *Torrance* v *Bolton* (1872) LR 8 Ch 118, 124 per James LJ; see *Waring* v *SJ Brentnall Ltd* [1975] 2 NZLR 401, 404–9 per Chilwell J.

[50] Goff and Jones, op cit, 185–91; DW Greig and JLR Davis, *The Law of Contract* (Sydney, Law Book Co, 1987) 919–21.

[51] (1956) 96 CLR 186.

[52] Id, 196–8.

[53] Id, 200. In *McRae* v *Commonwealth Disposals Commission* (1951) 84 CLR 377, a common mistake case decided at common law, Dixon and Fullagar JJ emphasized the express or implied intentions of the parties as fixing the risk of mistake; the limits of a 'construction of intention' approach are discussed in PS Atiyah, 'Judicial Techniques and the Common Law' in Atiyah, *Essays,* op cit, 247–53.

[54] Cf Finn, 'Equity and Contract', op cit, 148–53.

[55] See eg *Grist* v *Bailey* [1967] 1 Ch 532, 538–9, 541 per Goff J; *Lukacs* v *Wood* (1978) 19 SASR 520, 531 per Jacobs J; *Aluminium Co of America* v *Essex Group Inc* (1980) 499 *F Supp* 53; *Restatement of Contracts, Second* paras 152, 154.

[56] (1983) 151 CLR 447, hereafter *Amadio's* case. See also *National Australia Bank Ltd* v *Nobile* (1988) ATPR 49–233 (FCA); *Westpac Banking Corporation* v *Clemesha* SC of NSW, 29 July 1988 (unrep) per Cole J.

favour of a bank as a guarantee for their son's liabilities. The bank was aware that the guarantee was likely to be enforced due to the son's perilous financial position, and it further knew that the parents were aged migrants who spoke little English, were dependent on their son's judgments in all their business dealings, and did not fully comprehend the nature of the mortgage obligations. The majority of the Court (Gibbs CJ, Mason, Wilson, Deane JJ, Dawson J dissenting) set the transaction aside: Gibbs CJ on the basis that the bank owed a duty to disclose the unusual features and circumstances of the guarantee;[57] Mason, Wilson and Deane JJ on grounds that the bank had presumptively exploited the special disability of the guarantors in obtaining the execution of the mortgage so that the transaction was an unconscionable dealing.[58] Mason and Deane JJ delivered the leading judgments, each describing the nature of relief for unconscionable dealing in similar terms. It is perhaps Mason J's judgment that is the more concise and illuminating.

Mason J stated that relief would be granted:

> whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.[59]

An inequality of bargaining power was not sufficient to invoke relief; there further had to be:

> some . . . disabling condition or circumstance . . . which seriously affects the ability of the innocent party [P] to make a judgment as to his own best interests, when the other party [D] knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.[60]

A finding of unconscionable conduct or 'unconscientious use of . . . superior position or bargaining power'[61] on D's part was thus based on three factors.

(1) P must be specially disadvantaged. Apart from poverty, infirmity, ignorance and like disadvantages affecting P's ability to conserve his own interests, Mason J acknowledged that a special disability could arise in cases where a standard form contract was dictated by a party with superior bargaining power.[62] Since Mason J rejected inequality of bargaining power *per se* as a type of special disability, it would seem that the disability involved in a standard form transaction is a possible failure by P to comprehend the nature and scope of obligations contained in the contract. Although Mason J is not explicit on this point, his overall emphasis lies on factors impairing P's contractual judgment — personal and transactional disadvantages — rather than economic circumstances constraining P's choices.

[57] (1983) 151 CLR 447, 454–8.
[58] Id per Mason J at 466–8; per Deane J (Wilson J concurring) at 478–80.
[59] Id, 462.
[60] Id, 462; and see *Qantas Airways Ltd* v *Dillingham Corporation,* SC of NSW, 8 April 1987 (unrep) per Rogers J.
[61] *Amadio,* supra 461.
[62] Id, 462–3.

(2) D must have a certain degree of knowledge of P's special disadvantage. Actual knowledge by D of P's disadvantaged position is not required provided that D was aware of a possibility of disadvantage, or was 'aware of facts that would raise that possibility in the mind of any reasonable person'.[63] This knowledge test places less emphasis on P's subjective state of mind than the test regarding knowledge of unilateral mistake set out in *Taylor* v *Johnson*.[64] There the High Court majority spoke of 'wilful ignorance' and 'deliberate' concealment of mistake, suggesting that the non-mistaken party must consciously realize the possibility that the other is mistaken and hence vulnerable.[65] By contrast, in the sphere of unconscionable dealing Mason J imposed a more objective test, making clear that even if D could prove he was entirely ignorant of P's circumstances, D may nonetheless be said to have sufficient knowledge to ground a finding of unconscionability if a reasonable man in D's position would have been aware of P's condition.[66] A duty is thereby imposed on D to advert to P's relative bargaining position and be sensitive to his weaknesses. In short, Mason J was concerned not only with the subjective quality of D's conduct but also with upholding objective standards of bargaining behaviour for the protection of disadvantaged classes of contractors.[67]

(3) D must take unfair advantage of P's special disadvantage. The 'advantage' taken here appears to be the right to the contract itself. Mason J held that D acted unconscionably when he 'takes unfair advantage of his superior bargaining power or position by entering into [the intended] transaction',[68] or in this particular case, when the bank 'procur[ed] the surety's entry into the contract of guarantee'.[69] While Mason J referred once to the receipt of 'a benefit under a transaction' and the causing of 'detriment' to the weaker party,[70] he nowhere requires that the transaction amount to an unequal or unfair exchange going to D's material enrichment or P's loss; the benefit and detriment rather correspond to D's rights and P's duties under the unfairly obtained transaction.

This point emerges more boldly in the judgment of Deane J. He stated that:

> Unconscionable 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.[71]

Where P's 'special disability' was sufficiently evident to D this would make it

[63] Id, 467.
[64] (1983) 151 CLR 422.
[65] Id, 432–3; see above, text accompanying nn 29ff; and see *Amadio's* case (1983) 151 CLR 447, 479 per Deane J.
[66] *Amadio's* case (1983) 151 CLR 447, 467–8.
[67] See GA Muir, 'Contract and Equity: Striking a Balance' (1986) 10 *Adel LR* 153, 161–6.
[68] *Amadio's* case (1983) 151 CLR 447, 467.
[69] Id, 464.
[70] Id, 461.
[71] Id, 474.

'prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction'. D would then bear the onus of showing that the transaction was 'fair, just and reasonable'.[72] Deane J added:

> 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 viewpoint of the party under the disability.[73]

Reference was made to *Blomley* v *Ryan*[74] where Fullagar J stated that in the sphere of unconscionable dealing:

> It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain. In *Cooke* v *Clayworth*, in which specific performance was refused, it does not appear that there was anything actually unfair in the terms of the transaction itself. But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type ... — firstly 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.[75]

In sum, the substantive outcome of a transaction is only relevant as possible evidence of unfair bargaining conduct involving abuse of an unequal relationship; hence the unjust enrichment of a stronger party at the weaker's expense is neither necessary nor sufficient grounds for a finding of unconscionable dealing. Thus if D were to purchase property from P, knowing that P was entering the transaction as a result of poverty or distress such as to put P in a position of disadvantage, and D carefully offered a fair market price to protect the transaction from impeachment, then P would still be able to have the contract rescinded on the basis that the consent to the exchange was taken by unfair means. If adequacy of consideration is shown, however, it will be easier for D to establish that P's disadvantage had no bearing on the making of the transaction.

It is worth noting the different approaches to unconscionable dealing found in other common law jurisdictions. In English law the doctrine has largely been confined to cases of improvident sale of property at a 'considerable undervalue' by a disadvantaged party.[76] This emphasis reflects the eighteenth century origins of the doctrine as a paternalistic protection of heirs and reversioners who were likely to dispose of their interests at a discount while

[72] Ibid.
[73] Id, 475.
[74] (1956) 99 CLR 362.
[75] Id, 405.
[76] *Fry* v *Lane* (1889) 40 ChD 312, 322; *Cresswell* v *Potter* [1978] 1 WLR 255, 257–8 per Megarry J; *Multiservice Bookbinding Ltd* v *Marden* [1979] Ch 84, 105, 111 per Browne-Wilkinson J.

awaiting their inheritance.[77] The inclusion of a substantive unfairness requirement, together with a now-established requirement that the stronger party must have actual knowledge of the other's disability even when that disability is gross,[78] has ensured that the doctrine of unconscionable dealing is very rarely applied by the English courts.[79]

Lord Denning's 'inequality of bargaining power' doctrine in *Lloyds Bank Ltd* v *Bundy*[80] promised wider availability of relief. His conception of unconscionable dealing retained the requirement of substantively unfair terms or inadequacy of consideration, but dispensed with the requirement of knowledge of disability; it sufficed that the weaker party was materially detrimented by the other's exercise of superior bargaining power without a further element of conscious exploitation on the part of the stronger.[81] This doctrine found isolated use in restraint of trade cases,[82] but failed to win general support; it was eventually rejected by the House of Lords as posing too great a threat to freedom of contract.[83]

In Canada Lord Denning's doctrine has been accepted as a confirmation of established principles.[84] The Canadian authorities state that to find an unconscionable dealing there must be an inequality of bargaining power caused by the weaker party's disadvantages, combined with an 'improvident exchange' or 'proof of substantial unfairness of the bargain obtained by the stronger'.[85] There is no requirement of any knowing or conscious exploitation of disadvantage. More recently the Canadian courts have employed a single broad test of unconscionability, asking:

> whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it would be rescinded.[86]

[77] *Evans* v *Llewellin* (1787) 1 Cox CC 333; 29 ER 86; *Earl of Aylesford* v *Morris* (1873) LR 8 Ch App 484; see Sheridan, op cit, 132–45; RW Clark, *Inequality of Bargaining Power: Judicial Intervention in Improvident and Unconscionable Bargains* (Toronto, Carswell, 1987) pp 1–24.

[78] See *Hart* v *O'Connor* [1985] AC 1000, 1024–8 (PC).

[79] See SR Enman, 'Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law', (1987) 16 *Anglo-American Law Review* 191, 193–6, 202–4.

[80] [1975] QB 326, 339.

[81] '[T]he 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 . . . The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing the other'. Id, 339.

[82] *A Schroeder Music Publishing Co Ltd* v *Macaulay* [1974] 1 WLR 1308, esp at 1314 per Lord Reid; 1315–6 per Lord Diplock (HL); *Clifford Davis Management Ltd* v *WEA Records Ltd* [1975] 1 WLR 61 (CA). See MJ Trebilcock, 'The Doctrine of Inequality of Bargaining Powers: Post-Benthamite Economics in the House of Lords' (1976) *U Toronto LJ* 26, 359, who perceives in these cases a general principle of judicial market intervention.

[83] *National Westminster Bank Plc* v *Morgan* [1985] AC 686, 708 per Lord Scarman.

[84] *McKenzie* v *Bank of Montreal* (1975) 55 DLR 3d 641; *Pridmore* v *Calvert* (1975) 54 DLR 3d 133; *Royal Bank of Canada* v *Hinds* (1978) 88 DLR 3d 428; see SM Waddams, *The Law of Contracts* (2nd ed 1984), 388 ff.

[85] *Waters* v *Donnelly* (1884) 9 OR 391, 406 per Boyd C; *Morrison* v *Coast Finances* (1966) 55 DLR 2d 710, 713 per Davey JA (BCCA).

[86] *Harry* v *Kreutziger* (1979) 95 DLR 3d 231, 241 per Lambert JA (BCCA).

In applying this test, the courts appear to emphasize unfair outcomes enriching one party unjustly at the other's expense,[87] without engaging in close analysis of the processes of bargaining producing those outcomes. Under the 'unconscionability' rubric, relief is afforded indiscriminately where there is a disparity of contractual values resulting from misrepresentation,[88] undue influence or pressure,[89] or even a simple lack of information or sound judgment at time of contracting.[90] This free-wheeling approach can be criticized for its lack of clear guiding principles or predictive certainty: contracting parties cannot be sure when an advantageous contract won by vigorous bargaining will be characterized as an unconscionable dealing.[91]

In the United States the equitable notion of unconscionable dealing has been transformed by section 2–302 of the *Uniform Commercial Code* (1962). The jurisdiction can be described as one of judicial economic regulation as much as control of unconscionable conduct, and cannot be compared to Australian equity doctrine. The courts may judge the substantive fairness of a transaction by reference to its 'commercial setting, purpose and effect'; little evidence of procedural unconscionability is required where substantive unfairness or contractual imbalance is proved; procedural unconscionability may be established by a gross inequality of bargaining power, independently of the conduct, knowledge or individual relationship of the parties.[92]

3. Undue influence

In *Amadio's* case, Mason and Deane JJ noted the close relationship between the doctrines of unconscionable dealing and undue influence, but held that the doctrines remained distinct. Mason J stated:

> 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 other party unconscientiously taking advantage of that position.[93]

The leading Australian authority on undue influence remains the judgment of Dixon J in *Johnson* v *Buttress*.[94] Dixon J's outline of the jurisdiction may be summarized as follows.

(1) 'The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an uncon-

[87] See GHL Fridman and JG McLeod, *Restitution* (Toronto, Carswell, 1982) pp 231–40.
[88] *McKenzie* v *Bank of Montreal* (1975) 55 DLR 3d 641.
[89] *A & K Lick-a-Chick Franchises Ltd* v *Cordiv Enterprises Ltd* (1981) 119 DLR 3d 440 (NSSCTD); *Osorio* v *Cardona* (1984) 15 DLR 4d 619 (BCSC).
[90] *Dusik* v *Newton* (1985) 62 BCLR 1 (CA).
[91] Cf Enman, op cit 210–4.
[92] See Leff, op cit; JR Peden, *The Law of Unjust Contracts* (Sydney, Butterworths, 1982), 30–50; S Deutch, *Unfair Contracts* (Lexington Mass, Lexington Books, 1976).
[93] (1983) 151 CLR 447, 461 per Mason J; 474 per Deane J; cf IJ Hardingham, 'Unconscionable Dealing' in PD Finn (ed), *Essays in Equity* op cit pp 17–8; Sir Anthony Mason, 'Themes and Prospects', op cit 244.
[94] (1936) 56 CLR 113.

scientious use of any special capacity or opportunity that may exist or arise affecting the alienor's will or freedom of judgment in reference to such a matter'.[95]

(2) Undue influence may arise in a particular single transaction, for example by the deliberate contrivance of the stronger party (D). In such a case the weaker party (P) must prove that the transaction was the result of actual undue influence.[96]

(3) Where there is an antecedent relationship giving D authority or influence over P, any transaction between P and D is presumed to be procured by undue influence unless D can prove that the transaction was an exercise of P's free will. This is a prophylactic rule based on reasons of policy, namely the prevention of abuse of confidential relationship.[97]

(4) In the case of a contract, adequacy of consideration becomes a 'material question' in determining whether the contract was a proper business dealing representing P's free act,[98] ie substantive fairness is relevant evidence of the propriety of the transaction. But it appears that adequacy of consideration neither removes the presumption of undue influence nor necessarily excludes a finding of actual undue influence.[99] The vice lies in P's will being overborne in entering the transaction rather than any unfair or unequal contractual outcome tending to enrich D at P's expense.

In *National Westminster Bank Plc* v *Morgan,* [100] Lord Scarman and the House of Lords held that a presumption of undue influence could not arise unless the resulting transaction was shown to be 'manifestly disadvantageous' to the party seeking relief.[101] A 'disadvantageous' transaction was contrasted with a transaction which provided 'reasonably equal benefits for both parties', indicating that the former involves inequality of contractual exchange.[102] Lord Scarman rejected the Court of Appeal's argument that even where the stronger party had paid a fair price, the weaker party may still be presumed to have been influenced to enter a transaction he might have rejected had he considered the matter freely.[103]

The requirement of contractual imbalance in *Morgan* reflected a narrow view of the purpose of the undue influence presumption. Lord Scarman stated that this doctrine did not embody 'a vague "public policy"' aimed at safeguarding the integrity of relationships, but was a rule to prevent specifically the 'victimisation of one party by the other'.[104] In the absence of material imbalance it was perceived to be unlikely that influence had been exerted and

[95] Id, 134.
[96] Ibid.
[97] Id, 134–5.
[98] Id, 135–6.
[99] This interpretation is supported by PD Finn, *Fiduciary Obligations* (Sydney, Law Book Co, 1977) 83; Meagher, Gummow and Lehane, op cit para 1523; M Cope, 'Undue Influence and Alleged Manifestly Disadvantageous Transactions' (1986) 60 ALJ 87, 96.
[100] [1985] AC 686, hereafter *Morgan.*
[101] Id, 704–7; see also *Watkins* v *Combes* (1922) 30 CLR 180, 193–4 per Isaacs J.
[102] *Morgan* [1985] AC 686, 704.
[103] Id, 702–7; cf [1983] 3 All ER 85, 90 per Dunn LJ; 92 per Slade LJ (CA).
[104] [1985] AC 686, 705.

it was therefore unfair to throw upon the stronger party the onus of proving that the will of the other was not overborne. But this did not imply that it was necessary to show unequal exchange in a case where *actual* undue influence was proved by the weaker party independently of any presumption arising from the relationship. Thus even according to the restrictive *Morgan* approach, an inequality of benefits enriching the stronger party should only be an evidential factor and not an essential element in establishing exercise of influence amounting to unconscionable conduct.[105]

4. The approach of Goff and Jones and Birks

Goff and Jones, the leading English writers on restitution, argue that when a court of equity intervenes to prevent the enforcement of a bargain procured by unconscionable conduct and permits P (the innocent party) to rescind the contract, that intervention may be regarded as a prevention of unjust enrichment in the sense that an order of rescission and *restitutio ad integrum* prevents D (the party seeking enforcement) from retaining contractual benefits acquired from P under the vitiated transaction.[106] This restitutionary characterization of equitable intervention cannot, however, be supported in every case of unconscionability in bargaining. There will be no enrichment of D at P's expense and no call for restitution where the voidable contract is wholly executory at time of rescission, with no bargained-for benefit yet having moved from P to D. An issue of unjust enrichment can only arise if the contract is part- or wholly-executed when set aside; the presence of unjust enrichment is thus a contingency depending on the stage of performance at which the contract is avoided. The wider point here is that restitution of an executed contractual benefit is merely a particular remedial result flowing from the anterior right of rescission; P's right to avoid the contract is prior to and independent of any ensuing claim to recover a benefit which may have passed under the contract. It is perhaps more illuminating to analyse or classify P's rescissionary rights in terms of their *cause* or *origin* (namely, unconscionability arising from the bargaining process) rather than a particular *remedy* (restitution) which may be associated with those rescissionary rights.

Birks suggests that equitable rescission of a transaction unconscionably procured is an act of restitution even where the contract is executory and no material benefit falls to be restored to P. He argues that the legal right to enforce the contract is itself a form of wealth — a present right to future benefit or an 'anticipated enrichment' — which is 'revoked' or taken back by P upon rescission.[107] In other words an executory benefit under a contract is seen to be reversed by the undoing of the contract. It is submitted that this

[105] It is a matter for regret that the English Court of Appeal has recently required material transactional imbalance as a prerequisite of contractual relief even in cases of proved influence overbearing the will: see *Bank of Credit and Commerce International SA* v *Aboody* [1989] 2 WLR 759, 779–85 (CA, FC); *Bank of Baroda* v *Shah* [1988] 3 All ER 24, 30 per Neill LJ (CA).

[106] Jones op cit pp 29–36, 52–5, chs 8, 10, 11.

[107] Birks, op cit pp 65–7, 162–4, 170–3.

analysis holds little attraction: Birks merely replaces the concept of equitable restraint of legal rights with a new and somewhat opaque concept of 'restitution of rights', thereby re-labelling equitable intervention in contract as a species of 'restitution' without adding anything to our understanding of the nature or purpose of such intervention. The better approach, as reflected in the judgments of the High Court, is to acknowledge that the equitable principles governing the various types of unconscionability in bargaining are primarily concerned with the quality of the parties' conduct during contract formation rather than any issue of unjust enrichment or restitution, even if the remedial response to an unconscionability in bargaining can be restitutionary in effect.

UNCONSCIONABLE EXERCISE OF REMEDIAL RIGHTS

Contractual obligations may be divided between *primary obligations* requiring an agreed exchange of performances between the parties, and *secondary obligations,* or remedial liabilities operating upon breach of contract to compensate the obligee and protect his interests from any adverse consequences flowing from breach.[108].

Whilst equity will not supervise the substantive fairness of primary contractual obligations, it will intervene to ensure that secondary obligations fixed by the parties (such as stipulations for pre-estimated damages or forfeiture of property) are not intrinsically harsh and oppressive, or exercised in an unfair or harsh manner. In the eye of equity, to insist upon a stipulated remedy which is unfairly disproportionate to the seriousness of the breach is regarded as a form of unconscionable conduct.

1. Relief from penalties

A penalty may be defined as a stipulated remedy which is inherently harsh and excessive measured as at time of contract formation. On one view, the evil of a penalty is that it operates to enforce performance of the primary obligations *in terrorem,* by imposing a different and greater remedial obligation on the obligor (P) than he would be liable for if he were to compensate the obligee (D) under ordinary principles of remedy.[109] Older authorities suggested that in replacing a penalty with general law remedial liabilities, a court of equity merely fulfilled the true intent or purpose of the contract, which was to guarantee performance of primary obligation or else fair compensation for

[108] Cf GA Muir, 'Stipulations for the Payment of Agreed Sums' (1985) 10 *Syd L Rev* 503, 514, 519–22, who challenges this distinction.

[109] *Clydebank Engineering and Shipbuilding Co Ltd* v *Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, 10 per Earl of Halsbury LC; *Dunlop Pneumatic Tyre Co Ltd* v *New Garage and Motor Co Ltd* [1915] AC 79, 86 per Lord Dunedin; *Legione* v *Hateley* (1983) 152 CLR 406, 445 per Mason and Deane JJ; cf *Bridge* v *Campbell Discount Co Ltd* [1962] AC 600, 622 per Lord Radcliffe; Muir, op cit 510 ff.

breach.[110] Today, however, the courts recognize that relief from penalties blatantly overrides contractual intention and curbs freedom of contract in the interests of substantive fairness.[111] According to the High Court an intrinsically excessive remedy 'is a penalty regardless of the intentions of the parties in making it';[112] the purpose of intervention is to relieve against 'an unconscionable inflation of the amount to be paid',[113] an 'unreasonable windfall and an unconscionable burden ... in the event of breach',[114] 'provisions ... so unconscionable and oppressive that their nature is penal rather than compensatory'.[115] It is not inaccurate to describe this branch of equitable intervention in terms of preventing the obligee's unjust enrichment through unfair remedy resulting in overcompensation; hence the language of unconscionability is perhaps inapposite, for it is not unfair conduct of the obligee — for example, exploitation of bargaining inequality — which is at issue, but the substantive unfairness of his contractual rights howsoever acquired. It has been suggested that procedural unconscionability in the negotiation of remedial rights is an important consideration in the identification of penal stipulations,[116] but this factor is of secondary significance[117] and cannot be taken as the basis of the penalties jurisdiction.

The most common form of penalty is a pre-estimate of damages which 'is either extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach or, judged as at the time of making the contract, is unreasonable in the burden which it imposes in the circumstances which have arisen'.[118] A provision for forfeiture of contractual deposit, pre-payment, instalment or proprietary interest upon breach can also be penal in character. In all cases the High Court has affirmed that the time for determining whether a stipulated

[110] See eg *Peachy* v *Duke of Somerset* (1721) 1 Str 447, 453; 93 ER 626, 630 per Lord Macclesfield LC; *Sloman* v *Walter* (1783) 1 Bro CC 418, 419; 28 ER 1213, 1214 per Lord Thurlow LC.

[111] *Elsley* v *JG Collins Insurance Agencies Ltd* (1978) 83 DLR 3d 1, 15 per Dickson J (SCC); *Amev-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170, 193–4 per Mason and Wilson JJ; *Esanda Finance Corporation Ltd* v *Plessnig* (1989) 166 CLR 131, 139–40 per Wilson and Toohey JJ. Cf PR Kaplan, 'A Critique of the Penalty Limitation on Liquidated Damages' (1977) 50 *Southern Cal L Rev* 1055, 1063ff.

[112] *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 400, per Deane J.

[113] *AMEV-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170, 201 per Deane J.

[114] *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 400 per Deane J.

[115] *AMEV-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170, 193 per Mason and Wilson JJ.

[116] Id, 193–4 per Mason and Wilson JJ: 'the nature of the relationship between the contracting parties [is] a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term ... The doctrine of penalties answers ... [a] criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power'; *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 375 per Murphy J: penalties 'are a trap for an unwary or unfortunate lessee'; and see Birks, op cit, pp 213–6.

[117] See *Esanda Finance Corporation Ltd* v *Plessnig* (1989) 166 CLR 131, 141–2 per Wilson and Toohey JJ.

[118] *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 400 (following *Dunlop Pneumatic Tyre* case [1915] AC 79, 86–8 per Lord Dunedin).

remedy is a penalty is the time of the making of the contract: the provision must be inherently penal in its allocation of remedial rights and liabilities from the outset, not merely penal in its actual operation in the circumstances of a particular case.[119]

A further indicium of penalty is where a remedial provision potentially operates in cases of minor (as well as serious) breach, which at a maximum could only cause a loss falling below the quantum of compensation provided.[120] This test was refined in the *AMEV-UDC* case[121] and *Plessnig's* case,[122] where the High Court held that a stipulated remedy was only voidable if it was 'out of all proportion' to the greatest possible loss resulting from the projected breach so as to be 'extravagant, exorbitant or unconscionable'; hence a remedy is not penal merely because it may provide for compensation greater in some degree than a potential loss. Moreover, the Court has held that only situations of breach *likely* to occur need be taken into account in testing for penalty; merely because a hypothetical but unlikely breach of contract *could* result in unfair overcompensation of the obligee through the operation of a damages or forfeiture clause is not sufficient reason to characterize that clause as unconscionable.[123] In *Plessnig,*[124] by contrast, Deane J suggested in obiter that if such an unlikely situation of overcompensation had actually occurred, then the stipulated remedy might be struck down as an operative penalty measured as at time of breach, or else the surplus compensation might be restored to the obligor under general principles of unjust enrichment. This approach, if developed, would transform the penalties jurisdiction. Instead of the court testing the substantive fairness of an allocation of remedial risks and burdens set by the parties at contract, there would be an examination of the justice of outcomes actually produced by remedial stipulations when enforced; this would be to undermine the chief objective of agreed or pre-estimated remedies, which is to define in advance the precise rights and liabilities of the parties and thus exclude the uncertainties of judicial calculation of remedy.[125] Deane J's suggested approach, aiming at the rigorous prevention of actual overcompensation or unjust enrichment, is at odds with the High

[119] Id, 368 per Gibbs CJ, 383 per Wilson J; 400 per Deane J; *AMEV-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170, 193 per Mason and Wilson JJ; *Esanda Finance Corporation Ltd* v *Plessnig* (1989) 166 CLR 131, 141–2 per Wilson and Toohey JJ; *AMEV Finance Ltd* v *Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564 (NSW CA).

[120] *Dunlop Pneumatic Tyre* case [1915] AC 79, 87 per Lord Dunedin; *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 369 per Gibbs CJ, 400 per Deane J.

[121] *AMEV-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170, 190, 193 per Mason and Wilson JJ.

[122] *Esanda Finance Corporation Ltd* v *Plessnig* (1989) 166 CLR 131, 139–43 per Wilson and Toohey JJ.

[123] Id, 139–43 per Wilson and Toohey JJ; 149–52 per Brennan J.

[124] Id, 154–5.

[125] See *AMEV-UDC Finance Ltd* v *Austin* (1986) 162 CLR 170, 190, 193 per Mason and Wilson JJ; Muir, loc cit, esp 526–7. Cf *Stockloser* v *Johnson* [1954] 1 QB 476, 488 per Somervell LJ; 492 per Denning LJ, where it was suggested that the time for determining a penal forfeiture is at breach, in order to prevent the forfeiture resulting in unjust enrichment.

Court's general relaxation of supervision over contracting parties' power to decide for themselves their own secondary obligations.

2. Relief from forfeiture

Equity will restrain forfeiture of a proprietary or possessory interest where the purpose of the contractual right of forfeiture is essentially to secure performance of primary obligations in the event of default (for example, to secure payment of money), and the obligor is willing to perform those obligations with adequate compensation for the breach.[126] The mortgagor's equity of redemption is the prime example of this form of relief; equity here can be said to enforce the true contractual purpose or intentions of the parties, so that resort to non-consensual principles of unconscionable conduct or unjust enrichment is unnecessary to explain the restraint of forfeiture.[127]

A court of equity may also prevent exercise of a right of forfeiture where the right is not intended merely to secure performance, and is not intrinsically penal or unfair, but where some form of 'unconscionable conduct' attends the exercise of that right. It is established that the requisite unconscionable conduct will only be found in 'exceptional circumstances',[128] which include:

(1) where D's conduct caused or contributed to P's breach so that D's right to forfeit is enlivened by his own actions, for example where he puts obstacles in the way of performance[129] or indicates that the breach will be waived;[130]

(2) where the breach is (i) slight or trivial, or (ii) inadvertent (eg due to

[126] *Peachy* v *Duke of Somerset* (1721) 1 Stra 447, 453; 93 ER 626, 630 per Lord Macclesfield LC; *Shiloh Spinners Ltd* v *Harding* [1973] AC 691, 721, 723 per Lord Wilberforce; *Legione* v *Hateley* (1983) 152 CLR 406, 424 per Gibbs CJ and Murphy J.

[127] *Noakes & Co Ltd* v *Rice* [1902] AC 24, 32–4 per Lord Davey; *G & C Kreglinger* v *New Patagonia Meats & Cold Storage Co Ltd* [1914] AC 25, 35–8 per Viscount Haldane LC; see RW Turner, *The Equity of Redemption* (Cambridge, University Press, 1931); JD Heydon, WMC Gummow and RP Austin, *Cases and Materials on Equity and Trusts* (3rd ed, Sydney, Butterworths, 1989), 335–50. In *Stern* v *McArthur* (1988) 165 CLR 489, 526–9, Deane and Dawson JJ extended this category of relief by characterizing a long-term instalment contract for purchase of real property as a security transaction in substance, so that the property could not be forfeited on default of payments if the purchaser reasonably offered to pay the due purchase price with compensation for breach. A similar approach was followed in *Esanda Finance Corporation Ltd* v *Plessnig* (1989) 166 CLR 131, 149–52 by Brennan J describing a chattel lease with a contractual right of purchase upon completion of term as a secured moneylending transaction whereby the lessor provided credit for the lessee's purchase.

[128] *Legione* v *Hateley* (1983) 152 CLR 406, 429 per Gibbs CJ and Murphy J; 447–9 per Mason and Deane JJ; *Ciavarella* v *Balmer* (1983) 153 CLR 438, 453–4; *Stern* v *McArthur* (1988) 165 CLR 489, 501–3 per Mason CJ; 513–4 per Brennan J; 526 per Deane J; *Lexane Pty Ltd* v *Highfern Pty Ltd* [1985] 1 QdR 446, 453 per Macpherson J; *Milton* v *Proctor CA of NSW*, 22 December 1988 (unrep) transcript, 23 per Clarke JA.

[129] *Stern* v *McArthur* (1988) 165 CLR 489, 504 per Mason CJ; 520–1 per Brennan J; 541–2 per Gaudron J.

[130] *Legione* v *Hateley* (1983) 152 CLR 406, 429 per Gibbs CJ and Mason J; 449–50 per Mason and Deane JJ; there is an overlap between this principle and promissory estoppel: see supra and note *Milton* v *Proctor CA of NSW*, 22 December 1988 (unrep), 13–4 per McHugh JA (dissenting), where it was stated that under this head of relief there must virtually be facts raising an estoppel, viz D must encourage P to order his affairs on the assumption that there will be no forfeiture.

accident or mistake), yet D takes advantage of the breach to insist on his strict rights of forfeiture;[131] and

(3) where the forfeiture results in an 'ill-merited windfall' to D, as where P has improved the property to be forfeited and D offers no compensation for loss of the value of the improvements upon forfeiture.[132]

These first two categories of unconscionable conduct can readily be classified as species of equitable fraud;[133] the final category of unconscionability is, however, of more elusive nature. It can be described in terms of the bad conscience or improper motive of the obligee in forfeiting with the object of taking the benefit of the obligor's improvements, rather than to protect himself from the adverse consequences of breach.[134] Alternatively the unconscionability could be said to lie in the objective injustice of the outcome[135] — for example the undue enrichment of the obligee at obligor's expense.[136] In *Stern* v *McArthur*[137] the latter approach was adopted and extended by the High Court majority. In that case, Deane and Dawson JJ[138] and Gaudron J[139] held that where property sold under an instalment contract had appreciated in value with the passage of time, it would then be unconscionable for the vendor to forfeit the purchaser's interest in the property upon fundamental breach where the purchaser was prepared to make compensation. According to Deane and Dawson JJ, the purchaser had a 'reasonable expectation' of benefiting from the capital gain, and it was therefore unjust or unconscionable for the vendor to take the 'windfall' of that gain.[140] Deane and Dawson JJ further indicated that an insistence on what the court perceived to be an unjust outcome could be equated with unconscionable conduct: equitable relief was justified whenever:

> it is necessary to avoid injustice, or, what is the same thing, to relieve against unconscionable — or, more accurately, unconscientious — conduct.[141]

It was stated, moreover, that in relieving against unconscientious conduct, equity's general aim was to prevent insistence on legal rights producing 'unjust enrichment'.[142]

131 *Legione* v *Hateley* (1983) 152 CLR 406; 429 per Gibbs CJ and Murphy J; 449 per Mason and Wilson JJ; *Stern* v *McArthur* (1988) 165 CLR 489, 503–5 per Mason CJ; 527 per Deane and Dawson JJ; *Shiloh Spinners Ltd* v *Harding* [1973] AC 691, 725 per Lord Wilberforce.

132 *Legione* v *Hateley* (1983) 152 CLR 406; *Stern* v *McArthur* (1988) 165 CLR 489, 504–5 per Mason CJ; 518–9 per Brennan J; 529 per Deane and Dawson JJ.

133 *Legione* v *Hateley* (1983) 152 CLR 406, 424–5 per Gibbs CJ and Murphy J; 447 per Mason and Deane JJ; *Shiloh Spinners Ltd* v *Harding* [1973] AC 691, 722–3 per Lord Wilberforce.

134 *Legione* v *Hateley* (1983) 152 CLR 406, 449 per Mason and Deane JJ.

135 Id, 429 per Gibbs CJ and Murphy J.

136 See *PJ Constructions (Vic) Pty Ltd* v *TM Burke Pty Ltd* Sup Ct of Vic, 26 Feb 1988 (unrep) transcript 10ff, 19–20 per Teague J.

137 (1988) 165 CLR 489.

138 Id, 529–30.

139 Id, 540–2.

140 Id, 529–30.

141 Id, 526.

142 Id, and see text accompanying nn18–9.

Mason CJ and Brennan J emphatically rejected the majority approach, and affirmed that in cases of non-penal forfeiture, unconscionable conduct could be established only in circumstances where the obligee contributed to the breach, or unreasonably refused to allow the obligor an opportunity to cure the breach, or sought to take the benefit of improvements.[143] In the absence of such factors, to grant relief merely because the obligee would acquire an unexpected material advantage by exercise of his contractual rights would, in Mason CJ's view, be 'to eviscerate unconscionability of its meaning':

> the jurisdiction to grant relief against forfeiture does not authorise a court to reshape contractual relations into a form the court thinks more reasonable or fair when subsequent events have rendered one side's situation more favourable.[144].

Brennan J similarly stated that 'the concept of unconscionability is not a charter for judicial reformation of contracts'[145], recalling a dictum of Deane J that modern equity does not operate according to 'undefined notions of "justice" and what was "fair"'.[146] Both judges insisted that unconscionability could only be defined in terms of identifiable instances of unjust conduct.[147]

The minority approach in *Stern* v *McArthur* is perhaps more principled and coherent than that of the majority: it is difficult to see how a court of equity can rationally identify 'unconscionability' in an insistence on an unjust enrichment or outcome, entirely without reference to either the quality of relational conduct of the parties or the intrinsic fairness of the legal rights[148] which gave rise to such final outcome. The *Stern* v *McArthur* majority gave no reasons as to *why* the enrichment accruing to the vendor was 'unjust', beyond asserting that it was 'reasonable' that purchaser and not vendor should win the benefit of the capital gain. It remains to be seen whether the majority's discretionary, outcome-oriented concept of unconscionable conduct will extend beyond forfeiture law into other spheres of equity.

EQUITABLE ESTOPPEL

1. Equitable estoppel as reliance-based liability

In *Waltons Stores (Interstate) Ltd* v *Maher*[149] the High Court moved towards combining the equitable doctrines of promissory and proprietary estoppel (and perhaps also common law estoppel) into a unified principle of equitable

[143] Id, 502–5 per Mason CJ; 514–20 per Brennan J.
[144] Id, 503.
[145] Id, 514.
[146] *Muschinski* v *Dodds* (1985) 160 CLR 583, 616.
[147] *Stern* v *McArthur,* (1988) 165 CLR 489 502–5 per Mason CJ; 514–21 per Brennan J.
[148] Compare the penalties jurisdiction.
[149] (1988) 164 CLR 387, hereafter *Waltons.*

estoppel based on the prevention of unconscionable conduct.[150] The most important discussions of equitable estoppel appear in the judgments of Mason CJ, Wilson and Brennan JJ.

Mason CJ and Wilson J summed up the principle of equitable estoppel thus:

> equity will come to the relief of the plaintiff [P] who has acted to his detriment on the basis of a basic assumption in relation to which the other party on the transaction [D] 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"[151] . . . 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.[152]

A species of unconscionability thus arises from the detriment caused to P by a departure from an assumption acted upon by P where D is responsible in some way for that assumption.[153] Mason CJ and Wilson J indicated that the relevant assumption can either be *created* by D (as where he initiates P's assumptions by positive representation) or *encouraged* by D (as where D by his conduct confirms or lends force to P's self-induced assumption). The assumption need not involve a mistaken belief about a presently existing state of affairs; an expectation concerning the future conduct or relationship of the parties can also found an estoppel.[154] It was not made clear, however, whether it is necessary that D further know of P's assumption and of his ensuing reliant actions. In the context of promissory estoppel, the Privy Council decision in *Attorney-General of Hong Kong* v *Humphreys Estate (Queen's Gardens) Ltd*[155] was noted as requiring that D be aware of P's detrimental reliance on an assumption induced by D in order to raise an equity.[156] But favourable reference was also made to the United States approach[157] whereby a reasonable expectation on D's part that P would be induced to act upon an assumption

[150] Mason CJ and Wilson J (at 398–9) were unwilling to expand common law estoppel by representation or conduct to cases where there is an assumption as to future events, and thus remove the major distinction between common law and equitable estoppel. See also Brennan J, at 413–6. The breadth of the equitable estoppel doctrine stated by the Court was arguably wide enough to embrace the traditional sphere of operation of common law estoppel: see Deane J, at 451–3; cf *Corpers (No 664) Pty Ltd* v *NZI Securities Australia Ltd* Sup Ct of NSW in Eq, 2 March 1989 (unrep), transcript, 21–2 per Young J; Heydon, Gummow and Austin, op cit, 404, 407–8, 429. But now see *Foran* v *Wight* (1989) 88 ALR 413 (decided after completion of this article), where Mason CJ and Deane J stated that common law and equitable estoppels have merged, and both may be based upon reliances induced by expectations as to future conduct: at 430–1 per Mason CJ, 448–9 per Deane J; cf Dawson J at 459.

[151] Per Dixon J in *Grundt* v *The Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 675; see also *Thompson* v *Palmer* (1933) 49 CLR 507, 547.

[152] *Waltons* (1988) 164 CLR 387, 404.

[153] In *Foran* v *Wight* (1989) 88 ALR 413, 432, Mason CJ (obiter) raised the possibility that reliance *without* detriment may be found in equitable estoppel, following Lord Denning's dicta in *WJ Alan & Co Ltd* v *El Nasr Export and Import Co* [1972] 2 QB 189, 213–4, and *Brikom Investments Ltd* v *Carr* [1979] QB 467, 482; this permutation of estoppel doctrine is not, however, pursued in the judgment.

[154] *Waltons* (1988) 164 CLR 387, 400–6, esp 405–6.

[155] [1987] 1 AC 114, 123–4.

[156] *Waltons* (1988) 164 CLR 387, 405–6.

[157] Id, 401–2, 406.

created by D suffices to give rise to obligation.[158] The instant case was decided on the basis that the defendant knew of and encouraged both the assumptions and reliance of the plaintiff;[159] it was therefore unnecessary to decide whether actual knowledge of reliance upon assumption is essential to establish unconscionable conduct bringing equitable estoppel into play.[160]

Mason CJ and Wilson J stressed that once unconscionable conduct on D's part was found, the form of relief appropriate to deal with the unconscionability depended on the circumstances of the case. Upholding P's assumption or expectation (for example, by enforcing the terms of a representation creating the assumption) was 'merely one way of doing justice between the parties'.[161] Thus the *basis* of intervention — the unconscionable causing of detriment — was seen to be distinct from the *form* of intervention — the nature and extent of D's obligations fixed by the exercise of judicial discretion.

Brennan J outlined a similar broad doctrine of equitable estoppel. He held that D would be guilty of unconscionable conduct and subjected to equitable obligations in a case where: (1) D induced P to adopt an assumption, either by actively initiating the assumption or by encouraging or acquiescing in an assumption already formed; (2) D knew or intended that P would act in reliance on the assumption; and (3) P acted on the assumption so that non-fulfilment of the assumption would cause him detriment.[162] It did not appear that D was required to have actual knowledge of P's reliant actions in order to give rise to an equity against him.

Brennan J's formulation of the estoppel principle emphasized P's detriment both as the cause of intervention and the measure of remedy:

> The unconscionable conduct which it is the object of equity to prevent is the failure of [D] . . . to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act . . . thereon.[163]

This detriment-based concept of remedy was not intended to curb the flexibility of relief available under the estoppel doctrine. Brennan J acknowledged that:

> Sometimes it is necessary to decree that a party's expectation be specifically fulfilled by the party bound by the equity [of estoppel]; sometimes it is

[158] *Restatement of Contracts (Second)* para 90.
[159] *Waltons* (1988) 164 CLR 387, 406–8.
[160] Cf *PS Chellaram & Co Ltd* v *China Ocean Shipping Company* Sup Ct of NSW, 7 December 1988 (unrep) transcript, 17–20 per Carruthers J, where Mason CJ and Wilson J's judgment in *Waltons* was interpreted as requiring knowledge of assumption and reliance; contrast K Sutton, 'Contract by Estoppel' (1989) 1 *Journal of Contract Law* 205, 211–3, where it is suggested that (i) knowledge *or* (ii) encouragement of reliance are alternative bases of obligation according to the *Waltons* test.
[161] *Waltons* (1988) 164 CLR 387, 405.
[162] Id, 428–9.
[163] Id, 423.

> 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.[164]

However, in moulding relief the court was to go no further than was 'necessary to prevent detriment resulting from unconscionable conduct'.[165]

In *Waltons* it was held that equitable estoppel could operate not only (1) to restrain the future exercise of existing legal rights (proprietary or contractual), but also (2) to create new obligations unrelated to any presently existing positive right.[166] The facts in that case were that W induced M to assume that a contractual relationship between the parties would shortly be entered into. M on the faith of this assumption, and with W's knowledge, engaged in detrimental actions pursuant to the anticipated contract; W then refused to conclude the contract. W's conduct was found to be unconscionable and W was subjected to obligations aimed at protecting M from detriment — in this case, to make good M's assumptions and enter into the expected contract.[167] The equity here did not amount to the restraint or diminution of a vested legal right, but involved the imposition of wholly independent obligations aimed at the prevention of unconscionable conduct.

It is not easy to reconcile the application of equitable estoppel in *Waltons* with the traditional theory that equity acts to restrain the unconscionable exercise of existing legal rights.[168] Mason CJ and Wilson J seemed to be aware of this tension, and suggested that where an estoppel was founded upon an assumption unrelated to any positive legal right, the obligation imposed on the defendant could be seen as a restraint of the defendant's negative legal right *not* to fulfil the plaintiff's assumptions or expectations.[169] Brennan J offered a simpler and more cogent analysis, acknowledging that in cases of estoppel equity could intervene either by extinguishing D's subsisting legal rights or by creating entirely new and independent obligations.[170] Whichever

[164] Id, 419.

[165] Id, 419, 425.

[166] Id, 400–6 per Mason CJ and Wilson J; 423–9 per Brennan J, approving D Jackson, 'Estoppel as a Sword' (1965) 81 LQR 84, 223, 241–3.

[167] *Waltons* (1988) 164 CLR 387, 407–8 per Mason CJ and Wilson J; 429–30 per Brennan J.

[168] See *Legione* v *Hateley* (1983) 152 CLR 406, 444 per Mason and Deane JJ, supra text accompanying n3. In the context of promissory estoppel, the limiting effect of the 'restraint of positive right' theory is reiterated in *Legione* v *Hateley*, supra at 432–5 per Mason and Deane JJ; *State Rail Authority of NSW* v *Health Outdoor Pty Ltd* (1987) 7 NSWLR 170, 193 per McHugh JA; *Bank Negara Indonesia* v *Philip Hoalim* [1973] 2 MLJ 3, 5 (PC); *Emmanuel Ayodeji Ajayi* v *RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, 1330 (PC); cf *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130, 134–5 per Denning J; *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] QB 84, 104 ff per Goff J; 122 per Lord Denning MR (CA); *Pacol Ltd* v *Trade Lines Ltd* [1982] 1 Ll LRep 456; and see generally PD Finn, 'Equitable Estoppel' in Finn (ed), *Essays in Equity* (North Ryde, Law Book Co, 1985) pp 76–8, 82–4; 93–4; Sir Anthony Mason, 'Themes and Prospects', op cit, 244–5; TB Dawson, 'Estoppel and Obligation: the Modern Role of Estoppel by Convention' (1989) 9 *Legal Studies* 16.

[169] *Waltons* (1988) 164 CLR 387, 406.

[170] Id, 425–6, 429; and now see *Foran* v *Wight* (1989) 88 ALR 413, 430–1 per Mason CJ; 448–9 per Deane J; *Commonwealth* v *Verwayen* (1990) 95 ALR 321.

analysis is adopted, the result is to extend the scope of actionable unconscionability involving representational conduct to embrace non-contractual and non-proprietary relationships, suggesting an analogy with tortious[171] and statutory [172] liabilities for harmful representation.

Deane and Gaudron JJ, the remaining members of the Court, based their decisions in *Waltons*[173] primarily on common law estoppel grounds, finding that M had acted to his detriment on the basis of an assumption of existing fact, namely that a contract with W had already been concluded. Deane and Gaudron JJ did discuss the doctrine of equitable estoppel as an alternative basis of decision, basically following the approach of the other judges; Deane J, however, identified a further novel ground for intervention not found in the other judgments. He stated that in the present case W had not only induced M's assumptions and known of M's ensuing detrimental reliance, but had also taken some advantage from M's actions, namely the opportunity of entering into the contract anticipated by M's pre-contractual performance. In the result,

> Notions of good conscience and fair dealing, enforced by the rationale of legal doctrines precluding unjust ... enrichment, point towards a conclusion that, in such circumstances, [W] should be precluded from departing from the mistaken assumption about his future conduct.[174]

Deane J thus indicated that a defendant's conduct in occasioning a plaintiff's detrimental actions will more readily attract liability where those actions tend to the defendant's own self-interest or enrichment. There was, however, no suggestion that some enrichment or benefiting of the defendant was an important factor or prerequisite governing the imposition of estoppel obligations.[175]

2. Proprietary estoppel and unjust enrichment

In *Waltons* Brennan J assimilated the doctrine of proprietary estoppel to the general principle of equitable estoppel.[176] Mason CJ and Wilson J took a

[171] Eg fraudulent or negligent misstatement: see id, 427 per Brennan J; *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465.

[172] Eg *Trade Practices Act* 1974 (Cth) s 52(1).

[173] *Waltons* (1988) 164 CLR 387, 443–6 per Deane J; 458–64 per Gaudron J.

[174] Id, 453.

[175] Cf *Sabemo Pty Ltd* v *North Sydney Municipal Council* [1977] 2 NSWLR 880, 902–3 per Sheppard J, who held that where P performs non-gratuitous pre-contractual work 'beneficial for the project, and thus in the interests of the two parties', on a reasonable assumption encouraged by D that a contract will eventually be settled, then D may not unilaterally withdraw from the project without making 'compensation or restitution' for P's services. This liability has been interpreted by Birks, op cit, 274–5, as a restitutionary obligation founded on prevention of unjust enrichment rather than contract or estoppel; however, Sheppard J in *Sabemo*, supra, 897, indicated that the pre-contractual work need not benefit or enrich D to establish liability. The case can be interpreted in terms of a duty of good faith in contractual negotiation: see Mason and Gageler, op cit, 15–6; today a promissory estoppel solution would be available, following *Waltons*; cf *Hoffman* v *Red Owl Stores, Inc* (1965) 133 NW 2d, 267.

[176] (1988) 164 CLR 387, 416 ff.

similar approach, but noted the separate lineage of the proprietary estoppel doctrine in English equity.[177]

Four categories of proprietary estoppel can be extracted from the English case law. The first, derived from *Ramsden* v *Dyson*,[178] was summarized by Mason CJ and Wilson J in *Waltons* in the following terms:

> a person [D] whose conduct creates or lends force to an assumption by another [P] that he will obtain an interest in the first person's land and on the basis of that expectation the other person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person.[179]

The second category arises where D creates an assumption by P that D has executed a transfer of proprietary interest to P (as in *Dillwyn* v *Llewelyn*).[180] This category is often placed within the principle of *Ramsden* v *Dyson* as involving an expectation that D will in the future uphold or perfect the represented transfer.[181] The third category involves acquiescence by D in P's unilateral mistaken belief that P is vested with proprietary rights in fact belonging to D (as in *Willmott* v *Barber*).[182] The fourth involves encouragement or acquiescence by D in P's detrimental actions which are premised on a mistaken belief shared by both parties concerning their respective proprietary rights (as in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd*[183] and *ER Ives Investment Ltd* v *High*).[184] In each category it is necessary to establish not only that P has relied on the relevant assumption to his detriment, but also that D has knowingly encouraged or acquiesced in P's detrimental actions.[185] The remedy will involve a qualification of D's proprietary rights in P's favour, the nature of the remedy varying with the circumstances of the case.

Birks has suggested a very different structure for the doctrine of proprietary estoppel, moving away from the notion of inducement of detriment as the basis of obligation. He splits proprietary estoppel into two distinct doctrines, one analogous to contract, the other based on unjust enrichment. His analysis appears to be confined to cases where P's detrimental conduct founding the estoppel involves expenditure on D's land. According to Birks' scheme:[186]

[177] Id, 404. For detailed analysis, see *Silovi Pty Ltd* v *Barbaro* (1988) 13 NSWLR 466 (NSW CA) per Priestly JA; *Austotel Pty Ltd* v *Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (NSW CA) per Priestly JA.

[178] (1866) LR 1 HL 129.

[179] *Waltons* (1988) 164 CLR 387, 404; and see also *Re Sharpe* [1980] 1 WLR 219.

[180] (1862) 4 De GF & J 517; 45 ER 1285; and see *Olsson* v *Dyson* (1969) 120 CLR 365, 378–9 per Kitto J.

[181] See eg *Inwards* v *Baker* [1965] 2 QB 29, 35–7 per Lord Denning MR; *Ward* v *Kirkland* [1967] 1 Ch 194, 235–41 per Ungoed-Thomas J; *ER Ives Investment Ltd* v *High* [1967] 2 QB 379, 394–5 per Lord Denning MR, 400 per Danckwerts LJ; *Olsson* v *Dyson* (1969) 120 CLR 365, 378–9 per Kitto J; *Crabb* v *Arun District Council* [1976] Ch 179, 193 per Scarman LJ.

[182] (1880) 15 ChD 96, 105–6 per Fry J.

[183] [1982] QB 133.

[184] *ER Ives Investment Ltd* v *High* [1967] 2 QB 379.

[185] Finn, in 'Equitable Estoppel' op cit pp 81–2, questions the knowledge requirement in the second category of proprietary estoppel, but this requirement seems to be established in *Olsson* v *Dyson*, (1969) 120 CLR 365. 379 per Kitto J.

[186] Birks, op cit 277–86, 290–3.

(1) Where D *actively encourages* an assumption by P that P has received, or will acquire, an interest in D's land, and thereby induces P to improve the land, P will then have a right to have his assumption or expectation of proprietary interest made good. The interest thus granted may be of far greater value than the cost of P's expenditures or the ensuing increase in value of D's land; the reason for this generous measure of relief lies in the moral notion that D should be bound to fulfil assumptions or expectations which he actively creates with knowledge that they will be taken seriously and acted upon.

(2) Where D *passively acquiesces* in P's improvement of D's land, knowing that P is acting under a mistake as to his rights or a self-induced expectation that certain rights will be his in the future, then P will have a right to claim restitution of the value of his improvements (but not fulfilment of P's self-induced assumptions or expectations). The basis of recovery is that D has freely accepted services or materials from P, knowing that (i) P acted under mistake or misprediction concerning his rights, and (ii) P did not intend gratuitously to benefit D; the acceptance of benefit by D gives rise to an unjust enrichment at P's expense which D in justice is required to disgorge, for example by granting P a lien or charge over the land for the value of the enrichment.

There is some support in older proprietary estoppel authority for the notion that positive inducement of an expectation or belief later acted upon gives rise to a 'contractual' or contract-like right to have that expectation or belief upheld,[187] whilst passive acquiescence can properly be dealt with by a lesser remedy of restitution.[188] The modern tendency, however, is to avoid raising any distinction in principle between situations of encouragement and acquiescence, and to order a discretionary measure of relief depending in each case on the nature of P's detriment,[189] the seriousness of D's unconscionable conduct,[190] and the appropriateness of a particular remedy in the circumstances.[191] If generalization can be made, the courts now stress P's reliance interest — the quantum of P's loss — as the primary interest to be protected in all cases of equitable estoppel.[192] Following from this position, enforcement of P's expectation or restitution interests is regarded solely as a convenient or effective means of remedying detriment;[193] the precise measure of relief is not

[187] See eg *Dillwyn* v *Llewelyn* (1862) 4 De GF & J 517, 521; 45 ER 1285, 1286 per Lord Westbury; *Ramsden* v *Dyson* (1866) LR 1 HL 129, 170 per Lord Kingsdown.

[188] See eg *In Re Unity Joint Stock Mutual Banking Association; Ex Parte* King (1858) 3 De G & J 63; 44 ER 1192.

[189] See eg *Crabb* v *Arun District Council* [1976] Ch 179; *Vinden* v *Vinden* [1982] 1 NSWLR 618.

[190] See eg *Pascoe* v *Turner* [1979] 1 WLR 431; *Crabb* v *Arun District Council* [1976] Ch 179.

[191] *Plimmer* v *Mayor etc of Wellington* (1884) 9 App Cas 699, 713 (PC); *Crabb* v *Arun District Council* [1976] Ch 179; *Hussey* v *Palmer* [1972] 1 WLR 1286; *Morris* v *Morris* [1982] 1 NSWLR 61.

[192] See eg *Crabb* [1976] Ch 179, 192–3, 198–9 per Scarman LJ; *Waltons* (1988) 164 CLR 387, 423–6, 428–9 per Brennan J.

[193] This is to adopt Fuller and Perdue's 'reliance' theory of contractual obligation and remedy, in the limited context of estoppel as a source of rights: cf LL Fuller and WR

directly tied to the nature of D's conduct in occasioning P's detrimental change of position.

A second criticism of Birks' analysis is that the operation of proprietary estoppel involving acquiescence has not been confined to cases where D, the acquiescing party, is enriched by P's detrimental actions. In *Willmott* v *Barber,*[194] for example, Fry J clearly stated that P's expenditure of money or other reliant action need not necessarily be made upon D's land in order to found an equity; it sufficed that P acted to his detriment upon a mistaken belief concerning P and D's rights, of which mistake and detriment D was aware. And in *ER Ives Investment Ltd* v *High,*[195] a case involving common mistaken assumption, Lord Denning held that estoppel could arise from acquiescence by D in P's mistaken expenditures on P's own land. The estoppel by acquiescence cases commonly have involved expenditures on the estopped party's land, but a transfer of benefit to the landowner has not been regarded in principle as a requisite factor establishing equitable obligation on the part of the owner.

Thirdly, it appears that a proprietary estoppel can arise where D acquiesces in mistaken improvements of land *without* knowledge of P's mistaken assumptions. For example, where D shares a rights mistake with P and stands by as P makes expenditures on the faith of the mistake, D may be estopped from setting up the true position upon discovery of his rights.[196] D's obligation here cannot arise from 'free acceptance' of a benefit or enrichment known by D to be non-gratuitous, for D is not aware that he was receiving any benefit at the time of improvement and therefore cannot be said to have had a free opportunity of acceptance or rejection.

Fourthly, a sharp dichotomy cannot easily be drawn in practice between positive creation of, and passive acquiescence in, a plaintiff's assumptions as grounds of estoppel obligation, as Birks' theory suggests. For example, where P commences expenditures on D's land in circumstances where (i) it is evident to D that P must be acting in reliance upon a mistake or misprediction, and (ii) it is reasonable that D should inform P of the true position, then for D to remain passive in such a situation could be said to shade into an implied representation actively inducing P's assumptions: D's acquiescence may, for instance, confirm P in an assumption only tentatively held, and thus in a sense positively generate that assumption.[197]

There is further strong reason for rejecting a pure restitutionary approach to cases of acquiescence in expenditures: the difficulty of defining or deter-

Perdue JR, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale LJ* 52 and 373.

194 (1880) 15 ChD 96, 105–6.

195 [1967] 2 QB 379.

196 In *Taylor Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 155–7, Oliver J rejected a common mistake estoppel based on acquiescence on the facts of the instance case; but he appeared to recognize that such an estoppel could arise in principle. See also *ER Ives Investment Ltd* v *High* [1967] 2 QB 379, 394–5 per Lord Denning MR; cf Finn, 'Equitable Estoppel', op cit 81.

197 See eg *Crabb* v *Arun District Council* [1976] Ch 179; see also Heydon, Gummow and Austin, op cit paras 419–20; cf Meagher, Gummow and Lehane, op cit paras 1718–9; Finn, op cit paras 92–3.

mining the quantum of the unjust enrichment to be restored by the intervention of the court. A restitutionary intervention is generally accepted to involve a stripping of the unjust gain or profit or increase in wealth placed in the defendant's hands at the expense of the plaintiff.[198] In other words the defendant must surrender the value of the end-product resulting from the plaintiff's loss or the defendant's breach of duty owed to the plaintiff. Characteristically this value is measured objectively by reference to the market: the unjust benefit is measured in monetary terms by fixing its exchange value.[199] Now where P makes expenditures on D's land, the ensuing enrichment may be difficult or impossible to measure on a market scale: first, there may be no relevant buyers constituting a market for the reference of the court; second, it may be hard to calculate the increment in market value attributable to P's expenditures.[200] It is possible to envisage a situation where P's expenditures result in no increase in the value of D's property or assets whatsoever, because P's 'improvements' are useless or do not have any value in the eyes of potential buyers; a strict restitutionary analysis might deny P any remedy in such circumstances, for D has not objectively been enriched and has no benefit to surrender.

Birks deals with this problem by the concept of free acceptance, arguing that if D knowingly allows P to make non-gratuitous expenditures on his land he thereby demonstrates that those expenditures are of value to him and therefore can be regarded as an 'enrichment'; in other words by free acceptance D constitutes himself as a market of a single individual who invests the accepted benefit with objective worth. The value of the enrichment can then conveniently be taken as the reasonable value of P's expenditures or services.[201]

It is difficult to see how clarity of analysis is advanced by describing the value of a detriment resulting from reliance as an objective 'enrichment' on the basis of free acceptance. As Traynor CJ of the Supreme Court of California has argued, it makes better sense to state that by inducing or accepting expenditures and services, a defendant becomes liable to remedy any corresponding detriment because he is responsible for that detriment per se;[202] it is

[198] See eg *ANZ Banking Group Ltd* v *Westpac Banking Corporation* (1988) 164 CLR 662, 673; *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221, 257, 263–4 per Deane J, Goff and Jones, op cit pp 16–23, Birks, op cit pp 9–27.

[199] See J Beatson, 'Benefit, Reliance and the Structure of Unjust Enrichment' (1987) 40 *Current Legal Problems* 71, 74 ff.

[200] Id, 77–8 and ff; AS Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576, 582–3.

[201] Birks, op cit pp 265–8, 279–86; and see Goff and Jones, op cit 26–9.

[202] See *Coleman Engineering* v *North American Aviation* 420 P2d 713, 729 (1966): 'If in fact the performance of services has conferred no benefit on the person requesting them, it is pure fiction to base restitution on a benefit conferred'; Traynor CJ's comments were broad enough to apply to cases of expenditure encouraged, accepted or acquiesced in, rather than requested; see also *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221, 263, where Deane J stated that restitution of the reasonable cost of unsolicited but subsequently accepted improvements cannot be enforced where the cost of improvements exceeds the enhanced value of the property, because the recipient cannot be said to be unjustly enriched; see Beatson, op cit *Uses and Abuses of Unjust Enrichment*, op cit vi; 76–86; S Arrowsmith, 'Ineffective transactions and unjust enrichment: a framework for analysis' (1989) 9 *Legal Studies* 121, 307; H O Hunter, 'Measuring the Unjust Enrichment in a Restitution Case' (1989) 12 *SydLRev* 76; M Garner, 'The Role of Sub-

an unnecessary complication to classify expenditure producing no objective increase in marketable assets as some kind of 'benefit' to the recipient.

It may be concluded that there is little basis for describing proprietary estoppel by acquiescence as a restitutionary doctrine: the doctrine is neither grounded on notions of unjust enrichment nor sharply differentiated from estoppels based on encouragement and reliance.

ABUSE OF RELATIONSHIP AND WRONGFUL RETENTION OF PROPERTY

In *Hospital Products Ltd* v *United States Surgical Corporation,*[203] Deane J held that:

> 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.[204]

A notion of unconscionability — of assertion of legal rights against conscience — was thus used to ground a broad principle of equitable proprietary restitution.[205] Birks has argued that the substance of Deane J's doctrine is that damages or other appropriate remedy is available to effect restitution in cases of unjust enrichment through breach of obligation.[206] In *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd*[207] Deane J, expanding on Birks' ideas, indicated that (i) a cause of action can be founded on unjust enrichment and (ii) a court in a fused system of law and equity can order flexible restitutionary relief to do justice in the circumstances of a particular case of unjust enrichment.

In this chapter it will be argued that equitable restitution, while indeed serving to prevent unjust enrichment, is based on the prevention of abuse of relationships rather than notions of unjust enrichment per se. It will further be argued that the concept of unjust enrichment as a cause of action is being overused by High Court judges both in equity and in law, and that only in the field of money had and received is that concept illuminating or centrally important.

jective Benefit in the Law of Restitution' (1990) 10 OJLS 42; for elaborate discussion of this issue.

203 (1984) 156 CLR 41.

204 Id, 125.

205 Cf JG Starke QC, 'The High Court and the Limits of the Doctrine of the Constructive Trust' (1987) 61 ALJR 241, 241.

206 P Birks, 'Restitutionary Damages for Breach of Contract' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 421, 438 ff.

207 (1988) 165 CLR 107, 145–6.

1. Equitable restitution

Where D breaches some relational equitable duty owed to P (whether involving unconscionable conduct or breach of obligation of trust or good faith),[208] and as a result of that breach acquires property from P or from some other source, then a court of equity may order restitution or surrender of the wealth to P. Restitution may be effected by various remedies, such as the remedial constructive trust, equitable lien, charge, subrogation, or duties of account,[209] and perhaps by an emerging remedy of equitable restitutionary damages.[210] In whatever form, restitutionary intervention here serves as an appropriate method of sanctioning breach of obligation and maintaining observance of behavioural rules: by preventing enrichment through breach the court more effectively enforces or vindicates the parties' equitable rights and duties. It follows from this analysis that to describe equitable restitution as being 'based upon' the prevention of unjust enrichment is to put the cart before the horse: the stripping of D's enrichment is merely a remedial response aimed at upholding an existing equitable duty which is the prime source of D's liabilities. In other words the enrichment is unjust and reversible *because of* the breach of anterior obligation; the basis of D's obligation does not lie in the injustice of the enrichment.[211]

In the United States and Canada the remedial constructive trust has been used to effect restitution in a much broader fashion, involving the imposition of proprietary obligations upon a party holding assets perceived to be an unjust enrichment independently of any prior existing equitable (or legal) duty.[212] In *Hussey* v *Palmer*[213] Lord Denning advocated a similar approach, describing the constructive trust as:

> a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity.... It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.[214]

In *Muschinski* v *Dodds*[215] the High Court rejected Lord Denning's restitutionary constructive trust doctrine as contrary to authority and principle. Deane J in his leading judgment stated that:

[208] Arising, for example, where there is an express trusteeship, a fiduciary relationship, a relation of confidentiality, or a contract imposing duties of good faith in contractual performance.

[209] See *Stephenson Nominees Pty Ltd* v *Official Receiver on behalf of Official Trustee in Bankruptcy; Ex parte Roberts (Re Stephenson Nominees Pty Ltd)* (1987) 76 ALR 485, 501–6 per Gummow J (dissenting) (FCA).

[210] Birks, loc cit.

[211] See *Re Stephenson Nominees Pty Ltd* (1987) 76 ALR 485, 503–4 per Gummow J (dissenting) (FCA); SJ Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 MLR 603, 604–5, 609–10.

[212] See American Law Institute, *Restatement of Restitution* (1937) para 160 and Comment; AW Scott, *Scott on Trusts* (3rd ed, Boston, Little, Brown, 1967) vol V paras 461, 462; 1983 Supplement para 666; GE Palmer, *The Law of Restitution* (Boston, Little, Brown, 1978) vol I, 8–20.

[213] [1972] 1 WLR 1286.

[214] Id, 1289–90; and see also *Eves* v *Eves* [1975] 1 WLR 1338, 1341.

[215] (1985) 160 CLR 583.

> 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 declaraction that the ownership in whole or in part lies . . . in that other.[216]

His Honour further rejected any notion of restitution or unjust enrichment as an explanation of the constructive trust. He noted that in other common law countries the prevention of unjust enrichment had been recognized as an acceptable basis for the imposition of constructive trust obligations, but held that no such general principle was yet established in Australia.[217] Deane J stated that the true basis of the remedial constructive trust was to be found in established equitable principles requiring 'the imposition upon the legal owner of property, regardless of actual or presumed agreement or intention, of the obligation to hold or apply the property for the benefit of another'.[218] General notions of 'fairness or justice' were not unimportant in this process, for they were relevant to 'the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity'. But in all cases the plaintiff had to show some applicable rule, doctrine, or underlying principle of equity providing a basis for restitutionary intervention — not merely assert that fairness required reallocation of proprietary rights in a specific instance.[219]

In *Muschinski* v *Dodds,* Deane J identified a particular equitable principle justifying restitution, which he found to underlie the equitable right to recover capital upon dissolution of a partnership or joint venture, the quasi-contractual right to recover money had and received, and the contractual right to recover executed contractual payments following a total failure of consideration.[220] The principle operated:

> 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 . . . would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the 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 so to do.[221]

Unconscionable conduct here can be interpreted as the breach of a common

[216] Id, 616, see generally 612–6; and see 594–5 per Gibbs CJ.

[217] Id, 617: 'The most that can be said at the present time is that "unjust enrichment" is a term commonly used to identify the notion underlying a variety of distinct categories of case in which the law has recognized an obligation on the part of a defendant to account for a benefit derived at the expense of a plaintiff'.

[218] Id, 617; and see 614–5; cf DWM Waters, *The Constructive Trust* (London, London University, 1964) 7–27, 43 ff.

[219] Id, 616, 617.

[220] Id, 618–20. For recovery of payments following total failure of consideration, see *Fibrosa Spolka Akeyjna* v *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61 per Lord Wright; *Foran* v *Wight* (1989) 168 CLR 385, 432 per Brennan J;450–9 per Deane J.

[221] Id, 620.

intention regarding rights to wealth within a relationship, such intention being presumed or construed from the nature and circumstances of the relationship by asking what the parties might reasonably have agreed upon had they adverted to the issue in dispute at the time of entering the relationship.[222] An analogous process is found at common law in the implication of contractual terms, where the court supplies rights and obligations as is necessary to give effect to the overall agreement of the parties.[223] Deane J did in fact avoid the controversial language of 'constructive' or reasonably implied intention, instead stating that it was inherently unconscionable to assert legal entitlement in the 'unforeseen circumstances' of a collapsed relationship where no provision for defeasance of property has been made by the parties.[224] But the finding of unconscionability in this context is ultimately derived from the intentions of the parties, for the wrong is constituted by the assertion of a proprietary right in a manner alien to the intended purpose of the parties' relationship; only by reference to the actual and presumed intentions of the parties can that controlling purpose be determined.

In *Baumgartner* v *Baumgartner*[225] the full High Court adopted Deane J's 'purpose of relationship' doctrine from *Muschinski* v *Dodds* without elaboration. Both cases turned on similar facts: P contributed purchase money to acquire property for the purpose of a joint domestic relationship with D, P's de facto husband; upon collapse of the relationship D asserted legal and beneficial title to the property without allowance for P's contribution to the cost of acquisition. D's unconscionable assertion of ownership was prevented in each case by imposition of a constructive trust giving P beneficial title proportionate to her financial contribution.[226]

Toohey J in *Baumgartner*[227] concurred in the Court's reasoning and conclusions, but suggested that an alternative ground for constructive trust relief could be found in the prevention of unjust enrichment. He cited Dickson J's judgment in the Canadian case of *Pettkus* v *Becker*,[228] where it was stated that:

> The principle of unjust enrichment lies at the heart of the constructive trust . . . there are three requirements to be satisfied before an unjust enrichment

[222] See *Pettitt* v *Pettitt* [1970] AC 777, 795 per Lord Reid; 823 per Lord Diplock; but cf *Gissing* v *Gissing* [1971] AC 886, 904 per Lord Diplock; *Allen* v *Snyder* [1977] 2 NSWLR 685, 694 per Glass JA; 701 per Samuels JA; *Muschinski* v *Dodds* (1985) 160 CLR 583, 595 per Gibbs CJ.

[223] See eg *The Moorcock* (1889) 14 PD 64, 68; *Liverpool City Council* v *Irwin* [1977] AC 239; *Helicopter Sales (Australia) Pty Ltd* v *Rotor Work Pty Ltd* (1974) 132 CLR 1; *Castlemaine Tooheys Ltd* v *Carlton and United Breweries Ltd* (1987) 10 NSWLR 468; DW Greig and JLR Davis, *The Law of Contract* (1987) pp 517–25, 547–60; Mason and Gageler, op cit 18–21.

[224] *Muschinski* v *Dodds* (1985) 160 CLR 583, 622.

[225] (1987) 164 CLR 137, 147–9 per Mason CJ, Wilson and Deane JJ; 152 per Toohey J; 155–7 per Gaudron J; see generally P Parkinson, 'Doing Equity Between De Facto Spouses: From Calverley v Green to Baumgartner' (1988) 11 *Adel LR* 370.

[226] Cf *Re Osborn* (1989) 91 ALR 135, 140–3 per Pincus J (FCA).

[227] *Baumgartner* (1987) 164 CLR 137, 152–4.

[228] (1980) 117 DLR (3rd) 257 (SCC).

> can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.[229]

There is little appeal in such a doctrine. It does not explain trust obligations arising where P suffers no loss corresponding to D's unjust gain, as where D in breach of fiduciary obligations owed to P realizes a profit which P himself could not have made.[230] And the doctrine provides no guidance as to when an enrichment is to be regarded as 'unjust'; there is no delineation of positive grounds rendering retention of property unjust in the circumstances of a particular relationship (as provided by Deane J's doctrine in *Muschinski* v *Dodds*) — only an unhelpful negative concept of 'enrichment without justification'. One possible interpretation of this notion is that an enriched defendant must bear the onus of justifying his acquisition or retention of wealth, for example by showing a valid contract or gift. More plausibly, the doctrine simply vests the court with a strong discretion to re-allocate wealth as seems just on the facts of each case.[231] In light of the High Court's firm rejection of Lord Denning's concept of constructive trust as a vehicle for discretionary restitution, it is unlikely that the *Pettkus* v *Becker* unjust enrichment doctrine will be accepted in Australia.

2. Mistaken payments and equitable obligation

In *Muschinski* v *Dodds*[232] Deane J suggested that recovery of money had and received was based on the same 'general equitable notions' as recovery of property from a collapsed joint relationship. In the area of payments made under mistake of fact, perhaps the most important category of money had and received, it is difficult to see how a payor's restitutionary claim can be grounded upon the frustration of a relationship for which purpose the payment was made. In many cases there will be no relevant relationship between the parties prior to the making of the mistaken payment; the parties may indeed be total strangers, with the payee receiving the money without any knowledge of the intended purpose of the payment or of the payee's lack of entitlement to the money. In short, the innocent recipient of a mistaken payment cannot be said to have acted unconscionably in the sense of abusing an existing relationship.[233]

It could be argued that (i) a payee who knows of the payor's mistake of fact

[229] Id, 273–4.

[230] See eg *Furs Ltd* v *Tomkies* (1936) 54 CLR 583; *Regal (Hastings) Ltd* v *Gulliver* [1967] 2 AC 134 (Note, decided 1942); *Boardman* v *Phipps* [1967] 2 AC 46; *Re Stephenson Nominees* (1987) 76 ALR 485, 503 per Gummow J (dissenting) (FCA).

[231] See *Hayward* v *Giordani* [1983] NZLR 140, 147–8 per Cooke J (NZ CA).

[232] (1985) 160 CLR 583, 619.

[233] In *Chase Manhattan Bank NA* v *Israel-British Bank (London) Ltd* [1981] Ch 105, Goulding J held that a mistaken payor and payee were placed in a fiduciary relationship binding the payee's conscience from the moment of transfer of the mistaken payment, so that retention of the property was a breach of fiduciary obligation creating a proprietary obligation of restitution via constructive trust. This identification of a fiduciary relationship was purely instrumental, aimed at justifying use of equitable proprietary tracing remedies, and was not regarded as the juristic basis of the payee's liabilities: see [1981] Ch 105, 118–9.

in making a payment behaves unconscionably in accepting the money, and that (ii) an innocent payee behaves unconscionably by keeping money once he receives notice that it was paid over by mistake. In each case the unconscionability inheres in retaining the value of a money benefit which the payee knows he was not intended to have, and which was not transferred in accordance with any objective contractual obligation shifting the risk of mistake to the payor. In *ANZ Banking Group Ltd* v *Westpac Banking Corporation,*[234] the High Court acknowledged that the obligation to restore mistaken payments could be said to draw upon notions of good conscience, but it was held that the jurisdiction was based on common law notions of unjust enrichment rather than any specific concept of equity. This approach accords with the history of the jurisdiction for recovery of mistaken payments (together with the other money had and received counts), which belonged to the common law courts and not to Chancery.[235] The Court in *ANZ* did not, however, explain why on principle the recipient of a mistaken payment is unjustly enriched and hence required to make restitution. The generally accepted explanation of recovery is that the payor's intention to transfer money to the payee is vitiated by his mistake, so that the payee cannot justly assert an absolute right as transferee to the benefit of the money.[236] The relevant factor triggering intervention is thus the state of mind of the payor, the quality of his transmissive intent, and not the conduct or conscience of the recipient. A similar unjust enrichment principle operates in the case of recovery of compelled payments: it is the lack of valid, unqualified transmissive intention of the payor resulting from the compulsion rather than the wrongful coercive behaviour of the payee which gives rise to a reversible unjust enrichment.[237]

[234] (1988) 164 CLR 662, 673.

[235] *Moses* v *Macferlan* (1760) 2 Burr 1005; 97 ER 676 (KB) per Lord Mansfield is the foundational case, where the common law writ of indebitatus assumpsit was used to effect restitution in the absence of any real implied promise of payment: see references collected in n19 above.

[236] See Goff and Jones, op cit p 87ff; Birks, Introduction, op cit pp 140, 146 ff; SJ Stoljar, The Law of Quasi-Contract (2nd ed, Sydney, Law Book Co, 1989) pp 5–10, 20ff. Stoljar provides a further explanation that the payor's right is based on a concept of property in the money or its value; for a discussion of the historical support for his view, see *Howard* v *Wood* (1679) 21, 22; *Martin* v *Sitwell* (1690) 1 Sho KB 156, 157 per Holt CJ; *Tomkins* v *Bernet* (1693) 1 Salk 22 per Treby CJ; *Attorney General* v *Perry* (1733) 2 Com Rep 481, 491; W Blackstone, Commentaries on the Laws of England (5th ed, 1773) iii, 162; *Hudson* v *Robinson* (1816) 4 M & S 475, 478 per Lord Ellenborough; *Hall* v *Swansea* (1844) 5 KB 526, 547 per Lord Denman; *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1, 54 per Lord Porter; *Nelson* v *Larhold* [1948] 1 KB 339, 342 per Denning J; A T Denning, 'The Recovery of Money' (1949) 65 LQR 37; Stoljar, *Quasi-Contract,* op cit, 2–10; S J Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 MLR 603, 603–5; P S Atiyah, *The Rise and Fall of Freedom of Contract* (New York, Oxford University Press, 1979) pp 181–4; S Hedley, 'Contract, Tort or Restitution; or, On cutting the legal system down to size' (1988) 8 *Legal Studies* 137, 149–50; cf G H L Friedman and J G McLeod, *Restitution* (1982) pp 31–4. And now see *Lepkin Gorman* v *Karpnale Ltd* House of Lords, 6 June 1991, reported *The Times* 7 June 1991, where Lords Templeman and Goff set out a proprietary theory of unjust enrichment as grounds for the recovery of money, and further recognise a change of position defence based on the proprietary theory.

[237] See *Mason* v *State of New South Wales* (1959) 102 CLR 108, 142–6 per Windeyer J; cf 114, 116–7 per Dixon CJ; Birks, op cit, 295.

3. Unjust retention of contractual consideration

The *Muschinski* v *Dodds* 'purpose of relationship' doctrine was also stated by Deane J in that case to explain restitution of an executed consideration under a frustrated or ineffective contract.[238] A different doctrine was later applied in *Pavey & Matthews Pty Ltd* v *Paul.*[239] In this case the High Court majority (Mason, Wilson and Deane JJ) held that a quantum meruit action for recovery of a just compensation for a consideration executed under an unenforceable contract was an action for the restitution of an accepted benefit or enrichment. The basis of obligation was the transferee's unjust enrichment, and not (as traditionally thought) some tacit contract based on an implied agreement or assumption by the parties that the transferor of the consideration would be recompensed.[240] The majority's approach can be criticized as unnecessarily creating an *ex lege* obligation divorced from the will of the parties, the extent of which is fixed by the transferee's perhaps unrealizable or unmeasurable gain.[241] Dawson J suggested a simpler solution based directly on the voluntary acts and intentions of the parties, whereby the court enforces a consensual compensatory obligation measured by the easily-gauged market cost of the agreed and requested performance.[242]

The majority decision in *Pavey* indicates that in the sphere of contractual relationships, novel unjust enrichment arguments are winning increasing favour in the High Court. This tendency produced questionable doctrinal developments in the recent important case of *Trident General Insurances Co Ltd* v *McNiece Bros Pty Ltd.*[243] The facts were that B paid a premium to T, an insurance company, as consideration for a policy covering B's contractors. The contractors had not been hired at the time of issue of the policy and were not privy to the insurance agreement. M, a contractor entitled to indemnity under the terms of the insurance policy, made a claim on the policy of a third party beneficiary.

The High Court majority unheld M's claim, but on a variety of disparate grounds. Mason CJ, Wilson and Toohey JJ moved towards abandoning or confining the doctrine of privity of contract and allowed M as third party beneficiary to sue directly on the insurance contract, in order to protect M's expectations and remedy possible detrimental reliance induced by T's promise of indemnity.[244] Deane J held that M could join B to the action as trustee of the benefit of the insurance contract, and thus attempt to enforce the prom-

[238] (1895) 160 CLR 583, 618–9; and see also *Foran* v *Wight* (1989) 88 ALR 413, 446 per Brennan J; 450–1 per Deane J, where recovery of contractual deposit or payment upon total failure of consideration is explained as an instance of quasi-contractual or restitutionary right.

[239] (1987) 162 CLR 221.

[240] Id, 227–8 per Mason and Wilson JJ; 255–7 per Deane J; and see G Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?' (1988) 1 *Journal of Contract Law* 8; *Foran* v *Wight* (1989) 168 CLR 385, 438–9 per Deane J.

[241] Cf text accompanying notes 193–7.

[242] *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221, 264–9. For criticism of the majority's historical analysis of the quantum meruit doctrine, see D Ibbetson, 'Implied Contracts and Restitution in the High Court of Australia' (1988) 8 *OJLS* 312.

[243] (1988) 165 CLR 107.

[244] Id, 121–4 per Mason CJ and Wilson J; 170–2 per Toohey J.

ised indemnity as equitable beneficiary of the promise.[245] Gaudron J, the remaining member of the majority, agreed with the minority (Brennan and Dawson JJ) that the privity rule was too entrenched to be overthrown and that there was no sufficient intention in this case to create a trust of the contractual promise. Her Honour found for M on the basis that T had been unjustly enriched by receipt of the premium money as consideration for indemnities which were not paid; and that the most appropriate means of preventing that unjust enrichment was to require T to perform its promise and pay over the expected indemnity.[246]

Gaudron J's unjust enrichment doctrine may be criticized on a number of grounds. First, if the measure of obligation in cases of unjust enrichment is generally restitution of the objective quantum of the defendant's wrongful or unjust gain, this would suggest that the appropriate remedy to prevent T's unjust enrichment would be to order surrender of the executed premium moneys and no more. Gaudron J's approach equates the quantum of the defendant's gain from the executed consideration with the value to the plaintiff of the promised performance, thus confusing the objective value of a money enrichment with its exchange value set by the subjective agreement of the contracting parties. It would be simpler to enforce the third-party plaintiff's expectations interest directly as a contractual right created by the original bargain, and not to describe the defendant's obligation to perform the promise as a restitutionary obligation aimed at the disgorging of gain.

Secondly, an unjust enrichment claim is generally enforced in favour of the party at whose expense the defendant is enriched. It is strongly arguable that a promisor under a contract to benefit a third party is enriched at the expense of the promisee paying over the consideration and buying the promisor's future performance, and not at the expense of the third party who later seeks enforcement of the contract.[247]

It is true that the promisee intends that the third party ultimately have the 'benefit' (viz. the exchange value) of the consideration; the third party is not, however, vested with rights to the consideration as a value or benefit in itself, in the sense, for example, that a donee has rights in a fund held by a stakeholder on his behalf.[248]

Thirdly, if a third party beneficiary's claim on a contract is unjust enrichment-based, then no claim can proceed unless the consideration is paid over to the promisor-defendant by the other contracting party. It is arbitrary and unsatisfactory that the third party's rights should depend upon the contingency of that other having executed the consideration.

Finally, an unjust enrichment solution to the third party contract issue

[245] Id, 146–54.

[246] Id, 173–7. Deane J hinted at a similar approach at 145–6; and see also *Lawrence* v *Fox* 20 NY 268 (1859) per Gray J, cited in *Corbin on Contracts,* op cit vol 4, para 779A n 55.

[247] In *Trident*'s case the third party may have provided the consideration to the promisor indirectly through adjustment of the price of the contract between the promisee and third party; however Gaudron J did not base the third party's 'restitutionary' right on that fact: cf KB Soh, 'Privity of Contract and Restitution' (1989) 105 LQR 4, 5–6.

[248] Cf *Shamia* v *Joory* [1958] 1 QB 448.

evades basic questions concerning the purpose and policy of the privity and consideration rules of contract. It is submitted that Mason CJ, Wilson and Toohey JJ's policy oriented reform of the privity rule is the preferable approach, and that the use of unjust enrichment arguments to bridge perceived deficiencies in classical contract law in an ad hoc fashion is an undesirable form of judicial creativity.

CONCLUSION

1.

Ten years ago, Professor Atiyah noted a general rise of notions of unjust enrichment in English legal thinking, both academic and judicial. He suggested that this movement was symptomatic of a sea-change in legal values, as lawyers strove to escape the formalistic classical categories of property, promises and harms as the basis of private rights, and sought to develop new approaches to do justice in particular fact situations.[249]

In Australia it has been chiefly through the instrument of equity and not by use of unjust enrichment concepts that the common law has been reformed to give expression to evolving notion of justice. Pre-eminent in equitable intervention has been the notion of unconscionable conduct.

Unconscionability has not been used by the High Court as a rubric justifying discretionary intervention to correct substantive injustice.[250] The jurisdiction to prevent unconscionability has not degenerated into a roving commission enabling an imperial judiciary to redistribute benefits and burdens between transacting individuals by decree — as arguably is the case in Canadian[251] and United States[252] unconscionability law. The notion of unconscionability in Australia has rather been employed in a limited manner, in the sense of unfair conduct in a relationship which is held to affect the conscience of the non-innocent party, independently of any unfair outcome or unjust enrichment which may have resulted from that conduct.

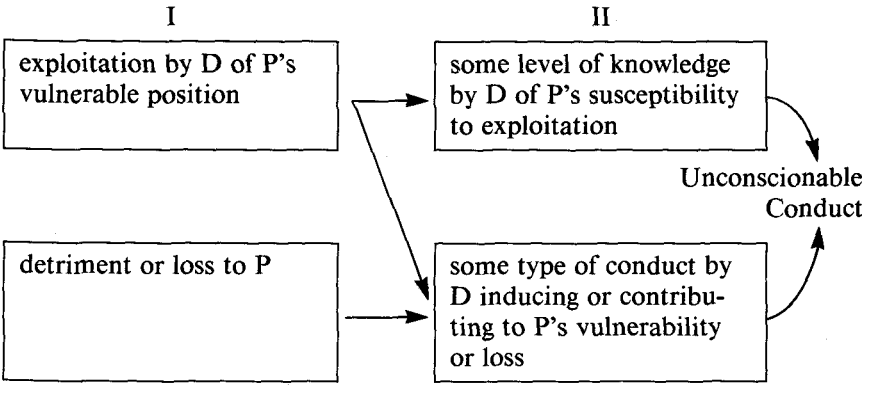
The key components of unconscionable conduct emerging from our survey of Australian case-law, and establishing grounds for intervention in areas as diverse as unconscionability in bargaining, unjust forfeiture, equitable estoppel, and exploitation of consensual relationship, can be represented schematically as follows:

[249] P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) op cit pp 764–70 ff; cf 479–501.

[250] With the possible exception of the unsettled area of relief from penalties and forfeiture; see above.

[251] See text accompanying nn 81–8.

[252] See Leff, loc cit; C Fried, *Contract as Promise* (Cambridge, Mass. Harvard University Press, 1981) pp 20–1, 92, 103; cf MP Ellinghaus, 'In Defense of Unconscionability' (1969) 78 *Yale LJ* 757. Duncan Kennedy from a left anarchist position argues that notions of unconscionability in bargaining are nothing but a formalistic veil for discretionary redistribution of wealth from rich to poor, of which Kennedy approves: 'Distributive and Paternalist Motives in Contract and Tort with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland L Rev* 563.



The existence of unjust enrichment is pertinent in establishing unconscionable conduct in that it can evidence a state of knowledge or conduct by D giving rise to unconscionability. But unjust enrichment is neither necessary nor sufficient to prove unconscionability. Leaving aside the bare-majority decision of the High Court in *Stern* v *McArthur*,[253] the only established departure from this basic position is found in the penalties jurisdiction, which perhaps ought to be re-classified as an unjust enrichment doctrine whereby the court applies formulae testing the substantive fairness of stipulated compensations.[254]

The very coherence of the unconscionability principle as applied in Australia, with its stress on the knowledge and conduct of the non-innocent party, defines the logical limits of its operation. When the High Court departs from this clarity of principle and extends unconscionability to include exploitation of a vulnerability of which D *ought* to have known,[255] or insistence on legal rights to a benefit which '*reasonably*' belongs to P,[256] then the Court severs unconscionability from its roots in wrongdoing and bad conscience. It is submitted that new and more cogent doctrines should be developed to justify intervention in cases such as these where an outcome is perceived to be unfair, and yet unconscionability according to definite principle is absent. The scope of the unconscionability concept should not be expanded so far as to deprive it of meaning.

2.

The notion of unjust enrichment may now be emerging as a general principle of intervention augmenting the unconscionability principle. As we have seen, concepts of unjust enrichment are gaining some currency in the thinking and language of the High Court as a basis or inspiration for judicial impo-

[253] (1988) 165 CLR 489; see above, text accompanying nn 126ff.
[254] See above, text accompanying nn 33ff.
[255] See eg *Amadio's* case (1983) 151 CLR 447, 467–86 per Mason J, discussed in text accompanying nn 60–4.
[256] See eg *Stern* v *McArthur* (1988) 165 CLR 489, 528–9 per Deane and Dawson JJ, discussed in text accompanying nn 133–44.

sition of obligations, not only in the quasi-contractual fields of money had and received and quantum meruit, but also in wider areas of contract and equity. It is questionable, however, whether it is necessary or desirable that a notion of 'unjust enrichment' be adopted as a general source of rights and obligations. First, the idea of an unjust enrichment begs the question: what are the criteria by which a particular enrichment is to be regarded as unjust? A finding of unjust enrichment logically seems to be the *conclusion* of a process of reasoning whereby the acquisition or retention of wealth is judged to be unwarranted by some principle of law or morality. More particularly the rules of property, contract, tort, trust and equity, by enforcing duties regulating the taking of wealth, opportunity or advantage, *indirectly* define what is an unjust enrichment by direct control of conduct; in contrast, a naked concept of unjust enrichment by itself provides no signposts for the creation of obligations.[257]

In the limited sphere of money had and received in quasi-contract, the notion of unjust enrichment is useful as recovery cannot easily be explained in terms of proprietary right[258] or contractual or trust relationship; but unjust enrichment in this context is defined by relatively well-settled principles identifying a vitiated intention to transfer money: for example mistake, compulsion, or failure of consideration. To move beyond quasi-contract and use unjust enrichment ideas at large, uncontrolled by settled doctrine, is to confer on the court a strong and unpredictable judicial discretion.

Secondly, obligations based on the prevention of unjust enrichment are associated with restitutionary remedies only, that is, the surrender of benefit or material gain.[259] It is, however, possible to envisage a number of situations where some form of unwarranted enrichment is present, and yet restitution is not the most appropriate or convenient remedy, as for example in cases of unfair contract, estoppel, mistaken improvements, unenforceable part-executed contract, or unrequested but justified services. A resolution of such cases in terms of reversing unjust enrichment would require distortion of the concept of restitution to provide a suitable remedy. By contrast, contractual and equitable solutions are not inherently restricted to a single class of remedial response.

Finally, there is potential for an expansion of existing legal principles to deal with unfair gain, avoiding any need to institute a novel general principle of unjust enrichment. For example, transacting parties can be relieved of unfair obligations or denied unfair entitlements by judicial imposition of strictly non-consensual terms justly allocating risks or determining benefit and burden within a consensual or contractual relationship. Court allocation of risk is arguably the true explanation of what the judges are already doing in

[257] See S Hedley, 'Unjust enrichment as the basis of Restitution — an over worked concept' (1985) 5 *Legal Studies* 56 ff. Cf Birks, op cit 16–22 ff, acknowledging the poverty of the unjust enrichment concept.

[258] Ie a right in rem; cf SJ Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 MLR 603 ff.

[259] See text accompanying nn 193–4.

cases of frustrated contract,[260] contract formed under common mistake,[261] collapsed joint relationship,[262] and contracts resulting in unexpected or unintended profits to one side upon termination.[263] The technique of implying just terms is no doubt a discretionary, open-ended vehicle of adjudication, but unlike 'prevention of unjust enrichment', principles may be developed to guide the process of implying (or more accurately, imputing) rights and duties in order to complement and regulate the overall purpose of transactions.[264]

Another approach, more familiar to United States than Anglo-Australian law, is to accord a greater role to the notion of reliance as a foundation of rights and obligations.[265] A broad reliance-based principle of obligation, whether described in terms of contract, estoppel or tort, would provide a framework for reasoned resolution of issues of recompense for services requested, accepted, or acquiesced in, on the basis that a party providing services should be protected from detriment caused by reliance on a justified assumption or expectation of remuneration. Moreover, a reliance-based conception of contractual liability, moving away from the classical notion of contract as a binding executory promise, might allow a court to avoid an imbalanced contract detrimenting a mistaken or improvident promisor and unduly enriching the promisee even in the absence of procedural unconscionability, provided that the contract had not been executed or otherwise relied upon by the promisee.[266] The reliance test gives the court a sophisticated policy discretion in the ascription of contractual responsibility; the dominant criterion of obligation becomes: has the obligee so ordered his affairs on the basis of expectations aroused by the obligor's conduct that justice or utility or

260 Cf *Codelfa Construction Pty Ltd* v *State Rail Authority of New South Wales* (1982) 149 CLR 337.

261 Cf *McRae* v *Commonwealth Disposals Commission* (1951) 84 CLR 377; *Svanosio* v *McNamara* (1956) 96 CLR 186.

262 Cf *Muschinski* v *Dodds* (1985) 160 CLR 583.

263 Cf *Stern* v *McArthur* (1988) 165 CLR 489.

264 Examples of doctrines for the implication of just terms include: 1) United States doctrines for allocation of risk of mistake in contract: *Restatement of Contracts (Second)* paras 152–4; 2) United States doctrines implying duties of good faith in contractual performance: *Uniform Commercial Code* s1–203; *Restatement of Contracts* (*Second*) para 205; and see HK Lucke, 'Good Faith and Contractual Performance' in PD Finn (ed), *Essays on Contract* (1987) p 155; 3) Anglo-Australian doctrines recognizing the legal and factual matrix of commercial and private transactions: see eg *The Moorcock* (1889) 14 PD 64, 68; *Liverpool City Council* v *Irwin* [1977] AC 239; *Helicopter Sales (Australia) Pty Ltd* v *Rotor Work Pty Ltd* (1974) 132 CLR 1; *Castlemaine Tooheys Ltd* v *Carlton and United Breweries Ltd* (1987) 10 NSWLR 468; *Australian Coarse Grains Pool Pty Ltd* v *Barley Marketing Board*, SC of Qld 22 Feburary 1988 (unrep) per Kelly SPJ [1989] 1 Qd R 499 (Qd SC); *Wright* v *TNU Management Pty Ltd* (1989) 85 ALR 442 (NSW CA) per Clarke JA; Greig and Davis, op cit pp 517–85; Mason and Gageler, op cit pp 18–21; R Goff, 'Commercial Contracts and the Commercial Court' [1984] *Lloyd's Maritime and Commercial Law Quarterly* 382; P S Atiyah, *An Introduction to the Law of Contract* (4th ed, New York, Oxford University Press, 1989).

265 *Restatement of Contracts* (*Second*) para 90; and see *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 401–2, 406 per Mason CJ and Wilson J.

266 Cf *Restatement of Contracts* (*Second*) para 153(a) Comments (c) (d) (e) (avoidance of mistaken tenders pending reliance).

communal notions of reasonableness require contract enforcement even if adverse to the obligor's interests?[267]

To sum up, by developing concepts of implied term, allocation of risk, and reliance-based obligation — principles which are already extant in the law — the justice of outcomes can rationally be dealt with by the courts where unconscionability principles would be inapt, and yet without recourse to a 'vague jurisprudence' of unjust enrichment.[268]

[267] Cf Atiyah, op cit Introduction pp 1–7, 139ff, 455ff, pp 771–79; Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR 193; Atiyah, 'Consideration: A Restatement' in Atiyah, *Essays on Contract* (1986) pp 179, 226–43; H Collins, *The Law of Contract* op cit, pp 36–55 ff; JH Baker, 'From Sanctity of Contract to Reasonable Expectation' (1979) 32 *Current Legal Problems* 17; G Gilmore, *The Death of Contract* (Columbus, Ohio, Ohio State University Press, 1974); cf *Beaton* v *McDivitt* (1985) 13 NSWLR 134 per Young J, (1987) 13 NSWLR 162 (NSW CA).

[268] Cf *Baylis* v *Bishop of London* [1913] 1 Ch 127, 140 per Hamilton LJ. See also *Orakpo* v *Manson Investments* [1978] AC 95, 104 per Lord Diplock.