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THE 'JOINT ENDEAVOUR CONSTRUCTIVE TRUST' DOCTRINE IN AUSTRALIA: DECONSTRUCTING UNCONSCIONABILITY

Abstract

The 'joint endeavour constructive trust' doctrine, propounded for the first time by the High Court in *Muschinski v Dodds*, is firmly part of modern Australian law. Yet, its precise requirements and remedial approach are poorly understood and inconsistently applied. The primary contributing factor is the prevailing understanding that unconscionability must be established for the doctrine to apply, and that the remedial approach aims to avoid unconscionability. But unconscionability has not been precisely explained, which has led to the erroneous view that the joint endeavour constructive trust doctrine is discretion-based instead of rule-based. This article argues, first, that unconscionability, either per se or as implying the need for wrongdoing, is not a prerequisite for the application of the doctrine, and that the doctrine is triggered by ascertainable and predetermined real world events. Second, this article argues that the remedial aim of avoiding unconscionability finds expression in a structured remedial approach: courts do not exercise open-ended remedial discretion. This deconstruction allows us to appreciate that the rationale of the doctrine lies in its autonomy-enhancing function, and also allows us to resolve prevailing uncertainties concerning the interplay between the joint endeavour constructive trust doctrine and the common intention constructive trust doctrine.

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I Introduction

It is well known that a novel constructive trust doctrine was enunciated for first time in *Muschinski v Dodds* ('*Muschinski*').[1] The following comments of Deane J ('Key Statement') formed the basis of this doctrine:[2]

> [T]he principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party [C] on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party [D] in circumstances in which it was not specifically intended or specially provided that that other party [D] should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party [D] to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.[3]

Barely two years later, this doctrine was approved and applied by the High Court in *Baumgartner v Baumgartner* ('*Baumgartner*'),[4] cementing its place in Australian law.

The doctrine expounded by Deane J — which may be termed the 'joint endeavour constructive trust' ('JECT') doctrine — has now been in existence for more than three and a half decades. Yet, its precise requirements and remedial approach are poorly understood and inconsistently applied. The primary factor contributing to this state of affairs is the prevailing understanding of the doctrine in terms of 'unconscionability'. Unconscionability is a protean word, which does not yield a universally accepted core meaning.[5] To date, no satisfactory attempt has been made to explain what, precisely, unconscionability entails in the context of the JECT doctrine. Instead, there seems to be a general assumption that unconscionability simply indicates that the doctrine is wholly or primarily discretion-based instead of rule-based,[6] and that,

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1 (1985) 160 CLR 583 ('*Muschinski*'). 'History has shown that the most significant judgment in *Muschinski v Dodds* is that given by Deane J': *Spink v Flourentzou* [2019] NSWSC 256, [235] (Robb J) ('*Spink*').

2 For the purposes of the ensuing discussion of the doctrine, the two parties his Honour referred to are designated herein as 'C' and 'D'.

3 *Muschinski* (n 1) 620 (citations omitted).

4 (1987) 164 CLR 137, 148 (Mason CJ, Wilson and Deane JJ, Toohey J agreeing at 151–2, Gaudron J agreeing at 155) ('*Baumgartner*').

5 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392 (Lord Nicholls) ('*Tan*').

6 See, eg, GE Dal Pont, 'The High Court's Constructive Trust Tricenarian: Its Legacy from 1985–2015' (2015) 36(2) *Adelaide Law Review* 459, 467–8; Barbara McDonald, 'Constructive Trusts' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 721, 790 [2146]; Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years since *Cummins* and Confusion Still Reigns' (2012) 36(1) *Melbourne University Law Review* 216, 219–20; *Carson v Wood* (1994) 34 NSWLR 9, 17–18 (Clarke JA, Kirby P agreeing at 10) ('*Carson*'), discussed in Pamela O'Connor,

therefore, it is a 'remedial constructive trust', a concept which is not recognised in England.[7]

It may be that this uncertainty has not received close examination due to the common perception that, today, the doctrine is of diminished relevance. After all, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) now allows courts to exercise remedial discretion to adjust property rights at the dissolution of de facto relationships. But a cursory survey of reported cases reveals that the JECT doctrine was pleaded in at least 26 cases in 2019 alone.[8] It is amply clear that the doctrine continues to be practically relevant in modern judicial practice, for example where disputes arise in the context of bankruptcy, or between parties who are not in a marital or de facto relationship. Therefore, the need for a proper understanding of the topic cannot be overstated.

The main aim of this article is to deconstruct the notion of unconscionability in the context of the JECT doctrine. Part II of this article critiques the idea that unconscionability is necessary for the doctrine to apply. The point is made that the operation of the doctrine is triggered by ascertainable and predetermined real world events and not by any vaguely defined standards. Part III explains that the JECT aims to prevent unconscionability. It suggests that the law achieves this through a structured remedial approach, as opposed to the exercise of open-ended remedial discretion. Part IV reflects on the implications of this analysis on the rationale of the JECT doctrine and on the relationship between the JECT doctrine and the common intention constructive trust ('CICT') doctrine.[9]

'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20(3) *Melbourne University Law Review* 735, 744; John Mee, 'Trusts of the Family Home: Social Change, Judicial Innovation and Legislative Reform' (2016) 56 *Irish Jurist* 161, 176–7.

7 See especially Ying Khai Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 75(3) *Cambridge Law Journal* 528, 540, 544, 546, 548.

8 *Massalski v Riley* [2019] FamCA 1013; *Zorostar Pty Ltd v Arian Investments Pty Ltd* [2019] WASC 415; *Clementi v Rossi* [2019] VSC 725 ('*Clementi*'); *Shepard v Behman* [2019] FCA 1801; *Weatherley v Weatherley* [2019] VCAT 1393 ('*Weatherley*'); *Wu v Yu* [2019] QCA 175; *Lamers v Lamers [No 4]* [2019] VSC 510; *Hughes v Sangster* [2019] ACTSC 178 ('*Hughes*'); *Combis v Brent* (2019) 17 ABC(NS) 53; *Nguyen v Minister for Home Affairs* [2019] FCA 1095; *Staatz v Berry [No 3]* (2019) 138 ACSR 231 ('*Staatz [No 3]*'); *Nguyen v Corbett [No 4]* [2019] NSWSC 712 ('*Corbett [No 4]*'); *DKL v LYK* [2019] SASC 100 ('*DKL*'); *Lu v Wong* [2019] WASC 169; *Diransson Pty Ltd v El Dirani* [2019] NSWSC 617; *Burton v Prior* [2019] NSWSC 518 ('*Burton*'); *E Co v Q [No 4]* [2019] NSWSC 429; *Grech v Richardson* [2019] VCAT 363; *Spink* (n 1); *Nguyen v Nguyen* [2019] NSWSC 131; *Stewart v Owen* [2019] VCAT 140; *Karan v Nicholas* [2019] VSC 35; *Ingles v Ingles* [2019] FamCA 33; *Currie v Currie [No 2]* [2019] WASCA 2; *Maisano v Maisano* [2019] VCC 787; *Yotchev v Georgievski* [2019] SADC 61.

9 A constructive trust arises when the precise requirements of the doctrine are fulfilled, namely, that there was an express or inferred common intention between the parties concerning their respective beneficial interests in the property, and reliance on that intention by C to their detriment: see *Allen v Snyder* [1977] 2 NSWLR 685, 690 (Glass JA, Samuels JA agreeing at 697) ('*Allen*'); see below Part IV(B).

II Requirements

There are two ways in which the requirements of the JECT doctrine have been understood. The first is that unconscionability is the ultimate overarching requirement. On this understanding, the situations in which the JECT doctrine typically arises are specific manifestations of the wider, more flexible notion of unconscionability. The second understanding is that the doctrine is engaged by a closed list of real world events, the occurrence of which is necessary and sufficient to trigger the application of the doctrine. These competing views are addressed in turn.

A *Unconscionability as the Overarching Requirement?*

The thinking underlying the approach that unconscionability acts as the overarching requirement can be traced back to *Muschinski*. In a passage addressing the fundamental nature of constructive trusts, Deane J said that they are based on 'the traditional equitable notion of unconscionable conduct'.[10] Later, his Honour drew on rules concerning the dissolution of partnerships, the collapse of joint ventures and the common law action for money had and received,[11] observing that there exists a general principle whereby a person is prevented 'from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct'.[12] It was in the course of further refining that principle that the Key Statement was made, which included the remark that '[t]he content of the [JECT] principle is that … equity will not permit … [D] to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do'.[13]

Given that the JECT doctrine was the specific product of Deane J's analytical progression from a more general notion of unconscionability, there is a strong temptation to focus on the latter at the expense of the former. A significant early example is found in *Bryson v Bryant*,[14] where, without close examination of any specific requirements, Kirby P applied 'the "new" principle of constructive trusts stated by the High Court of Australia in *Muschinski* and *Baumgartner*'[15] by assessing in an instinctive way whether it was 'unconscionable' for D to disregard C's wishes.[16] A more recent example is *Lloyd v Tedesco*,[17] in which Murray J cited the cases of *Muschinski* and *Baumgartner* as representing examples of remedial constructive trusts which 'may be imposed … in any case where circumstances and the conduct of the parties are

10 *Muschinski* (n 1) 616.

11 Ibid 619.

12 Ibid 620.

13 Ibid.

14 (1992) 29 NSWLR 188 ('*Bryson*').

15 Ibid 200.

16 Ibid 204–5.

17 (2002) 25 WAR 360 ('*Lloyd*').

such as to make it unconscionable not to impose the trust'.[18] His Honour explained away Deane J's Key Statement as simply a 'statement … made having regard to the particular circumstances of the case'.[19]

Examples can also be found in the literature. For instance, David Hayton has written that *Baumgartner* shows that 'there is a general doctrine of remedying unconscionable conduct that justifies the imposition of a constructive trust'.[20] Paul Finn has also cited *Baumgartner* as an example where 'direct legal effect [was given] to a finding that a person has acted unconscionably', and that, 'of itself, unconscionable conduct can found a cause of action'.[21] These examples take unconscionability to be the ultimate criterion, and imply that there are no more concrete requirements, the circumstances in which the JECT doctrine typically arises merely being specific examples of the wider notion of unconscionability in action.

It is clear that this understanding does not reflect the current state of the law. As will be discussed below, the majority of cases operate on the basis that the applicability of the JECT doctrine turns precisely on whether certain specific requirements have been fulfilled. As Kunc J observed in *Burton v Prior*,[22] '[a]n affirmative conclusion' that the requirements of the JECT doctrine have been fulfilled itself 'establishes the unconscionability which attracts the intervention of equity by the imposition of a constructive trust'.[23] Thus, the doctrine is 'delimited by an abstraction of the material facts in [*Muschinski* and *Baumgartner*]',[24] and the relevant cases do not 'allow interference in property rights in too uncertain terms' because 'the factors activating liability are relatively narrow and are specifically stated [by the High Court] in these cases'.[25]

Normatively, the inherent uncertainty affecting the notion of unconscionability also suggests that it ought not to be taken to be the ultimate criterion. This point can be made from two perspectives. First, when applied 'in its own uncompromising terms',[26] unconscionability is incapable of providing a reason for equity's

18 Ibid 363 [6] (Murray J, Hasluck J agreeing at 372 [47]).

19 Ibid 363 [8]. See also *Stewart v Owen* (2020) 60 VR 341, 358 [63] (Forbes J) ('*Stewart*').

20 David Hayton, 'Remedial Constructive Trusts of Homes: An Overseas View' [1988] (July–August) *Conveyancer and Property Lawyer* 259, 259.

21 Paul Finn, 'Unconscionable Conduct' (1994) 8(1) *Journal of Contract Law* 37, 39.

22 *Burton* (n 8).

23 Ibid [268].

24 O'Connor (n 6) 745.

25 Joachim Dietrich, 'Giving Content to General Concepts' (2005) 29(1) *Melbourne University Law Review* 218, 226.

26 Michael Bryan, 'Constructive Trusts and Unconscionability in Australia: On the Endless Road to Unattainable Perfection' (1994) 8(3) *Trust Law International* 74, 74 ('Unconscionability in Australia').

intervention: it is too imprecise to serve as a touchstone of liability.[27] This point is further developed below.[28]

The second perspective is that directly applying unconscionability unjustifiably collapses distinct doctrines into one another. Take for example the English doctrine exemplified in *Rochefoucauld v Boustead* ('*Rochefoucauld*')[29] and *Bannister v Bannister*,[30] which provides that, if C transfers land to D in reliance on D's informal promise to hold the land on trust for C, a constructive trust arises from the moment D acquires the land in C's favour.[31] At an uncomfortably high level of generality, it might be possible, as the Full Court of the Family Court in *Duarte v Morse*[32] did, to group this doctrine together with the JECT doctrine under the umbrella principle that '[c]onstructive trusts are imposed when it would be unconscionable to allow the legal owner to enjoy the corresponding beneficial ownership of the property'.[33] But such a view distorts a proper analysis by overlooking crucial and fundamental distinctions. To cite but one, the *Rochefoucauld* doctrine arises in response to an informal *agreement*,[34] whereas the JECT doctrine arises 'regardless of actual or presumed agreement or intention'.[35]

Conflating the two doctrines is liable to mislead. Consider the case of *Carson v Wood*,[36] where the plaintiff parties ('C') and the defendant parties ('D') were equal shareholders of a company, X Co. As part of a business reorganisation, the parties entered into a written agreement whereby C would transfer their shares in X Co to D, while D would transfer trademarks held by X Co to a new company ('Y Co'), and the parties would own Y Co equally. C carried out their part of the agreement but D reneged. The New South Wales Court of Appeal declared that X Co held its shares on constructive trust in equal shares for the parties. According to the majority, the reason was that it was 'inequitable and unconscionable' for X Co to assert 'that … [D] was the sole beneficial owner of the trade marks and that … [C] had no interest

27 See above n 5 and accompanying text. See also Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24(1) *University of Queensland Law Journal* 73.

28 See below Part II(B)(4).

29 [1897] 1 Ch 196 ('*Rochefoucauld*').

30 [1948] 2 All ER 133 ('*Bannister*').

31 The doctrine is well recognised in Australia: see, eg, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 656 (Brennan J); *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 53 ATR 527, 602 [329] (Barrett J); *Ciaglia v Ciaglia* (2010) 269 ALR 175.

32 (2019) 59 Fam LR 323.

33 Ibid 404 [536] (Strickland, Aldridge and Austin JJ). A similar analysis of *Rochefoucauld* (n 29) and *Bannister* (n 30) is found in McDonald (n 6): at 778 [2139].

34 This is why the content of the constructive trust tracks the content of D's promise: see Ying Khai Liew, *Rationalising Constructive Trusts* (Hart, 2017) 48.

35 *Baumgartner* (n 4) 148 (Mason CJ, Wilson and Deane JJ).

36 *Carson* (n 6).

in them'.[37] This reasoning is suspect. X Co — the legal entity (as opposed to D as a shareholder) — was not party to the agreement between C and D, and it was surely within its right to take the shareholders as it found them: it had no obligation to act otherwise. How, then, had it acted unconscionably? The root of the problem is a lack of recognition that the doctrine in *Rochefoucauld*, as distinct from the JECT doctrine, provides the proper analysis: C transferred their shares in X Co to D in reliance on D's promise to share the interests in the trademarks with C (via equal shareholding in Y Co); therefore, upon acquisition of C's shares in X Co, and pending transfer of the trademarks to Y Co, D held those transferred shares on constructive trust for C according to D's promise.

B *Real World Events*

Most modern cases take the applicability of the JECT doctrine to depend on the fulfilment of certain real world events. In general terms, it is accepted that those events are that: (1) the parties have contributed towards, or have pooled resources for the purposes of, a joint endeavour; (2) the joint endeavour has failed or terminated; and (3) this has occurred without any attributable blame.[38] On this understanding, it is these precise events which lead to the *conclusion* that it is unconscionable for D to retain the benefit of C's contribution; unconscionability is not itself a requirement for the doctrine to apply. But there is also an outstanding question as to whether a fourth ingredient, (4) wrongdoing in the form of an 'unconscionable retention' of the property, is also necessary.

Each of these elements requires close examination, in order to ascertain what precisely it is that attracts equity's intervention.

1 *Joint Endeavour*

First, what amounts to a joint endeavour? In *Muschinski*, Deane J spoke of a joint endeavour in coterminous terms as a 'joint relationship',[39] while contrasting it with a 'true partnership or contractual joint venture between the parties'.[40] The contrast with partnerships and joint ventures is easily understandable, as the JECT doctrine does not require the relevant parties to be in any association with a view to making a profit.[41]

37 Ibid 17 (Clarke JA).

38 *Muschinski* (n 1) 620.

39 Ibid.

40 Ibid 618.

41 See, eg, *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 15 (Dawson J). Cf the statement in *Lloyd* (n 18) that a 'commercial venture' is necessary for the JECT doctrine to apply: at 379 [86] (Pullin J).

But courts have refused to apply the JECT doctrine simply on the basis that the parties were in a close personal relationship involving cohabitation,[42] and instead C is required to go further 'to identify with some precision, the nature, purpose and scope of … [C's] alleged joint endeavour with [D]'.[43] This might appear surprising if the expressions 'joint endeavour' and 'joint relationship' are given their ordinary meaning, since cohabitants — particularly those in a longstanding relationship — might be thought obviously to fall within its scope. Moreover, such an approach causes uncertainty, as it does not state what precisely it is that C must establish; the subject matter remains ambivalent.

It is submitted that 'joint endeavour' has a technical legal meaning, one which has little to do with a close relationship per se. A joint endeavour, in the relevant sense, exists where both parties have made contributions which are linked directly or indirectly to the acquisition, maintenance, or improvement of the property the subject of the dispute; and the parties intend for the benefit of the contributions to be for their mutual enjoyment.[44] Those contributions must not have been simply put towards maintaining the parties' personal relationship,[45] such as the provision of 'love, care and support'.[46]

When determining whether there is a joint endeavour, it has occasionally been suggested that courts look to the parties' bilateral intentions. In particular, some cases insist that a 'common intention to pool' assets or resources is necessary.[47] The genesis of the phrase 'pooling' is undoubtedly *Baumgartner*, in which the term was

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42 *Willis v Western Australia [No 3]* (2010) 4 ASTLR 359, 376 [72] (Buss JA, McClure P agreeing at 362 [1], Owen JA agreeing at 362 [3]) ('*Willis [No 3]*'), cited in *Trajkoski v Western Australia* [2017] WASC 273, [30] (Le Miere J) ('*Trajkoski*'); *DKL* (n 8) [279] (Doyle J).

43 *Willis [No 3]* (n 42) 376 [72] (Buss JA).

44 See, eg, *Miller v Sutherland* (1990) 14 Fam LR 416, 424 (Cohen J) ('*Miller*'); *Bryson* (n 14) 231 (Samuels AJA); *Lloyd* (n 18) 365 [16] (Murray J); *Willis [No 3]* (n 42) 376 [72] (Buss JA); *DKL* (n 8) [279]–[280] (Doyle J); *Leane v Dalbon* [2020] VSC 461, [79] (Derham AsJ) ('*Leane*'). Some cases seem to set the bar higher, requiring, for example, a direct financial contribution or evidence of a gift: see, eg, *Balnaves v Balnaves* (1988) 12 Fam LR 488, 495 (Nicholson CJ, Fogarty and McCall JJ). Others require a contribution which increases the value of the property in question: see, eg, *Hill v Hill* [2005] NSWSC 863, [41] (Campbell J) ('*Hill*'). These statements, it is suggested, are inaccurate outliers.

45 See, eg, *Cressy v Johnson [No 3]* [2009] VSC 52, [195] (Kaye J); *Hill v Love* (2018) 53 VR 459, 482 [127] (Sifris J); *DKL* (n 8) [279] (Doyle J); *Weatherley* (n 8) [72] (Member Marks).

46 *Lloyd* (n 18) 368 [30] (Murray J).

47 *Fathers v Cook* [2006] WASC 129, [117], [158] (Simmonds J). See *Lloyd* (n 18) 379 [86] (Pullin J). See also at 368 [27] (Murray J), quoted in *Lamers v Western Australia* (2009) 192 A Crim R 471, 476 [33] (Templeman J). This requirement has been discussed in the literature: Mark Pawlowski and Nicola Grout, 'Common Intention and Unconscionability: A Comparative Study of English and Australian Constructive Trusts' (2012) 2(3) *Family Law Review* 164, 176.

employed as a description of the facts of the case.[48] However, one would be mistaken to think that such an intention is a prerequisite: as other cases have explicitly held, 'it is not necessary that there should be a physical pooling',[49] and it is not the case that 'a "pooling of earnings" is indispensable to relief'.[50] Moreover, the JECT doctrine has been applied in cases where no common intention was found, for example, where D told C that C would have no interest in the property,[51] or where C was found to have understood that they would not obtain an interest in the property.[52] This is consistent with the fact, as discussed above, that the JECT doctrine does not respond to any agreement between the parties. Instead, courts look to the *unilateral* intention of the contributor, and ask whether their contribution was intended to 'enhance the material wellbeing of both parties, or to provide the contributing party with an interest in specific property, or … [whether] it is made upon the basis that that party would have an interest in such property'.[53] A pooling of resources is good evidence in favour of inferring an intention to contribute to the joint endeavour, but '[i]t is not … the only circumstance from which such an intention may be inferred'.[54]

2 *Termination*

According to the Key Statement, it is necessary for the substratum of the joint endeavour to have been removed: a termination of the joint endeavour must have occurred.

What counts as a termination in the relevant sense? In a long line of cases,[55] the JECT doctrine was held to be applicable where the termination was due to the bankruptcy of one of the parties. The cases are less clear as to whether the death of one party suffices.[56]

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48 *Baumgartner* (n 4) 148–50 (Mason CJ, Wilson and Deane JJ).

49 *Hibberson v George* (1989) 12 Fam LR 725, 742 (McHugh JA, Hope JA agreeing at 726) ('*Hibberson*').

50 *Turner v Dunne* [1996] QCA 272, 18 (McPherson JA) ('*Turner*').

51 See *Hibberson* (n 49).

52 *Lipman v Lipman* (1989) 13 Fam LR 1, 20 (Powell J). Cf Simon Gardner, 'Rethinking Family Property' (1993) 109 (April) *Law Quarterly Review* 263, 277: '[T]he doctrine requires … that … [the contribution] was seen by the parties as a contribution to a joint venture involving the acquisition of the property'.

53 *Lloyd* (n 18) 365 [16] (Murray J). See also *Hibberson* (n 49) 742 (McHugh JA); *Turner* (n 50) 18 (McPherson JA).

54 *Noordennen v Rofe* [2006] VSCA 253, [32] (Buchanan JA, Callaway JA agreeing at [1], Ashley JA agreeing at [39]) ('*Noordennen*').

55 See, eg, *Re Sabri* (1996) 137 FLR 165 ('*Sabri*'); *Miller* (n 44); *Lo Pilato v Stankovic* [2012] FMCA 736 ('*Lo Pilato*'); *Trustees of the Property of Batavia (Bankrupt) v Batavia* [2018] FamCA 860 ('*Batavia*'); *Clout v Markwell* (2001) 1 ABC(NS) 177 ('*Clout*'); *Parianos v Melluish* (2003) 1 ABC(NS) 333 ('*Parianos*').

56 The result in *Bryson* (n 14) suggests not. Justice Nettle in *Read v Nicholls* [2004] VSC 66, in which one party had died, appeared to suggest that that was sufficient to engage the JECT doctrine. See at [44]: '[T]his case falls to be decided in accordance with the general equitable principles of unconscionable conduct essayed in *Muschinski* … and *Baumgartner*'.

It is submitted that a termination requires a change of circumstances which prevents the mutual enjoyment of the property — one which is substantial enough that it can be concluded that those circumstances were not foreseeable by C when they made their relevant contribution. This analysis is consistent with what the cases say: there needs to be 'a *premature* termination';[57] the new circumstances must 'not [have been] contemplated by the parties';[58] and those circumstances must be 'outside the contemplation or intentions of the parties at the time of entry into the joint endeavour'.[59] Thus, there is no closed list of circumstances which constitute a termination in the relevant sense: this is a question of fact. For example, D's bankruptcy may not be regarded as a relevant termination if, when C makes the relevant contribution, C foresees that D, who is in severe financial difficulty, may soon become bankrupt. Conversely, where D dies of a sudden and unexpected cause, it is likely that a termination will have occurred.[60]

3 *No Attributable Blame*

According to the Key Statement, the joint endeavour must have terminated 'without attributable blame'. Justice Bryson in *Bennett v Horgan*[61] gave the classic exposition of this requirement:

> [I]t does not call for a judgment attributing blame among members of a family for the continuing relationship becoming intolerable, unless perhaps in particularly gross cases. … Leaving gross cases involving criminality or similarly reprehensible behaviour on one side, it should usually be understood … that where personal relationships deteriorate and the sharing of a dwelling becomes intolerable to some or all of those concerned, there is, within the meaning of Deane J's expressions, no attributable blame and the case is one for an equitable adjustment.[62]

Although the point is well taken that judges should not apportion blameworthiness in familial relationships, the suggestion that criminal or similar behaviour would itself bar relief is apt to cause uncertainty. In the first place, it is surely not the case that the blameworthy conduct of *any* party will count: the rule is better understood as preventing *the party claiming an interest* — C — from doing so where C's blameworthy conduct secured the termination of the joint endeavour. Moreover, the

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57 *West v Mead* (2003) 13 BPR 24,431, 24,445 [64] (Campbell J) (emphasis in original) ('*West*').

58 *Henderson v Miles [No 2]* (2005) 12 BPR 23,579, 23,581 [23] (Young CJ in Eq) ('*Henderson [No 2]*').

59 *Cetojevic v Cetojevic* [2007] NSWCA 33, [34] (Hodgson JA, Tobias JA agreeing at [58], McColl JA agreeing at [65]) ('*Cetojevic*').

60 See generally *Cetojevic* (n 59), although the Court also looked at other relevant circumstances in that case.

61 (Supreme Court of New South Wales, Bryson J, 3 June 1994).

62 Ibid 11, quoted in *Kriezis v Kriezis* [2004] NSWSC 167, [23] (Burchett AJ); *Hill* (n 44) [35]; *McKay v McKay* [2008] NSWSC 177, [16] (Brereton J) ('*McKay*'); *Nowland v Nowland* [2020] QSC 151, [194] (Ryan J).

requirement of criminality fails to make a relevant distinction between securing the termination *of the joint endeavour* — that is, acting in such a way that the parties can no longer mutually enjoy the property — and securing the termination *of the personal relationship* between the parties (no matter how reprehensible or criminal that may be).

It is submitted that the better test is that C will be disqualified from obtaining relief if they intentionally hijack the joint endeavour *with the intention of profiting from it*. This test ensures that, consistent with certain other constructive trust doctrines,[63] people may not profit from their wrongdoing, regardless of whether the wrongful conduct may be inherently criminal. After all, it is not the inherent nature of the conduct, but the context in which it arises, with which the JECT doctrine ought to be concerned.

4 *Unconscionability as Wrongdoing?*

Is it a requirement for D to have acted unconscionably, in the sense of having acted wrongfully in *asserting* or *retaining* their interest in the property to the exclusion of C?

According to the Key Statement, the JECT doctrine *prevents* D from 'assert[ing] or retain[ing] the benefit of the relevant property to the extent that it would be unconscionable for him so to do'.[64] This understanding does not require D to have committed wrongdoing: it implies that D does not — and is unable to — commit a wrong as a result of equity's intervention. After all, that which a legal rule precludes cannot logically be a precondition, or a reason, for the legal rule to apply. A number of cases reflect this understanding. In particular, in *Clout v Markwell*[65] and *Jeffrey-Potts v Garel*,[66] the court rejected counsel's argument that the JECT doctrine ought not to apply because D was not shown to have engaged in any wrongful conduct, holding that it is sufficient to show that D's actions '*would be* unconscionable'.[67]

However, in *Muschinksi*, Deane J also went on to say the following about the defendant in that case: 'It is the assertion by Mr Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of their relationship and planned venture which lies at the heart of the characterization of his conduct as unconscionable.'[68]

63 For example, those imposed over property obtained by unlawful killing: see Harold Ford et al, Thomson Reuters, *Ford and Lee: The Law of Trusts* (online at 17 June 2021) [22A.620]. Another doctrine is that in respect of those constructive trusts imposed over bribes and secret commissions obtained by errant fiduciaries: see, eg, *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 360 [256] (Finn, Stone and Perram JJ).

64 *Muschinski* (n 1) 620.

65 *Clout* (n 55).

66 [2012] VSC 237 ('*Jeffrey-Potts*').

67 Ibid [290] (J Forrest J) (emphasis added). See also *Clout* (n 55) 184 [20] (Atkinson J).

68 *Muschinski* (n 1) 622.

This line of thinking was seized upon by the High Court in *Baumgartner*,[69] and by Sir Anthony Mason extra-curially,[70] as authority for the proposition that it is D's wrongful assertion or retention of a full interest which attracts equity's intervention. This thinking has also been adopted in many later cases, which say, for example, that: '*proof* of unconscionable conduct'[71] is required; D must have 'refused recognition of … [C's] interest';[72] or '[i]t is the *assertion* of legal right to the exclusion of or at the expense of the other's interest that calls for protection'.[73] In the context of limitation periods, it has also been suggested that a JECT action 'cannot accrue before … the retention of the contributions of … [C] by … [D] in circumstances where it would be unconscionable for … [D] to do so'.[74]

It is undoubtedly true that, in many of the cases, D acts in a manner which can be described as 'wrongful' or 'unconscionable', and in such cases it is unsurprising that judges seize the occasion to denounce those acts.[75] But the essential question is whether such wrongful conduct is a prerequisite to a JECT claim. As James Edelman has written, 'the key to identifying a given cause of action as a wrong is proof that remedial consequences flow from its characterisation as a breach of duty'.[76] Thus, the litmus test is to ask whether a successful plaintiff [C]'s action is capable of arising prior to any wrongful conduct by D. On the basis of this test, it seems beyond doubt that D's wrongful conduct is not a prerequisite. As discussed below,[77] there is a consistent line of cases holding that, where the joint endeavour terminates due to D's bankruptcy, the constructive trust arising under the doctrine prevails over D's trustee in bankruptcy. The only way in which that outcome can be explained is that the constructive trust arose, at the latest, when D was declared bankrupt. By that stage, it cannot possibly be said that D (or the trustee in bankruptcy) had acted wrongfully by asserting or retaining C's interest in the property; that is, the 'constructive trust … arises upon the failure of a joint endeavour',[78] and not merely when D commits a wrongful act.

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69 *Baumgartner* (n 4) 149 (Mason CJ, Wilson and Deane JJ), 152 (Toohey J).

70 Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 (April) *Law Quarterly Review* 238, 251.

71 *Scanlon v McLeay* [2018] QDC 17, [35] (Rosengren DCJ) (emphasis added).

72 *Re Osborn* (1989) 25 FCR 547, 554 (Pincus J) ('*Osborn*').

73 *Stewart* (n 19) 357 [59] (Forbes J) (emphasis added).

74 *Payne v Rowe* (2012) 16 BPR 30,869, 30,895 [99] (Ball J) ('*Payne*'), cited in *Williams v Congdon* [2018] WASC 289, [24] (Master Sanderson).

75 See, eg, *Muschinski* (n 1) 624 (Deane J).

76 James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 25.

77 See below n 100 and accompanying text.

78 *Staatz [No 3]* (n 8) 279 [178] (Derrington J).

III Remedy

According to the Key Statement, the appropriate remedy in JECT cases is that which prevents D from retaining the benefit of the property 'to the extent that it would be unconscionable for him so to do'.[79] It seems clear that Deane J did not mean for the remedy to be guided by the notion of unconscionability in its unrefined form, since that would conflict with another well-accepted portion of his Honour's judgment in *Muschinski* which cautions against constructive trusts being used as 'a medium for the indulgence of idiosyncratic notions of fairness and justice'.[80] It is surprising, however, that no serious attempt has been made, either in the cases or in the literature, to refine or explain what unconscionability means in this context. This is unfortunate, in light of two major sources of lingering uncertainty.

The first source of uncertainty is a body of High Court case law spanning the past two decades,[81] which suggests that, whenever an award of constructive trust is proposed to be made, courts must exercise remedial discretion to ensure innocent third parties are not prejudiced. The High Court has also stressed the need to join third parties to such proceedings: 'where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined'.[82] Both of these points are, however, framed in general terms; the Court does not say whether (and if so, to what extent) they concretely affect the JECT doctrine.

The second, narrower source of uncertainty is found in the JECT cases, in which there is a lack of consistency in the remedial approach taken. Such uncertainty can be detected from the very inception of the doctrine, in that *Muschinski* and *Baumgartner* approached the matter differently, as Parker J in *Nguyen v Corbett*[83] pointed out:

> In *Muschinski*, the order ultimately made … provided for the property to be sold, with the proceeds to be applied first towards repayment of contributions made by the parties and the balance then to be divided equally. …

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79 *Muschinski* (n 1) 620.

80 Ibid 615.

81 See, eg, *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Giumelli v Giumelli* (1999) 196 CLR 101, 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 45-6 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*John Alexander's Clubs*'). See generally Ying Khai Liew, 'Constructive Trusts in Australia: Taking Stock' (2021) 44(3) *Melbourne University Law Review* (forthcoming).

82 *John Alexander's Clubs* (n 81) 46 [131] (French CJ, Gummow, Hayne, Heydon and Kiefel).

83 *Corbett [No 4]* (n 8).

> The orders made in *Baumgartner* reflect a slightly different approach. … The High Court ordered that upon sale of the property and discharge of the mortgage, there should be deducted a separate contribution made by the appellant to the purchase price from the sale of his own unit, and also expenditure by the appellant after the relationship had come to an end. Subject to those deductions, the proceeds were to be shared in the ratio 55:45 [the ratio the parties agreed represented their respective contributions to the pooled fund].[84]

Lower courts, as well as tribunals, have likewise approached the remedial point in an inconsistent manner. Since *Baumgartner*, there have been at least 40 cases in the courts and tribunals where a remedy has been awarded to the plaintiff in a successful JECT claim.[85] In a significant majority — 29 cases — a constructive trust was awarded. In 21 of those 29 cases, C was awarded a share in the property which reflected the proportion of their contributions to the property;[86] in seven others, C was awarded a share reflecting an agreement or positive intention between the parties as to how the interest in the property would be split.[87] In *Re Sabri*,[88] the precise beneficial split was left to the parties to resolve, failing which the Court determined that it would hear further submissions.[89]

In the remaining 11 cases, a remedy was awarded with the aim simply of returning to C their contributions. However, in none of these 11 cases was a constructive trust awarded. Instead, in three cases, C was awarded compensation to the value of their

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84 Ibid 23–4 [106]–[107] (citations omitted).

85 Only an estimation is given as, for many of the cases, a judgment call is required as to whether or not the JECT doctrine, in its true form (as opposed to a more generalised or confused notion of 'constructive trust'), was applied leading to the remedy being awarded. This survey is not intended to be exhaustive: it is simply intended to be indicative of the trend in the lower courts.

86 *Hibberson* (n 49); *Turner* (n 50); *Brown v Manuel* [1996] QCA 65; *Parij v Parij* (1997) 72 SASR 153; *Justesen v Denham* [1999] WASC 181; *West* (n 57); *Deves v Porter* [2003] NSWSC 625; *Anson v Anson* (2004) 12 BPR 22,303 ('*Anson*'); *Swettenham v Wild* [2005] QCA 264 ('*Swettenham*') (in which C only sought repayment of their original contributions plus interest, but the Court said that a constructive trust reflecting the proportion of their contribution would have been appropriate had C asked for it); *Pain v Pain* [2006] QSC 335 ('*Pain*') (in which the property had been sold, so equitable compensation was awarded instead); *Noordennen* (n 54); *Cetojevic* (n 59) (although the basis for the award in that case is admittedly not clear-cut); *McKay* (n 62); *Djmal v Cemal* [2015] NSWSC 1125; *Nolan v Nolan* [2015] QCA 199; *Stavrianakos v Western Australia* [2016] WASC 64 ('*Stavrianakos*'); *Yeo v Arifovic* [2017] FCCA 604; *Batavia* (n 55); *Staatz [No 3]* (n 8); *Hughes* (n 8); *Clementi* (n 8).

87 *Nichols v Nichols* (1986) 4 BPR 9240; *Woodward v Johnston* [1992] 2 Qd R 214; *Huen v Official Receiver* (2008) 248 ALR 1 ('*Huen*'); *Lo Pilato* (n 55); *Jeffrey-Potts* (n 66); *Payne* (n 74); *Ngatoko v Giannopoulos* [2017] VCAT 360.

88 *Sabri* (n 55).

89 Ibid 189 (Chisholm J).

contribution secured by a charge on the property;[90] in five cases, a similar award was made without mention of a charge;[91] and in the final three cases, the award was a money payment of the *value* of the increase in the land which was ascribable to C's contributions, secured by a charge on the property.[92]

A *An Analytical Framework*

In order to facilitate an analytically robust discussion, it is necessary first to set out a framework for a precise understanding of the relationship between private law remedies and discretion. A comprehensive discussion of this topic has been undertaken elsewhere;[93] for present purposes an outline will suffice.

Remedies can be categorised according to how they relate to the parties' pre-trial, substantive (primary or secondary) rights. Three distinct types of remedies can be detected. The first can be labelled 'replicative' remedies, which give effect to primary rights. Primary rights are those which exist 'in and per se':[94] C has a primary right against D if that right arises from events other than a wrong; its existence does not depend on D committing any breach of a duty. A replicative remedy simply restates — indeed, replicates — the content of C's primary right. Discretion as to the goal or content of the remedy is not exercised: the fact that the law deems C's primary right worthy of being enforced per se negates the need for courts to exercise discretion as to the goal of the awarded remedy. The content of the remedy is determined by direct reference to the parties' rights and duties which comprise their legal relationship. For example, an order that a trustee restore to the trust fund trust property of which the trustee has taken possession is replicative in nature: the court order simply restates and enforces the beneficiary's primary right to the property as revealed in the trust instrument.

The second category of remedies can be labelled 'reflective' remedies, which give effect to — indeed, reflect — secondary rights. Secondary rights 'arise out of violations of primary rights':[95] when D breaches a primary duty, C obtains a

90 *Kavurma v Karakurt* (Supreme Court of New South Wales, Santow J, 7 November 1994) ('*Kavurma*'); *Kais v Turvey* (1994) 11 WAR 357; *Spink* (n 1).

91 *Taylor v Ismailjee* [2001] WASC 36 ('*Taylor*'); *Anderson v Jordan* [2001] WASC 98 ('*Anderson*') (although in this case C only claimed compensation); *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150 ('*John Nelson Developments*'); *Krajovska v Krajovska* [2011] NSWSC 903 (in which C claimed compensation secured by way of a charge, while the Court awarded compensation but refused to secure payment by way of charge); *Austin v Hornby* (2011) 16 BPR 30,623.

92 *Henderson [No 2]* (n 58); *Tasevska v Tasevski* [2011] NSWSC 174 ('*Tasevska*'); *Byrnes v Byrnes* [2012] NSWSC 1600 ('*Byrnes*').

93 See, eg, Liew, *Rationalising Constructive Trusts* (n 34) chs 2, 7, which builds on Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005).

94 John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law*, Robert Campbell (ed) (John Murray, 5th ed, 1885) vol 2, 762.

95 Ibid.

secondary right against D for the correction of the consequences of D's breach. The court is empowered to exercise discretion as to the type, content and extent of a reflective remedy. That discretion is not at large, because it is exercised with a firm view to reflect C's secondary rights. Thus, the discretion is exercised by reference to a remedial goal determined by 'the reasons for the primary obligation that was not performed when its performance was due'.[96] For example, pursuant to a compensatory goal, equitable compensation may be awarded where a trustee's negligent investment of trust property causes loss to the trust fund, and the court has discretion to determine the content (ie, quantum) of the award. Because, in the private law context, those primary rights and duties are owed *by the parties* to one another and to no other, any exercise of discretion to determine the content of the remedy will take into account only considerations which affect justice *inter partes*.

The third category can be labelled 'transformative' remedies. These remedies create 'a legal relation that significantly differs from any legal relation that existed before the court order was made'.[97] A transformative remedy, therefore, has little correlation to C's pre-trial rights, and its award substantially transforms those rights. These remedies provide for the widest remedial potential, allowing for discretion to be exercised both as to the goal and content of the awarded remedy. While providing the greatest degree of flexibility, it is often difficult to predict in advance whether a transformative remedy will be awarded in a particular case, and — if one is awarded — what its content will be. An example can be found in s 183(6) of the *Bankruptcy Act 1966* (Cth), which provides that, where a trustee in bankruptcy has died, their administrator may apply to the court for the release of the trustee's estate from any claims arising out of the trustee's administration of the bankrupt's estate, and 'the Court may make such order as it thinks proper in the circumstances'. The administrator does not have a 'right' to any particular remedy here; instead, the court's remedial discretion plays a central role in determining the type and extent of the remedy, taking into account the circumstances of the case. The discretion which is exercised in the award of transformative remedies can be — and often is — exercised with an eye on how the remedy may affect parties extraneous to those immediately before the court. Thus, third party considerations are often relevant in the award of these remedies.

B *Not Transformative Remedies*

The first point to be made is that the remedies awarded under this doctrine are clearly not transformative remedies. They could be classified as transformative remedies if the High Court's general statements, described above, were taken to be relevant to the JECT doctrine, leading judges to award or deny[98] a constructive trust in view of third party considerations. But this is far from the case.

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96 John Gardner, 'What Is Tort Law for? Part 1: The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1, 33.

97 Zakrzewski (n 93) 203.

98 Or, indeed, to have the constructive trust take effect only from the date of judgment, as in *Muschinski* (n 1). There is hardly a JECT case where such a constructive trust has been awarded.

Take those cases where a joint endeavour was terminated by reason of D's bankruptcy. Apart from an old outlier decision in which Pincus J refused to impose a constructive trust in order to protect the interests of D's innocent creditors,[99] courts have consistently awarded a constructive trust to C which takes priority over D's creditors.[100] If third party considerations were truly relevant, C would clearly have been denied a constructive trust on the basis of 'prejudice' to D's innocent creditors. But, in reality, courts rarely give such consideration to D's creditors in making the award.[101] Even more strikingly, where courts *have* considered the interests of D's creditors, they have come down firmly against them. For example, in *Trustees of the Property of Batavia (Bankrupt) v Batavia*,[102] Cronin J tersely dismissed their interests by holding that 'the Trustees [in bankruptcy] stand in the shoes of the Bankrupt',[103] and in *Clout v Markwell*,[104] Atkinson J held that,

> [a]lthough this may be inconvenient for the administration of bankrupt estates … [c]reditors should be expected in these times to be aware of the possibility of constructive trusts or of equitable interests which may arise when the debtor is married or in a de facto relationship.[105]

Even outside the bankruptcy context, there is hardly any case in which a constructive trust award was denied on the basis of third party considerations. Any remedial discretion has been exercised having regard exclusively to considerations affecting C and D inter se, for example, that: C 'owned the relevant property all along';[106] D's improvements to the property were not shown to have increased its value;[107] the parties were not in 'a very substantial and long-standing relationship';[108] and there was a need for a clean break between C and D.[109]

It is also telling that, in a number of non-bankruptcy cases in which the timing of the remedy was a crucial factor, courts have consistently held that C's right under the

99 *Osborn* (n 72) 554.

100 See, eg, *Sabri* (n 55); *Clout* (n 55); *Parianos* (n 55); *Huen* (n 87); *Tamer v Official Trustee in Bankruptcy* [2016] NSWSC 680 ('*Tamer*'); *Saba v Plumb* [2017] NSWSC 622 ('*Saba*'); *Batavia* (n 55); *Staatz [No 3]* (n 8); *Miller* (n 44); *Lo Pilato* (n 55).

101 See, eg, *Tamer* (n 100); *Parianos* (n 55); *Staatz [No 3]* (n 8); *Miller* (n 44).

102 *Batavia* (n 55).

103 Ibid [51].

104 *Clout* (n 55).

105 Ibid 185 [21].

106 *Hill* (n 44) [38] (Campbell J).

107 Ibid [41].

108 *Kavurma* (n 90) 19 (Santow J). In that case, 'while … a significant relationship existed between [C and D]', it was that 'between a married man and mistress': at 3, 19. Therefore, it was not 'in the same category as those which led the court in those other cases to … [impose] a constructive trust': at 19.

109 *Stoklasa v Stoklasa* [2004] NSWSC 518, [42] (Gzell J).

constructive trust arises at a point in time prior to the orders being made.[110] If third party considerations were a factor in determining the appropriate remedy, it would not be possible to know whether any such parties would be prejudiced until the court so determined.

Neither have the courts been hesitant to impose constructive trusts for want of joinder of third parties. This is wholly consistent with the analysis of Sifris J in *Chickabo Pty Ltd v Zphere Pty Ltd [No 2]*,[111] that third parties who are 'directly affected' are those who have pre-existing interests in the property, and not those who would be affected should a constructive trust remedy be awarded.[112] In any event, the joinder principle is a principle of general application pertaining to legal procedure, and not one specifically affecting the law of constructive trusts.[113]

In the light of the case law, therefore, it can be said that the JECT doctrine does not involve the award of transformative remedies. Contrary to a common assumption, it is amply clear that the doctrine does not provide for 'a wide-ranging judicial discretion to adjust property entitlements on the termination of an intimate cohabitation'.[114] Nor is there a 'dissociation of liability and remedy',[115] that is, once C succeeds in establishing their JECT case, remedial discretion is exercised without the need to consider any rationale underlying the case established.

C *Not Reflective Remedies*

Only in a small number of cases in which remedial discretion was exercised to deny a constructive trust have the courts provided reasons for so doing. In substance, they boil down to one reason: proportionality. For example, in *Taylor v Ismailjee*,[116] Murray J refused to award a constructive trust due to the fact that there was 'an extreme imbalance' in the parties' respective contributions.[117] Further, in *Henderson*

110 See, eg, *Re Jonton Pty Ltd* [1992] 2 Qd R 105, 107–8 (Mackenzie J), quoting *Muschinski* (n 1) 613–14 (Deane J). See also *Parianos* (n 55); *Saba* (n 100); *Stavrianakos* (n 86); *Huen* (n 87).

111 [2019] VSC 580.

112 Ibid [100]–[120].

113 See Ford et al (n 63) [22.580].

114 Mee (n 6) 176. See also Malcolm Cope, 'A Comparative Evaluation of Developments in Equitable Relief for Breach of Fiduciary Duty and Breach of Trust' (2006) 6(1) *Queensland University of Technology Law and Justice Journal* 118, 135–7; Dal Pont (n 6) 474.

115 O'Connor (n 6) 751. See also, David Wright, 'Third Parties and the Australian Remedial Constructive Trust' (2014) 37(2) *University of Western Australia Law Review* 31.

116 *Taylor* (n 91).

117 Ibid [49].

v Miles [No 2] ('*Henderson [No 2]*'),[118] *Tasevska v Tasevski*,[119] and *Byrnes v Byrnes*,[120] the court approached the matter on the basis that it was its task to award only the minimum relief necessary to do justice. In these cases, the remedy was, in essence, conceptualised as a reflective remedy, particularly in that the discretion was exercised taking into account considerations affecting justice inter partes and not matters extraneous to the parties. That is, the discretion was exercised to determine the content of the remedy in order to achieve a particular goal — ostensibly that of proportionality.

There are, however, three reasons why it is mistaken to understand the JECT doctrine as leading to the award of reflective remedies.

First, the ability to award reflective remedies is predicated on there being some breach or wrongdoing. This is because reflective remedies give effect to secondary rights, and secondary rights arise only where there is a breach of a primary right. As Peter Birks explains,

> a practical question of great importance turns on the distinction between, on the one hand, primary obligations … and, on the other, secondary obligations arising from wrongs. Wrongs have a wide-open remedial potential. … A victim of a wrong can be given such remedial rights as the system thinks good. … The system has a choice.[121]

As discussed earlier, wrongdoing is not a prerequisite for the engagement of the JECT doctrine; therefore, the reflective remedies analysis does not work. That is, because the doctrine does not require wrongdoing, it therefore does not have as its aim the correction of the consequences of wrongdoing. Hence, there is no logical room for discretion to be exercised to determine the appropriate content of the remedy.

Secondly, even if wrongdoing were a prerequisite, no satisfactory goal of the remedy can be found. Proportionality is incapable of providing the goal of the exercise of discretion, because it always begs the question — proportionate to what? Proportionality therefore requires a more concrete aim or a target by which its appropriateness can be measured.

To put this in another way, a court cannot impose a remedy *simply* as the 'minimum equity to do justice',[122] since without refining what the aim or target of 'justice' is, the court will simply be indulging in 'idiosyncratic notions of fairness and

118 *Henderson [No 2]* (n 58). See at 23,585 [62] (Young CJ in Eq).

119 *Tasevska* (n 92). See at [82] (Einstein J).

120 *Byrnes* (n 92). See at [124] (Lindsay J).

121 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 12.

122 *Henderson [No 2]* (n 58) 23,585 [62].

justice'.[123] But no concrete aim of the exercise of discretion is evident in the cases. A close contender is Brereton J's suggestion that 'equity can decree something less … [where a return of contributions] would be disproportionate to the requirements of conscionable behaviour'.[124] However, this is question-begging, since the notion of 'conscionable behaviour', left undefined, itself approximates 'idiosyncratic notions of fairness and justice'. Another contender may be 'detriment', drawing on the doctrine of proprietary estoppel, under which reflective remedies are awarded with the aim of preventing the plaintiff from suffering detriment.[125] But that aim cannot easily explain the JECT doctrine. It has been held that detriment 'is that which would flow from the change of position if the assumption were deserted that led to it'.[126] Given that a breach or wrongdoing is not a prerequisite to the application of the JECT doctrine, there is no detriment for the awarded remedy to avoid.

One might riposte, according to what was stated by Young CJ in Eq in *Henderson [No 2]*, that, under the JECT doctrine,

> one looks not to the detriment that might be suffered because the arrangement did not continue, but merely to the detriment of losing a fund to the other party to the arrangement through unexpected circumstances, where such loss would result in the other having an unconscionable gain.[127]

This leads to the third and final reason why the JECT doctrine does not entail reflective remedies: the exercise of discretion to achieve proportionality is never necessary. Certainly, the Key Statement says that 'equity will not permit … [D] to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do'. But it is difficult to see when it would ever be proportionate, and therefore conscionable, for D to assert their interest to the exclusion of C, regardless of how little C had contributed (so long as C's contribution is linked to the property in the relevant way and is not *de minimis*). An analogy with resulting trusts is apposite: if A contributes 1% and B contributes 99% to purchase a property in B's name, B holds the property on a resulting trust for A and B in proportion to their contributions: no question of proportionality arises even though A's contribution is minimal. Moreover, given that, under the JECT doctrine, C must have contributed to the acquisition, maintenance, or improvement of the property, the exercise of remedial discretion is likely to lead to an award which *disproportionately* allows D to retain the benefit of C's contribution.

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123 *Muschinski* (n 1) 615 (Deane J).

124 *McKay* (n 63) [33].

125 See, eg, *Staatz [No 3]* (n 8) 276 [166] (Derrington J). On proprietary estoppel, see Ying Khai Liew, 'Proprietary Estoppel in Australia: Two Options for Exercising Remedial Discretion' (2020) 43(1) *University of New South Wales Law Journal* 281.

126 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J), quoted in *Sidhu v Van Dyke* (2014) 251 CLR 505, 528 [80] (French CJ, Kiefel, Bell and Keane JJ).

127 *Henderson [No 2]* (n 58) 23,589 [95].

D *Replicative Remedies: A Structured Remedial Framework*

On a proper understanding, the JECT doctrine entails the award of a replicative remedy in line with a structured remedial framework. It is at once admitted that judges and commentators have not conceptualised JECT remedies in these terms, as the unrefined notion of unconscionability strongly permeates and clouds the present understanding. However, analytical coherence requires us to take the replicative nature of the remedy seriously. Indeed, such an analysis is capable of providing a coherent *explanation* of what courts mean by 'preventing' unconscionability.

To explain the structured remedial framework, it is necessary first to reject two types of analyses found in the cases. Most obviously, those cases in which the courts have exercised remedial discretion on the basis of proportionality must be taken to be wrongly decided for the reasons given above. Also to be rejected are those cases where the remedy precisely mirrors the content of the parties' agreement as to how the interest in the property would be split. The reason for this is not that those cases purport to exercise any remedial discretion at all, but rather that an intention- or agreement-based remedy is inconsistent with the very nature of the JECT doctrine: as discussed earlier, this doctrine arises regardless of intention. On a proper analysis, those cases are better understood as applications of other constructive trust doctrines, such as the doctrine in *Rochefoucauld*, discussed above,[128] or the CICT doctrine, discussed below.[129]

Once we put to one side those cases, a structured remedial framework emerges. This framework contains two limbs, each giving rise to a different type of remedy. The question of which applies is determined by the effect C's contribution has on the value of the property at the time of the failure of the joint endeavour. First, where C's contribution has increased the value of D's interest in the property, then D holds the proportional increase in value on constructive trust for C. Secondly, where C's contribution does not increase the value of D's interest in the property, but without which the value of D's interest in the property could not have been maintained, C obtains the right to equitable compensation from D for the value of C's contribution, secured by an equitable charge over D's interest in the property.

It appears that the first limb reflects the remedy ultimately awarded in *Baumgartner*. It also explains remedies awarded in the majority of lower court decisions; a probable reason for this is that C is more likely to pursue a claim against D where C's contribution increases the value of the interest D has in the property.

The second limb is reflected in *Muschinski*. In that case, C and D had purchased a property as tenants in common in equal shares, with C having contributed substantially more than D when their joint endeavour came to an end. The High Court imposed a constructive trust to the effect that the parties held 'their respective legal interests as tenants in common upon trust … to repay to each [party] her or his

128 See above nn 29–35 and accompanying text.

129 See below Part IV(B).

respective contribution and as to the residue for them both in equal shares'.[130] Taken literally, a constructive trust to repay each other their respective contributions is meaningless. A trust provides its beneficiary with a *beneficial interest* in the trust property; it is not a remedy suited to compel repayment of a sum of money.

Perhaps the Court imposed a 'constructive trust' because that was in substance C's claim, C having 'asserted merely a proprietary right'.[131] Moreover, the Court may have considered that that remedy was convenient because the parties had already been holding the property on trust as tenants in common from the outset. But to illustrate the oddity of that remedial outcome, suppose the property was held in D's sole name: it is hardly sensible for any court that wishes to compel D simply to repay to C the value of C's contribution to award a *constructive trust* to achieve that end. A more fitting remedy, surely, would be equitable compensation secured by a charge. Thus, in *Muschinski*, the outcome would have better been achieved by way of an award of equitable compensation to each party against the other for a half-share of the value of their contribution, secured by an equitable charge on the other's interest in the property. The explanation for why this was (in effect) the award in *Muschinski* is that neither party's contribution was shown to have *increased* the value of the other's share in the property. At best, each party's contribution enabled the other only to obtain their initial half-share interest in the property. Hence, a constructive trust reflecting an increase in value was not an appropriate remedy.

A number of crucial points about the structured remedial framework require noting. First, both limbs are consistent with — and indeed, give substance to — the part of the Key Statement which provides that the JECT doctrine prevents D from unconscionably retaining the benefit of the relevant property. In relation to the first limb, it is necessary to allocate to C the real value of their contribution because D ought never to have taken the benefit of the increase in value that was ascribable to C's contribution. In relation to the second limb, D cannot be left to take their interest in the property to C's exclusion without accounting to C for the value of C's contribution which has maintained the value of D's interest in the property.

Secondly, C's right to the (replicative) remedy arises from the moment the joint endeavour is prematurely terminated.[132] As a result, the exercise of remedial discretion does not come into the picture.

However, and thirdly, this is not to say that the courts are invariably bound by the structured framework in the sense that they *must* make the ultimate award it dictates. Rather, as *Baumgartner* indicates, adjustments may be necessary in order to ensure that the ultimate remedy awarded does not do more than necessary to allocate or return to C that which is due to them. Further, if C is entitled to a constructive trust under the structured framework, but the property has already been sold by D, then

130 *Muschinski* (n 1) 624 (Deane J, Gibbs CJ agreeing at 598, Mason J agreeing at 599).

131 Ibid 607 (Brennan J).

132 *Anson* (n 86) 22,309 [36] (Campbell J).

that cannot be done; rather, as *Pain v Pain*[133] indicates, equitable compensation will be the next best remedy. In addition, the remedy awarded will not exceed that which is actually sought by C, so that, if C claims a remedy less than what they would otherwise be entitled — for example, equitable compensation where a constructive trust would have been an appropriate award — then that is the maximum remedy which the court will award to C.[134]

Finally, the lack of discretion to determine the nature of the remedy is not inconsistent with the view expressed in *Baumgartner* that

> [t]he court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest.[135]

This statement simply provides two crucial reminders. On the one hand, C cannot expect to obtain a remedy simply on the basis of contributions *to the parties' joint relationship*: as discussed earlier, such contributions must be linked to the property in the relevant sense. On the other hand, the burden upon C to demonstrate that their contribution either increased or maintained the value of D's interest in the property is by no means a trivial one.

IV Implications

The discussion above has attempted to deconstruct the role of unconscionability in the JECT doctrine, first, by refuting the idea that unconscionability — either per se or as implying wrongdoing — is a prerequisite to the application of the doctrine, and secondly, by explaining that the remedial aim of 'avoiding unconscionability' is best understood by way of a structured framework. Under this framework, a replicative remedy is awarded, the nature of which depends on the effect of C's contribution to the value of D's interest in the property at the time of the termination of the parties' joint endeavour.

This Part considers how the foregoing analysis impacts on the conceptualisation of the rationale of the JECT doctrine, and on how we ought to understand the interplay between the JECT doctrine and the CICT doctrine.

A *Rationale*

To date, there has not been any attempt to explain the precise rationale of — or *reason for* — the JECT doctrine. This might appear to be a surprising claim in the light of Deane J's words in *Muschinski* that the 'rationale and operation' of the

133 *Pain* (n 86).

134 See, eg, *Swettenham* (n 86); *Anderson* (n 91).

135 *Baumgartner* (n 4) 150 (Mason CJ, Wilson and Deane JJ).

doctrine is 'to prevent wrongful and undue advantage being taken by one party of a benefit derived at the expense of the other party in the special circumstances of the unforeseen and premature collapse of a joint relationship or endeavour'.[136] However, the point has been made earlier in this article that that which is prevented by equity's intervention does not provide a positive *reason* for that intervention. To put this in a different way, Deane J's judgment does not explain precisely *why* it is wrongful or undue for D to retain the benefit of C's contribution in the relevant circumstances. It is insufficient to rely on an unrefined notion of (preventing) unconscionability.

Might it be said that equity intervenes because D is enriched unjustly at C's expense? There are insurmountable difficulties with this understanding. First, in *Muschinski* itself, Deane J rejected counsel's submission that there exists a general principle of unjust enrichment in Australia which provides 'a basis of decision as distinct from an informative generic label for purposes of classification'.[137] Insofar as Australian law is concerned, unjust enrichment is too imprecise to provide a reason for equity's intervention. Secondly, even if we accept that unjust enrichment is capable of playing a more active role in modern legal reasoning,[138] it is clear that Australian law does not adopt an 'absence of basis' understanding of unjust enrichment, whereby liability arises simply because there lacks a legal explanation for the transfer from C to D:[139] the principle can apply only if an unjust factor can positively be identified. The closest unjust factor potentially of relevance in the present context is a failure of basis.[140] However, a *total* failure is required,[141] a requirement which is not fulfilled in the context of the JECT doctrine because there is no failure from the time the contribution is made to the time the joint endeavour terminates. Thirdly, even if one takes the view that a 'total' failure is not actually required, but rather that the requirement is that the failure be not 'insubstantial',[142] it remains that the requirement will not be met in many JECT cases. This is particularly so in those cases in which C's contribution was made long before the termination of the parties' joint endeavour. Fourthly, even if an unjust factor could be identified in JECT cases, an unjust enrichment logic does not sit easily with the remedial approach of the JECT doctrine: it is by no means clear that unjust enrichment leads (or ought to lead) to the award of a proprietary remedy.[143]

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136 *Muschinski* (n 1) 621.

137 Ibid 617.

138 See Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice' (2020) 43(3) *Melbourne University Law Review* 903.

139 Michael Bryan, 'Peter Birks and Unjust Enrichment in Australia' (2004) 28(3) *Melbourne University Law Review* 724, 728.

140 See generally Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) ch 12.

141 See, eg, *Whincup v Hughes* (1871) LR 6 CP 78, 85 (Montague Smith J).

142 See, eg, Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72(2) *Cambridge Law Journal* 414.

143 See generally Mitchell, Mitchell and Watterson (n 140) Ch 37.

It is submitted that the rationale for the doctrine can be found in the Key Statement, but only if we shift our attention away from the notion of unconscionability therein. Justice Deane described the doctrine as being engaged where C's contribution is made 'in circumstances in which it was not specifically intended or specially provided that … [D] should so enjoy it'.[144] While it is true that the JECT doctrine arises 'independently of the actual intention of the parties',[145] its rationale has much to do with C's unilateral intention. Specifically, it is C's *negative intention* which provides the rationale for the doctrine: equity intervenes *because* C's intention in making the contribution was that it would not be for D's sole benefit, but rather for the parties' joint benefit pursuant to the joint endeavour. This is the reason why, when the joint endeavour prematurely terminates, equity ensures that D does not retain any unintended benefits of C's contribution, by applying the structured remedial framework discussed earlier. More broadly, this rationale is based on a general concern to protect and enhance C's personal autonomy, guarding against circumstances where individuals are coerced into relinquishing the benefits of their contributions where they have not decisively chosen to do so.[146] In so doing, the law maximises their ability to determine for themselves the purposes and goals towards which they make their contributions. In other words, the JECT doctrine is autonomy-enhancing.

B *Relationship with the CICT Doctrine*

Another implication of the analysis in this article is that the JECT doctrine is a property law doctrine: it provides a structured solution for the division of beneficial interests in property, rather than an open-ended discretion to (re)allocate property rights. Thus, it is neither here nor there to criticise the doctrine for failing to take into account 'role-divisions assumed within a domestic relationship',[147] or for inadequately recognising non-financial contributions.[148] Nor is it surprising to find that the JECT doctrine has not been applied exclusively in the domestic context.[149]

But it is undeniable that the JECT doctrine most commonly arises in the context of the termination of domestic relationships, and in that context an important question arises as to its precise relationship with the CICT doctrine. As Michael Bryan has observed, the High Court, in developing the JECT doctrine, 'failed to clarify whether the new model superseded the old "common intention" constructive trust or

144 *Muschinski* (n 1) 620.

145 Ibid 617.

146 See Ying Khai Liew, 'Justifying Anglo-American Trusts Law' (2021) 12(3) *William and Mary Business Law Review* 685.

147 Rebecca Bailey-Harris, 'Equity Still Childbearing in Australia?' (1997) 113 (April) *Law Quarterly Review* 227, 228.

148 Ibid 229.

149 See, eg, *Staatz [No 3]* (n 8); *Carson* (n 6); *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR 97,590; *John Nelson Developments* (n 91).

whether it operated alongside it'.[150] That uncertainty has been perpetuated by lower court decisions post-*Baumgartner*. While many cases treat the JECT and CICT as separate and distinct doctrines,[151] this is not invariably the case: a not insignificant number of cases have cited *Muschinski* and/or *Baumgartner* as authorities for the CICT doctrine.[152] As this article has sought to demonstrate, it is a mistake simply to accept that the constructive trusts arising by way of both doctrines are based on 'the equitable jurisdiction to prevent unconscionable conduct of the person having legal ownership'.[153] A more precise analysis is required.

When the authorities are closely examined, it can be seen that the CICT doctrine is concerned with replicative remedies.[154] A constructive trust arises when the precise requirements of the doctrine are fulfilled, namely, that there was an express or inferred common intention between the parties concerning their respective beneficial interests in the property, and reliance on that intention by C to their detriment.[155] Those precise requirements are distinct from those required to invoke the JECT doctrine; that is, each doctrine is triggered by different events. Most obviously, the CICT doctrine gives effect to the positive actual intentions of the parties, while the JECT doctrine does not;[156] additionally, the CICT doctrine responds to bilateral intention while the JECT doctrine responds to C's unilateral intention.

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150 Bryan, 'Unconscionability in Australia' (n 26) 74.

151 See, eg, *Green v Green* (1989) 17 NSWLR 343; *Miller* (n 44); *Sivritas v Sivritas* [2008] VSC 374; *Trajkoski* (n 42); *E Co v Q [No 3]* [2018] NSWSC 442; *Staatz [No 3]* (n 8); *Zekry v Zekry* [2020] VSC 221; *Buchan v Young* [2020] QDC 216, [52] (Long DCJ); *Leane* (n 44); *McMillan v Coolah Home Base* [2020] NSWSC 935, [108] (Ward CJ in Eq).

152 See, eg, *McDonald v Dunscombe* [2018] VSC 283, [181] (McMillan J); *Elzamtar v Bangladesh Islamic Centre of NSW Inc* [2020] NSWSC 1161, [137]–[138] (Parker J); *Lu v Yu* [2019] VSC 499, [8] (Derham AsJ); *Dencio v Dencio* [2020] ACTSC 250, [85]–[87], [96] (Burns J); *Moustapha v Nelson [No 3]* [2020] NSWSC 1263, [21] (Parker J); *Wallis v Rudek* [2020] NSWCA 207, [78] (Emmett AJA, White JA agreeing at [1], Simpson AJA agreeing at [119]); *Maher v Maher* [2020] NSWSC 844, [10] (Parker J); *Santos v Stephenson* [2020] NSWSC 90, [62] (Parker J).

153 Ashley Black, '*Baumgartner v Baumgartner*, the Constructive Trust and the Expanding Scope of Unconscionability' (1988) 11(1) *University New South Wales Law Journal* 117, 119.

154 *Parsons v McBain* (2001) 109 FCR 120, 125–6 [13] (Black CJ, Kiefel and Finkelstein JJ); *Clout* (n 55) 184–5 [20] (Atkinson J). Cf *Tamer* (n 100) [179] (Sackar J).

155 See *Allen* (n 9) 690 (Glass JA, Samuels JA agreeing at 697); *Austin v Keele* (1987) 10 NSWLR 283, 290–1 (Lord Oliver for the Court) (Privy Council). For a discussion of the CICT doctrine, see Ying Khai Liew, 'The Secondary-Rights Approach to the "Common Intention Constructive Trust"' [2015] (3) *Conveyancer and Property Lawyer* 210.

156 Thus, it has been repeatedly stressed by judges that the JECT doctrine arises regardless of the intention of the parties: see above n 35 and accompanying text. See also *Trajkoski* (n 42) [30] (Le Miere J); *Willis [No 3]* (n 42) 374 [64] (Buss JA); *Tracy v Bifield* (1998) 23 Fam LR 260, 263 (Templeman J) ('*Tracy*').

It remains to be asked, however, how the two doctrines interrelate: can and ought the JECT doctrine apply if the parties are found to have had a common intention concerning their respective beneficial interests in the property? In *Koh v Chan*,[157] Murray J would have answered this question in the affirmative, because

> the remedial declaration of such a trust is for the purpose of precluding the retention or assertion of the beneficial ownership of property where that would be contrary to equitable principle because in the circumstances it would be unconscionable to permit … [D] to exercise full legal and beneficial rights to the property.[158]

Conversely, in *Tracy v Bifield*,[159] Templeman J held that it was 'inappropriate to impose a constructive trust where the relationship between the parties is governed by an implied … trust based on their actual … intention', because '[c]onstructive trusts are tailored so as to prevent unjust or unconscionable results irrespective of intention. They therefore involve a degree of judicial discretion.'[160] The fact that polar opposite conclusions were reached on the basis of the notion of unconscionability serves only to reinforce the point that that notion, left unrefined, prevents a proper analysis of the law.

It is submitted that everything turns on the content of the parties' common intention. Sometimes the parties' common intention may extend to, or specifically provide for, the termination of their joint endeavour. Often, however, it is simply the case that they would not have contemplated the consequences of an *unforeseen*, premature termination of their joint endeavour. Only in the latter case can the JECT doctrine apply. This is consistent with Deane J's observation in *Muschinski* that

> [w]here there are express or implied contractual provisions specially dealing with the consequences of failure of the joint relationship or endeavour, they will ordinarily apply in law and equity to regulate the rights and duties of the parties between themselves and the prima facie legal position will accordingly prevail. Where, however, there are no applicable contractual provisions or the only applicable provisions were not framed to meet the contingency of premature failure of the enterprise or relationship, other rules or principles will commonly be called into play.[161]

157 (1997) 139 FLR 410.

158 Ibid 421. See also *Tamer* (n 100) [31] (Sackar J).

159 *Tracy* (n 156).

160 Ibid 263.

161 *Muschinski* (n 1) 618. See also *West* (n 57) 24,444–5 [63] (Campbell J); *Trajkoski* (n 42) [30] (Le Miere J).

V Conclusion

In *Royal Brunei Airlines Sdn Bhd v Tan*,[162] Lord Nicholls observed that

> [u]nconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience.[163]

Modern Australian law is worlds apart from the law of Middle Ages England, and yet the appeal of the notion of unconscionability to Australian lawyers seems almost irresistible. Giving in to that temptation sacrifices analytical vigour. Indeed, this article has demonstrated that, on a proper analysis, unconscionability — either per se or as implying the need for wrongdoing — is not a prerequisite to the application the JECT doctrine. The oft-stated aim of the doctrine of avoiding unconscionability in fact reflects a structured remedial framework, whereby plaintiffs obtain either a constructive trust or equitable compensation secured by a charge, depending on the effect of their contributions to the value of the defendant's interest in the relevant property. On the basis of this analysis, we are able to appreciate that the JECT doctrine is autonomy-enhancing; we are also able to resolve the uncertainties concerning the interplay between the JECT doctrine and the CICT doctrine.

162 *Tan* (n 5).

163 Ibid 392.