THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

# What We Talk About When We Talk About Conscience: The Meaning and Function of Conscience in Commercial Law Doctrine

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*For Kathryn, who makes everything possible,*
*and in memory of my father, Dónal Agnew.*

# DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).



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# ABSTRACT

This thesis seeks to explain the meaning and function of conscience in commercial law doctrine. It argues that the idea of conscience in law bears its ordinary meaning. When the courts use the language of conscience, they are simply expressing a moral judgement about whether, e.g. the defendant's behaviour or a particular state of affairs conforms to the commonly held standards of right and wrong to which we all have access and of which we are all expected to be aware. The thesis argues further that the language of conscience has a discernible but very limited function in commercial law doctrine. It helps us to understand that in recognising and enforcing obligations, equity is giving effect to moral obligations, and that it will not do so unless the individual on whom the obligation is to be imposed has knowledge of the relevant facts. However, beyond this, the language of conscience has little, if any, explanatory force. For example, it tells us nothing about the moral principles underpinning particular doctrines, nor does it tell us what or how much an individual must know before it will be reasonable to treat her as subject to an obligation. In fact, the courts' tendency to invoke the language of conscience and unconscionability without regard to the limits of its explanatory power means that a number of important doctrinal questions remain perpetually unanswered and sometimes obscured. Therefore, the thesis concludes that the courts should not continue to use the language of conscience without paying much greater attention to what it can and cannot explain.

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# CHAPTER 1: INTRODUCTION

## CONSCIENCE – THE CONUNDRUM

This thesis seeks to explain the meaning and function of conscience in commercial law doctrine. Conscience is an evocative word, which brings to mind ideas of religious morality and strongly held personal convictions. It conjures up hazy visions of the confessional and the ghosts of conscientious objectors. More prosaically, it speaks to us of our internal moral barometer: our instinct for choosing good over bad, right over wrong and, when we are unsure or fail to make the right choice, of the inner promptings of guilt that nag us repeatedly. It also alludes to intuitively understood moral precepts, which help us judge what *is* right or wrong and by which most of us try to live. Its dimensions are simultaneously internal and external, subjective and objective. Thus, it is 'the little inner voice which warns us that someone may be looking'[1] and at the same time 'a window through which one can see outward to the common truth which founds and sustains us all.'[2]

The idea of conscience is largely impressionistic. If asked to identify behaviour described as 'conscientious' or 'in accordance with good conscience', we could probably do it easily enough: giving alms to charity and returning a dropped wallet to a stranger in the street are obvious examples. In all likelihood, we would also recognize 'unconscientious' or 'unconscionable' behaviour without too much difficulty: lying, cheating in an exam, consciously taking advantage of another's weakness to gain an advantage or deliberately taking something that does not belong to us. Nevertheless, we might find it difficult to define terms such as 'conscientious', 'in good conscience', 'unconscientious' and 'unconscionable' more precisely than to equate them with moral goodness or immoral behaviour, as appropriate.

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[1] H.L. Mencken, *A Little Book in C Major* (John Lane Co 1916) 42, [12].
[2] J. Ratzinger, 'Conscience and Truth' (10th Workshop for Bishops, Dallas, Texas, February 1991) 2.

The blurred contours, intuitive content and distinctive moral overtones of the idea of conscience might well lead us to think that commercial law doctrine is not its obvious habitat. Great store is set by the goals of certainty and predictability in law,[3] particularly in relation to commercial matters.[4] Commercial certainty depends to a great extent on the meaning and function of legal concepts being clear, stable and easily understood by commercial actors. As Kitchin J recently commented, 'Business needs to know where it stands.'[5] Yet judges regularly invoke the idea of conscience - or variants such as unconscientiousness and unconscionability - in a wide range of private law doctrines which affect commercial life, such as trusts law,[6] the liability of third parties for receipt of trust property,[7] mistake,[8] economic duress,[9] undue influence[10] and unconscionable bargains.[11]

Views tend to polarise as to whether the idea of conscience can provide a useful organising legal principle or whether in fact it encourages judges to engage in unacceptably intuitive evaluations and confuses more than it elucidates. Thus, on the one hand it has been argued that the idea of unconscionability can operate as a principle for the unification of doctrines

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[3] O. Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 461.
[4] *Compania de Naviera Nedelka SA v Tradax Internacional SA (The Tres Flores)* [1974] QB 264 (CA), 278 (Roskill LJ); *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2009] 2 CLC 866 [25] (Dyson LJ); *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [123] (Leggatt LJ); *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) [142] (Stuart-Smith J).
[5] *Arrow Generics Ltd v Merck & Co Inc* [2007] EWHC 1900 (Pat), [2008] Bus LR 487 [58] (a patents case).
[6] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), 705 (Lord Browne-Wilkinson).
[7] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [1991] 1 Ch 437 (CA), 456 (Nourse LJ); *Arthur v Attorney General of Turks and Caicos* [2012] UKPC 30 [33] (Sir Terence Etherton).
[8] *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA), 515 (Buckley LJ); *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (CA), 277 (Stuart Smith LJ).
[9] *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620; [1999] CLC 230 (QB), 251 (Mance J) (*obiter*); *Alf Vaughan & Co Ltd (In Receivership) v Royscot Trust Plc* [1999] 1 All ER (Comm) 856 (Ch), 863 (Judge Rich QC).
[10] *Dickinson v Lowery* Unreported, Auld J, 23 March 1990 (QB), p. 20 of transcript (Auld LJ); also *Allcard v Skinner* (1887) 35 Ch D 145 (CA), 190 (Bowen LJ); *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 (CA), 153-4 (Millett LJ) (presumed undue influence); *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 (CA), 970 (Slade LJ) (actual undue influence).
[11] *Hart v O'Connor* [1985] AC 1000 (PC), 1027-28 (Lord Brightman); *Boustany v Pigott* (1993) 69 P & CR 298, 303 (Lord Templeman).

such as undue influence, economic duress and unconscionable bargains.[12] On the other hand the use of the idea of conscience in commercial cases has been subject to criticism on the grounds of vagueness, subjectivity and uncertainty.[13] As early as 1532 reference was made to 'a law called "conscience", which is always uncertain and depends for the greater part on the "arbytrement" of the judge in conscience'.[14] As Birks put it more recently, 'there are hundreds of kinds of equitable fraud and there are hundreds of kinds of unconscionable behaviour.'[15] It is therefore said that conscience is 'a category of meaningless reference likely both to mislead judges and to threaten the position of, in particular, commercial actors.'[16] It is also argued that different judges may take a different view as to what is right or wrong in a particular context, and this makes it possible for them to use the idea of conscience as a thin cloak for the implementation of their own subjectively held moral beliefs.[17]

Moreover, there is concern that the use of the idea of conscience in law may impede 'careful categorisation' of cases and undermine the idea that like cases ought to be treated alike,[18] thus affecting the correct classification of matters involving conscience within the taxonomy of the law. There are questions about how to distinguish between matters of conscience that are justiciable and those that are not in order to avoid the courts having to respond to every injury

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[12] M. Halliwell, *Equity and Good Conscience* (2nd edn, Old Bailey Press 2004); A. Phang, 'Undue Influence - Methodology, Sources and Linkages' [1995] JBL 552, 568-9, 570 (all three doctrines); D. Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479, 482; J. Devenney and A. Chandler, 'Unconscionability and the Taxonomy of Undue Influence' [2007] JBL 541, 542 (unconscionable bargains and undue influence).

[13] P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1, 16-17; P. Birks, 'Equity, Conscience and Unjust Enrichment' (1999) 23 MULR 1, 14-15; C. Rickett, 'Unconscionability and Commercial Law' (2005) 24 UQLJ 73, 74.

[14] J. Guy, *Christopher St German on Chancery and Statute* (Selden Society 1985) 79, quoting the words of Thomas Audley in a lecture given by him in 1532 and contained in The Reports of Sir John Spelman, Vol II, 198-200; F. Pollock, 'The Transformation of Equity' in P. Vinogradoff (ed), *Essays in Legal History* (Clarendon Press 1913) 293.

[15] Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (n 13) 16.

[16] Rickett (n 13) 74. In a similar vein: A. Leff, 'Unconscionability and the Code - the Emperor's New Clause' (1967) 115 U Phil L Rev 485, 557; P. Finn, 'Unconscionable Conduct' (1994) 8 JCL 37, 37; J. Wilson, 'The Institutional and Doctrinal Roles of 'Conscience' in the Law of Contract' (2005) 11 Auckland U L Rev 1, 4; E. Voyiakis, 'Unconscionability and the Value of Choice' in M. Kenny, J. Devenney and L. Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (2010) 80; K. Low, 'Nonfeasance in Equity' (2012) 128 LQR 63, 67.

[17] Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (n 13) 16-17; Birks, 'Equity, Conscience and Unjust Enrichment' (n 13) 14.

[18] Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (n 13) 17.

or injustice, however small.[19] All these criticisms reflect broader concerns about the relationship between the law and morality and tensions within the law between certainty and flexibility, rules and other standards, the common law and equity and distributive and corrective justice. How arguments about the utility of the idea of conscience in law are resolved therefore has implications for the coherence of the law in general.

In light of the above, this thesis seeks to provide a systematic, pan-doctrinal analysis of the meaning and function of conscience in commercial law. The quest for meaning has largely been overlooked but it is important in order that we may consider properly 'the philosophical foundations and principled interpretation of conscience' in private law.[20] It is also important to assess whether the idea of conscience performs a necessary function in adjudication or adds little to legal analysis other than to reassure us that the resolution of the practical problem in question is in some sense fair. This requires us to pay close attention to how the idea of conscience functions within and across doctrines,[21] as each doctrine provides a separate framework within which the idea of conscience works. It is hoped that this will aid a more principled analysis in future cases.

## ARGUMENT AND METHODOLOGY

The thesis draws on the etymology and ordinary meaning of the word 'conscience' as the starting point for what conscience and its variants might mean in law. The thesis goes on to analyse the way in which the courts use the language of conscience in justifying or explaining the basis of their interventions and the nature of the relief in a range of commercial law doctrines relating to: (i) the creation of express and non-express trusts and claims against third parties for interference with equitable relationships (trusts,

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[19] Ibid 17.
[20] G. Virgo, 'Whose Conscience? Unconscionability in the Common Law of Obligations' (Obligations VII, Hong Kong, 15-18 July 2014) 5 (cited with the author's permission).
[21] R. Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part 1' (2000) 16 JCL 1, 8; Wilson (n 16) 3; I. Samet, 'What Conscience Can Do For Equity' (2012) 3 Jurisprudence 13, 16.

the equitable proprietary claim, knowing receipt and dishonest assistance); and (ii) the formation of contracts (mistake, misrepresentation, economic duress, undue influence and unconscionable bargains).

In light of this analysis, the thesis makes a number of arguments. First, it argues that the idea of conscience as it appears in law is not a term of art or a principle. When the courts use the language of conscience and unconscionability, they are simply expressing a moral judgment about whether, e.g. the defendant's behaviour or a particular state of affairs conforms to the commonly held standards of right and wrong to which we all have access and of which we are all expected to be aware. Secondly, it argues that the language of conscience and unconscionability has a discernible but very limited explanatory function in the context of trusts and contract law. It helps us to understand that all obligations are rooted in morality and that equity does not expect us to comply with an obligation unless we have knowledge of the relevant facts. Only then is our capacity for moral reasoning invoked, so that we can - through the application of our innate moral understanding to the facts as we know them to be - determine what we ought to do in the circumstances. At this point (and not before) equity will underwrite the moral obligation with the force of law. Thirdly, it argues that beyond this, the language of conscience has little, if any, explanatory force. The courts' tendency to invoke the language of conscience and unconscionability without regard to the limits of its explanatory power means that a number of important questions remain perpetually unanswered and sometimes obscured. Thus, the language of conscience cannot help us to identify what moral principles underpin doctrines, what or how much an individual must know in order to come under an obligation, the nature and scope of obligations or the necessary preconditions for rescission or relief for wrongdoing. Sometimes the language of conscience also obscures necessary distinctions between liabilities and obligations and between a concern to protect autonomy and a concern to prevent wrongdoing. For all these reasons, the thesis concludes that if judges continue to use the language of conscience, not only must they 'articulate what it is that leads [them] to the conclusion that the conduct in question should

wear this label',[22] but they must also be mindful of what the concept of conscience can and cannot explain.

Inevitably, because of the constraints of space it has not been possible to consider every area of law in which the language of conscience occurs. For this reason, some boundaries have had to be drawn as follows. First, the thesis is concerned with commercial, private law doctrine. For this reason, a detailed consideration of the idea of conscience as it appears in legislation[23] is beyond the scope of this work. Secondly, doctrines in which the language of conscience may appear but which do not quite fit within either of the two broad groups of doctrines referred to above, such as, e.g. abuse of confidence, contractual exclusion clauses, relief against penalties and forfeiture and estoppel are not discussed here (although further work on the latter two doctrines is in progress). Thirdly, doctrines primarily concerned with personal rather than commercial relationships, such as family home constructive trusts, secret trusts and mutual wills, do not feature in this work. Finally, the purpose of this thesis is to explain the role of conscience in English law; it is not a comparative study. That said, the laws of other jurisdictions, particularly Australia and New Zealand, offer many insights concerning the role of conscience in a commercial law context. Consequently, the thesis makes reference to the laws of such jurisdictions where relevant.

This chapter continues by outlining the difficulties associated with analysing conscience in law by reference to the approach of the courts and the academic literature. It then takes as its own starting point for the analysis of the concept of conscience its etymology and dictionary definitions, in order to establish its non-legal meaning and distinguish it from other, related concepts. It considers how various aspects of the non-legal idea of conscience were visible in the idea of conscience as it developed in equity, and finishes by outlining briefly the content of the chapters that follow.

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[22] K. Hayne, 'Letting Justice be Done Without the Heavens Falling' (2002) 27 Mon LR 12, 16.
[23] Such as s.2-302, Uniform Commercial Code (USA); s.51AA, Trade Practices Act 1974 (Aus).

## THE DIFFICULTIES OF ANALYSING CONSCIENCE

The idea of conscience has not proved susceptible to easy explanation or clear categorisation. Judges themselves sometimes find the idea of conscience difficult to define.[24] Thus, Lord Scarman held that '[D]efinition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.'[25] What is more, judges do not consistently refer to a single *subject* whose conscience may be in issue:[26] they often talk about the court's conscience[27] and/or the defendant's conscience.[28] The judicial idea of conscience also appears to extend to different *objects* of evaluation. These include not only the defendant's state of mind[29] and conduct,[30] but also transactions[31] and outcomes.[32] The courts are not always consistent in their use of analytical criteria by which they describe the *modus operandi* of the idea of conscience in law.[33] In some doctrines, such as trusts,[34] knowing receipt[35] and unilateral mistake,[36] factual knowledge is said to affect the defendant's conscience and the concept appears to involve an inquiry into the defendant's

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[24] D. Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 QLJ 206, 209.
[25] *National Westminster Bank Plc v Morgan* [1985] AC 686 (HL), 709 (Lord Scarman); also *Ministry of Health v Simpson* [1951] 1 AC 251 (HL), 276 (Lord Simonds); *Royal Brunei Airlines Sdn. Bhd. v Tan* [1994] UKPC 4, [1995] 2 AC 378 (PC), 392 (Lord Nicholls).
[26] D. Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (2001) 46 McGill LJ 571, 602, 610; Virgo (n 20) 9.
[27] *Nocton v Lord Ashburton* [1914] AC 932 (HL), 952 (Viscount Haldane LC); *Jennings v Rice* [2002] EWCA Civ 159, [2002] 1 P & CR 8, [21] (Aldous LJ).
[28] *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108, 157, [124] (Lord Walker), citing Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch), 1310.
[29] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (n 7); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 6), 705 (Lord Browne-Wilkinson).
[30] *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* (n 8) 515 (Buckley LJ); *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.
[31] *Credit Lyonnais Bank Nederland NV v Burch* (n 10) 152 (Millett LJ); *Coldunell Ltd v Gallon* [1986] QB 1184 (CA), 1194 (Oliver LJ); *Boustany v Pigott* (n 11 ) 303 (Lord Templeman).
[32] *Mair v Rio Grande Rubber Estates Ltd* [1913] AC 853, 873 (Lord Moulton); *Boustany v Pigott* (n 11) 303 (Lord Templeman).
[33] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 602-608; Virgo (n 20).
[34] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 6) 705 (Lord Browne-Wilkinson).
[35] *Re Montagu's Settlement Trusts* [1987] 1 Ch 264 (Ch), 285 (Megarry VC).
[36] *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* (n 8).

internal, *subjective* state of mind. In others, such as e.g. economic duress,[37] actual undue influence[38] and unconscionable bargains,[39] the focus is on whether the defendant's behaviour was unconscionable. However, the use of the term, 'unconscionable' to describe a state of mind has been criticised[40] and judges have insisted that the evaluation of what is unconscionable is or should be exclusively an *objective inquiry*.[41]

In addition, when using the idea of conscience, the courts often engage in different temporal evaluations. Sometimes they use the idea of conscience prospectively, in order to help frame the cause of action, e.g. in cases of knowing receipt,[42] unconscionable bargains or economic duress.[43] This is sometimes referred to as 'unconscientiousness in acquisition'.[44] Sometimes they use the idea of conscience retrospectively, to pass judgment on the defendant's behaviour once the cause of action has been established, e.g. where a defendant is unjustly enriched by a mistaken payment.[45] This is sometimes referred to as 'unconscientiousness *ex post*'.[46] The retrospective use of the idea of conscience has been criticised on the basis that the language of conscience may confuse insofar as it suggests that bad behaviour is necessary to ground relief, when that is not the case.[47] Finally, judges do not always clearly delineate the boundaries between the idea of conscience and other concepts, such as honesty,[48] good faith[49] or reasonableness.[50] This does not

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[37] *Borrelli v Ting* (n 30).
[38] *Bank of Credit and Commerce International v Aboody* (n 7).
[39] *Boustany v Pigott* (n 11).
[40] P. Birks, 'Receipt' in P. Birks and A. Pretto (eds), *Breach of Trust* (Hart 2002) 226; *Pitt v Holt* (n ) 157, [125] (Lord Walker).
[41] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, 1788, [92] (Lord Walker) (proprietary estoppel); *Pitt v Holt* (n 28) 157, [125] (Lord Walker) (mistaken voluntary dispositions).
[42] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (n 7); *Arthur v Attorney General of Turks and Caicos* (n 7).
[43] N. Chin, 'Relieving against Forfeiture: Windfalls and Conscience' (1995) 25 WALR 110, 111.
[44] Ibid 111.
[45] *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24, [58]/26 (Parke B).
[46] P. Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 5-6; P. Birks and N. Chin, 'On the Nature of Undue Influence' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995) 60; Chin (n 44) 112.
[47] Birks, *Unjust Enrichment* (n 46) 5-6; Birks and Chin, 'On the Nature of Undue Influence' (n 46) 61; Chin (n 46) 112.
[48] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 25) 392 (Lord Nicholls).
[49] *Arthur v Attorney General of Turks and Caicos* (n 7) [40] (Etherton LJ).

help to advance our understanding of conscience or the other ideas with which it may be compared.

Furthermore, the term, 'unconscionability' is often used as shorthand[51] to describe two types of contractual unfairness:[52] (i) procedural unfairness, e.g. where a factor such as undue influence, misrepresentation or duress distorts the bargaining process; and (ii) substantive unfairness, e.g. where a contract term disproportionately favours one party. The use of the language of unconscionability in this way can be confusing for two reasons. First, views differ as to whether procedural unconscionability is better explained by reference to a problem with the claimant's consent[53] or to the defendant's fault.[54] Secondly, the distinction between procedural and substantive unfairness is not always clear-cut,[55] not least because contractual imbalance

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[50] *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [60] (Sedley LJ).

[51] Leff (n 16) 489; J. Murray, 'Unconscionability: Unconscionability' (1969) 31 U Pitt L Rev 1, 2; S. Waddams, 'Unconscionability in Contracts' (1976) 39 MLR 369, 390; M. Eisenberg, 'The Bargain Principle and its Limits' (1981-1982) 95 Harv L Rev 741, 752; S. Waddams, 'Unconscionable Contracts: Competing Perspectives' [1999] Saskatchewan L Rev 1, 3. D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999), 251, 252-254, 255-256; *Principles of Equity* (P. Parkinson ed, 2nd edn, Lawbook Co. 2003), 34, [204].

[52] *Hart v O'Connor* (n 11) 1017-8 (Lord Brightman).

[53] M. Ellinghaus, 'In Defense of Unconscionability' (1969) 78 Yale LJ 757, 762; and P. Bridwell, 'The Philosophical Dimensions of the Doctrine of Unconscionability' (2003) 70 U Chi L Rev 1513, 1514 make this argument by reference to freedom of consent generally, in Bridwell's case by reference to the idea of negative freedom. Murray (n 51) 26 and J. Fort, 'Understanding Unconscionability: Defining the Principle' (1978) 9 Loyola University of Chicago Law Journal 765, 798 focus on freedom of consent to the risks allocated by the contract. Birks originally argued that liability for unjust enrichment was strict, so that all unjust factors were based on the vitiation or qualification of consent: P. Birks, *An Introduction to the Law of Restitution* (revised edn, 1989). Later, he argued for a new composite unjust factor of 'absence of basis': Birks, *Unjust Enrichment* (n 46) 101-127. A. Burrows, *The Law of Restitution* (Oxford University Press 2010) 95-117 has rejected absence of basis in favour of the original classification of unjust factors.

[54] M. Eisenberg, 'The Bargain Principle and its Limits' (1982) 95 Harv L Rev 741, 799; Waddams, 'Unconscionable Contracts: Competing Perspectives' (n 51) 1; Bigwood (n 21); R. Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part II' (2000) 16 JCL 191; M. Eisenberg, 'The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake and Nonperformance' (2009) 107 MichLRev 1412, 1416; R. Bigwood, *Exploitative Contracts* (Oxford University Press 2003); R. Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (2005) 25 OJLS 65; D. Capper, 'Protection of the Vulnerable in Financial Transactions - What the Common Law Vitiating Factors can do for You' in M. Kenny, J. Devenney and L. Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press 2010) 167.

[55] A. Phang, 'The Uses of Unconscionability' (1995) 111 LQR 559, 560-561; A. Phang, 'Vitiating Factors in Contract Law - The Interaction of Theory and Practice' (2009) 10 SAcLJ 1, 56; A. Phang, 'Doctrine and Fairness in the Law of Contract' (2009) 29 LS 534, 537, n10;

often provides powerful evidence of bargaining abuse.[56] In addition, the English courts have ostensibly set their faces against relief for contractual imbalance or 'inequality of bargaining power',[57] on the grounds that the restriction of freedom of contract is a legislative task[58] and that, historically, equity did not grant relief for unfairness 'unless the conscience of the plaintiff was in some way affected'.[59]

Although there are some theoretical and doctrinal accounts of conscience in English law, the questions of its meaning and function within and across a wide range of commercial law doctrines have yet to be adequately addressed. Theoretical accounts of conscience[60] tend to reflect a particular philosophical approach and are valuable in their own right, but they do not take us any closer to a doctrinal understanding of what judges actually mean when they use the idea of conscience and what role, if any, it plays in commercial adjudication. Doctrinal attempts to ascribe meaning to unconscionability tend to be either vague, insofar as they rely on equally broad synonyms such as 'unfair' and 'unjust',[61] or tautologous insofar as they define it by reference to synonyms

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Eisenberg, 'The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake and Nonperformance' (n 54) 1416.

[56] E. Posner, 'Contract Law in the Welfare State: A Defence of the Unconscionability Doctrine, Usury Laws and Related Limitations on the Freedom to Contract' (1994) 24 JLS 283, 304; *Hart v O'Connor* (n 11) 1017-1018 (Lord Brightman); A. Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 Anglo-AmLR 1, 10-11.

[57] Lord Denning MR suggested the doctrine of undue influence could be subsumed into a general principle of inequality of bargaining power in *Lloyd's Bank Ltd v Bundy* [1975] QB 326, 339; Waddams, 'Unconscionability in Contracts' (n 51) 385-386, 387. The House of Lords rejected Lord Denning MR's suggestion in *National Westminster Bank Plc v Morgan* (n 25) 707-8 (Lord Scarman). Lord Radcliffe expressed similar sentiments in *Bridge v Campbell Discount Company Ltd* [1962] AC 600 (HL), 622. For differing academic views on whether relief should be granted for substantive unfairness, compare Eisenberg, 'The Bargain Principle and its Limits' (n 54); S. Smith, 'In Defence of Substantive Fairness' (1996) 112 LQR 138; and R. Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 J L Econ & Org 293.

[58] *National Westminster Bank Plc v Morgan* (n 25) 708 (Lord Scarman).

[59] *Hart v O'Connor* (n 11) 1024 (Lord Brightman).

[60] E.g. Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part 1' (n 21); Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part II' (n 54); Bigwood, *Exploitative Contracts* (n 54); Samet (n 21); Voyiakis (n 16); J. Wightman, 'From Individual Thought to Transactional Risk: Some Relational Thoughts about Unconscionability and Regulation' in M. Kenny, J. Devenney and L. Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press 2010).

[61] E.g. Finn (n 16) 38; P. Parkinson, 'The Conscience of Equity' in P. Parkinson (ed), *The Principles of Equity* (2nd edn, Lawbook Co. 2003); Capper, 'Protection of the Vulnerable in Financial Transactions - What the Common Law Vitiating Factors can do for You' (n 54)166.

such as 'unconscientious'.[62] Some doctrinal accounts identify various themes or concepts that appear within doctrines in which the language of conscience is used. The themes identified are diverse and include: lack of consent, avoidance of unjust enrichment and deterrence of wrongdoing;[63] mutuality, leverage, confidence, candour and awareness;[64] and the protection of reasonable expectations of parties engaged in common endeavours falling short of contracts and the protection of parties within relationships of proximity from harm.[65] These themes are not necessarily exclusive to doctrines in which the ideas of conscience and unconscionability appear, so they do not help us to define these ideas more clearly. There is also a tendency to use thematic commonality as a basis for arguing that the idea of unconscionability can work as an umbrella doctrine or principle under which individual doctrines sharing similar features, e.g., the exertion of undue pressure,[66] the absence of real consent or real consideration[67] or relational inequality, transactional imbalance and unconscionable conduct,[68] can be merged or consolidated. The number and diversity of themes makes it very difficult to arrive at a stable definition that is neither so over-inclusive as to be almost meaningless nor arbitrarily narrow.

Two recent accounts of the idea of conscience in law are more enlightening. Klinck[69] considers the meaning of conscience in Canadian equity. Where appropriate this chapter refers to and builds upon his insights as to the meaning of conscience. Virgo[70] undertakes a similar exercise for English equity. His starting point is that at 'the heart of the debate about the use and abuse of

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[62] Halliwell (n 12) v; Wilson (n 16) 4.
[63] S. Waddams, 'Protection of Weaker Parties in English Law' in M. Kenny, J. Devenney and L. Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press 2010).
[64] Klinck, 'The Nebulous Equitable Duty of Conscience' (n 24) (this account is avowedly descriptive: 258).
[65] Finn (n 16) 39.
[66] Halliwell (n 12) 59; Phang, 'Undue Influence - Methodology, Sources and Linkages' (n 12) 568-9, 570 (undue influence, unconscionable bargains and economic duress).
[67] J. McConvill and M. Bagaric, 'The Yoking of Unconscionability and Unjust Enrichment in Australia' (2002) 7 Deakin Law Review 225, 227 (unjust enrichment).
[68] Capper, 'Undue Influence and Unconscionability: A Rationalisation' (n 12) 482 (undue influence and unconscionable bargains); cf. Devenney and Chandler (n 12) 542.
[69] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26).
[70] Virgo (n 20).

"unconscionability" is confusion about whose conscience is relevant to determine what is against conscience'.[71] He then puts forward a taxonomy of conscience that rests on a distinction between the conscience of the defendant and that of the court.[72] However, it is really only possible to answer the question, 'whose conscience?' once we have established what conscience is or what it means. This thesis seeks to address this anterior issue. It considers what conscience means and then examines whether the idea of conscience performs a useful function within English commercial law, a matter which neither Virgo nor Klinck treat in detail.

## CONSCIENCE – ETYMOLOGY AND ORDINARY MEANING

In light of the difficulties associated with analysing conscience outlined above, a different approach is taken here. Before we can consider what conscience might mean in law, it makes sense to consider its non-legal meaning, i.e. how we usually or ordinarily understand the idea of conscience. This section considers the etymology and dictionary definitions of conscience and argues that the idea of conscience refers to the way in which we make moral judgements. In particular, the language of conscience enables us to describe the process of reaching such judgements and the standards to which they refer.

### *Etymology*

The roots of the word 'conscience' are to be found in the Greek word *suneidesis* and the Latin word *conscientia*, which were understood as 'the state (or act) of sharing knowledge or else simply knowledge, awareness, apprehension'.[73] The dictionary defines *conscientia* as 'privity of knowledge, consciousness, from *conscire* be privy to, formed as CON- + *scire* know'.[74] Our contemporary understanding of conscience derives from these roots and

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[71] Ibid 1.
[72] Ibid 26.
[73] C.S. Lewis, *Studies in Words* (2nd edn, Cambridge University Press 1967) 181; R. Trumble and A. Stevenson (eds), *Shorter Oxford English Dictionary*, vol 1 (5th edn, OUP 2002) 490.
[74] Trumble and Stevenson (n 73) 490.

has been heavily influenced by Christian theology along the way,[75] particularly by the work of St Thomas Aquinas.

The idea of conscience refers to two types of consciousness. The first is simply an awareness of one's own acts. It is the recognition 'that we have done or not done something … and according to this, conscience is said to witness'.[76] It has therefore been described as 'knowledge within oneself'[77] or conscience as 'inner witness'.[78] We do not often use the idea of conscience to describe this factual consciousness alone. Instead, we typically use it to refer to *moral* consciousness. Thus, we have a 'clear' conscience when we are conscious that what we have done is right and conversely, we have a 'guilty' conscience when we are conscious that we have done something that is (morally) wrong.[79] How do we reach or obtain this moral consciousness? It depends on an inbuilt human faculty to discern right from wrong. Aquinas referred to this faculty as '*synderesis*',[80] which he described as a 'special natural habit … bestowed on us by nature', which inclines us to good and away from evil.[81] Thus conceived, *synderesis* described our innate capacity for understanding 'the external, objective moral law'.[82] In other words, the Thomist idea of conscience presupposed an external set of universal, objective moral truths to which everyone had access through *synderesis* and which were applicable to any given set of facts.

It is this combination of our awareness of our own acts and our ability to discern what morality requires of us that enables us to make moral judgments. Thus, for Aquinas, the idea of conscience described an act of applied

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[75] D. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate 2010); T. Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47 UTFacLRev 549.
[76] St. Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province tr, Benziger Bros. edn, 1947) Pt I (I), 79, art. 13.
[77] M. Drakopoulou, 'Equity, Conscience and the Art of Judgment as Ius Aequi et Boni' (2000-2001) 5 Law Text Culture 345, 349.
[78] Lewis (n 73) 190.
[79] Trumble and Stevenson (n 73) 491.
[80] Seemingly, a derivative of the Greek *suneidesis*.
[81] Aquinas (n 76) Pt I (I), 79, art. 12; P. Vinogradoff, 'Reason and Conscience in Sixteenth-Century Jurisprudence' (1908) 96 LQR 373, 378.
[82] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 32.

knowledge, an internal process by which *synderesis* combined with factual knowledge of a relevant situation[83] so as to enable the individual to reach a conclusion as to the moral quality of her actions. Conscience could therefore guide us as to what we ought or ought not to do (in the present or future). As Aquinas put it, 'so far as through the conscience we judge that something should be done or not done; and in this sense, conscience is said to incite or to bind'.[84] When performing this function, conscience could be described as 'inner lawgiver'.[85] Conscience could also help us evaluate the moral quality of our past acts: '[I]n the third way, so far as by conscience we judge that something done is well done or ill done, and in this sense conscience is said to excuse, accuse, or torment.'[86] When performing this function, conscience could be described as 'inner judge'.[87] As we shall see in the next section, the Thomist ideas of conscience as inner witness, lawgiver and judge have survived over time.[88]

***Dictionary Definitions***

Our contemporary understanding of conscience closely resembles the Thomist idea of conscience in that the language of conscience refers to the making of moral judgements. We can use the language of conscience to describe the internal process by which we make moral judgements, e.g. we might say that our conscience tells or prompts us to do something. We can also use it to describe the standards by reference to which we make such judgements, e.g. we might say that 'as a matter of conscience' we ought or ought not to do something, i.e. because morality requires it. Finally, we can use it to describe the outcomes of such judgements, e.g. we might conclude that particular behaviour or an outcome was or was not 'in accordance with conscience', i.e. it was moral or immoral.

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[83] Ibid 34.
[84] Aquinas (n 76) Pt I(I), 79, art 13.
[85] Lewis (n 73)194.
[86] Aquinas (n 76).
[87] Lewis (n 73) 194; the Kantian idea of conscience seems to be very similar. According to Samet (n 21) 20, it involves 'the judge as inner voice that applies public objective standard'.
[88] Lewis (n 73) 195.

It is convenient to take the dictionary definition of conscience in three parts. The first part is largely peripheral to our ordinary understanding of conscience. It reads:

> **I 1** One's inmost thought, one's mind or heart.
> …
> **3** Reasonableness, understanding. *rare* (Shakes).[89]

We do not tend to use either definition in everyday speech, perhaps because we have other words that adequately explain the ideas behind the definition, such as 'knowledge' or 'reasonableness'. On their own, these definitions have no moral connotations and therefore do not really get to the heart of what is distinctive about the idea of conscience. For this reason, they are not considered further.

The second part of the dictionary definition of conscience is central to our understanding of conscience in that it describes the factual and moral consciousness that enables us to make moral judgements:

> **2** (An) inward knowledge or consciousness; (an) internal conviction; mental recognition or acknowledgement (of)
> ….
> **II 4** A moral sense of right or wrong; a sense of responsibility felt for private or public actions, motives, etc; the faculty or principle that leads to the approval of right thought or action and condemnation of wrong
> ….
> **7** Sense of guilt with regard to a thought or action; scruple, compunction, remorse.[90]

We can use these three definitions of conscience to describe the internal process by which we make moral judgements. Definition 2 refers to internal knowledge and echoes the Thomist idea of conscience as inner witness. Definition 4 clearly posits a moral sensibility that enables us to tell right from wrong and choose the right course of action. This echoes the Thomist idea of *synderesis*: it suggests an innate capacity to identify moral truth, a sort of

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[89] Trumble and Stevenson (n 73) 490.
[90] Ibid 490.

moral barometer. Definition 7 points to the sense of guilt we feel if we know we have acted wrongly.

An example illustrates the way in which these three definitions help us to describe the process by which we reach moral judgements. Assume I take my neighbour's car without permission. I know the facts, i.e. that I have taken the car. I understand morally that the taking of another's property without permission is regarded as theft and therefore wrong. The application of my internal moral barometer to my internal knowledge of the facts should lead me to the conclusion that it was wrong of me to take the car. If my conscience is working properly, I will feel guilty, which ought to prompt me to return the car. Here, we would typically use the language of conscience to connote the fact that my judgement is a moral one, i.e. 'my conscience told me that taking the car was wrong' or 'my conscience tells me that I ought to give the car back'. What is more, my innate moral understanding enables me to judge the moral quality of other people's behaviour as well as my own, and the language of conscience is also apt to describe this. It follows that if *you* have taken the car without permission, I might say that 'as a matter of conscience, you ought not to have taken the car and should give it back'. However, it is not possible for me to make a moral judgement about my conduct or yours *unless* I have knowledge of the material facts, i.e. that at the time the car was taken, it belonged to someone else.

Our ability to make judgements of conscience presupposes that there are objective moral standards by which such judgements may be made. The third part of the dictionary definition of conscience refers to the act of compliance or the state of conformity with such standards. It reads as follows:

> **5** Conscientious observance *of*, regard *to*.
> **6** Practice of or conformity with what is considered right; conscientiousness. *arch.*[91]

[91] Ibid 490.

Thus, we might say that someone's behaviour or a situation is 'in accordance with' or 'against conscience'. In this way, we use the language of conscience in two ways: to indicate that the standard we are using is a moral one and to describe the outcome of behaviour or a situation in moral terms.

The phrase 'what is considered right' in definition 6 is capable of describing the fact that moral judgements may be made by reference to what is *generally* considered right, as well as what *I* consider to be right. In other words, it presupposes the idea of moral truth. This is important because if the standards by which we make moral judgements were entirely personal, the idea of conscience would be reduced to a synonym for sincerity. Then we would end up with a multiplicity of inconsistent answers to the same question produced by different individuals.[92] The better view is that 'what is considered right' also refers to external, objectively ascertainable moral standards, which we are able to discern through our innate faculty of moral understanding. A definition of conscience that did *not* admit of objective moral standards would be inconsistent not only with the Thomist idea of conscience, but also with the way in which we usually think about morality. As Samet suggests, conscience must 'relate to objective values that can be quoted to other members of the community as reasons for action over and above the special significance they hold for the individual.'[93] Thus, when we say genocide is wrong, we mean it is immoral not just for us but generally.[94] Therefore, what I consider right is best understood as my interpretation of what the objective standard of morality ('the objective standard') requires. Of course, I may sometimes get this wrong, so although I may have acted in accordance with what my conscience tells me is right, I have nevertheless breached the objective standard and so I may also be said to have behaved unconscionably.

The fact that the language of conscience is apt to describe my adherence to the objective standard and my practice of what I believe to be right means that we

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[92] Ratzinger (n 2) 1.
[93] Samet (n 21) 20.
[94] R. Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 Philosophy and Public Affairs 87, 92.

need to be clear about what we mean when we use it to describe the standards by which we make moral judgements or their outcomes. Again, the car example illustrates. Assume I take my neighbour's car without permission. Assume further that society regards the taking of another's property without permission as theft and therefore immoral but I do not believe in private property as a moral good. Because of my personal understanding of what the objective standard requires, I am able to say that even though I took the car, I have acted in accordance with what my conscience tells me is right. Of course, I am mistaken in my understanding of what the *objective* standard of morality requires and I have breached it. Thus, I may be said to have *acted against* or *failed to comply with* the requirements of conscience. Klinck therefore suggests a distinction between doing what *I* believe to be right, in which case we may say I act 'according to conscience',[95] and doing what *is* right (by reference to the objective standard), in which case we may say I act 'according to *good* conscience'.[96] On the same basis, he would distinguish between a 'clear' conscience and a 'sound' conscience. My conscience may be clear because I believe I acted morally in taking the car. However, my conscience is not sound because it failed *in fact* to distinguish between right and wrong,[97] and led me to breach the objective standard by taking the car without permission.

Ultimately, therefore, our ordinary understanding of conscience comprehends a synergy between the internal process by which we make moral judgements and the objective moral standards by reference to which we make them. These moral standards are 'independent of the mind who thinks them', so that our inner debate is not about whether a particular moral obligation or duty exists but 'rather the application of the duty to the specific case at hand.'[98] If our conscience is working properly, our innate capacity for moral understanding allows us to perceive what the objective standard requires of us in a particular case. In turn, by applying our moral understanding to a given set of facts as

[95] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 600.
[96] Ibid.
[97] Ibid.
[98] Samet (n 21) 25.

they are known to us, we can ensure that our behaviour meets with what is right and thus, we may be said to act in accordance with good conscience. This interpretation of conscience is reflected in our contemporary, non-legal understanding of unconscionability and how the idea of conscience developed in equity.

## UNCONSCIONABILITY AND UNCONSCIENTIOUSNESS - ORDINARY MEANING

The ideas of unconscionability and unconscientiousness are very similar in that they both denote a negative moral judgement, [99] i.e. a finding that particular behaviour or an outcome is not in accordance with good conscience in that it fails to comply with the objective standard of morality. The only real difference between the concepts lies in the fact that the idea of unconscientiousness admits of the possibility that an individual's behaviour may be excused on the basis of her personal understanding of what the objective standard requires.

### *Unconscionability*

The word 'unconscionable' is frequently used in law and therefore it is appropriate to consider its non-legal meaning here. 'Unconscionable' suggests a negative moral judgement; it is best understood as describing behaviour, situations or outcomes that do not comply with the objective standard of morality. This failure to comply may but need not be conscious or deliberate: the term 'unconscionable' also captures innocent or inadvertent breaches. This becomes clear when we scrutinise the dictionary definition of 'unconscionable', which reads as follows:

> A *adjective.* 1 Showing no regard for conscience; not in accordance with what is right or reasonable.
> b Unreasonably excessive. c As an intensive: egregious, blatant.

[99] P. Finn, 'Equity and Contract' in P. Finn (ed), *Essays in Contract* (Law Book Co 1987) 106 describes unconscionability as one of equity's 'pejorative adjectives'.

2 Having no conscience; not controlled by conscience; unscrupulous.[100]

Part 1 of the definition of 'unconscionable' refers to a breach of the objective standard, pure and simple. The phrase 'showing no regard for conscience' is ambiguous: it can be read as indicating a failure to comply with one's personal understanding of what the objective standard requires or a failure to comply with the objective standard *per se*. However, the fact that this phrase is followed directly by the phrase 'not in accordance with what is right or reasonable' suggests that 'unconscionable' indicates the latter. It follows that 'showing no regard for conscience' means showing no regard for 'what is right and reasonable', i.e. for what the objective standard of morality requires. I may show no regard for conscience because I do not understand (morally) what it requires or I may know what it requires but I may consciously and deliberately ignore or override it. The definition includes both possibilities. Therefore, if I take my neighbour's car without permission, my behaviour is, without more, unconscionable, irrespective of whether I understood morally that I was acting wrongly when I took it.

Part 1b of the definition defines 'unconscionable' as 'unreasonably excessive'. Arguably, this definition is qualitative, although it contains a quantitative element. For example, if I am sharing a cake with friends and I take an *unconscionably* large slice as opposed to an *extremely* large slice, the implication is that I took more than I was (morally) entitled to. There is nothing to suggest that for my behaviour to be unconscionable, I must have deliberately or consciously taken more than I was entitled to, although of course this may be the case. Part 1c tells us that unconscionable may be used as an intensive to mean 'egregious', i.e. remarkably bad,[101] or 'blatant', i.e. conspicuous or unashamed.[102] It is therefore capable of describing conduct that is just plain bad, i.e. objectively bad, as well as conduct that is unashamedly, i.e. deliberately or consciously bad.

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[100] W. Trumble and A. Stevenson (eds), *Shorter Oxford English Dictionary*, vol 2 (5th edn, OUP 2002) 3421.
[101] Trumble and Stevenson, *Shorter Oxford English Dictionary* vol 1 (n 73) 796.
[102] Ibid 245.

Part 2 of the definition of 'unconscionable' describes the circumstances where an individual breaches the objective standard either without any sense of the moral quality of her actions at all or deliberately, i.e. conscious that she is doing wrong. Here 'unconscionable' is defined as having no conscience or not controlled by conscience or unscrupulous, i.e. without scruples as to the morality of a course of action.[103] If we say I have no conscience, this suggests I lack the faculty of moral understanding, which would enable me to discern what the objective standard requires of me in a particular situation. For example, I may not understand morally that the taking of a car without permission is theft and therefore wrong. I take the car without any sense of the moral quality of my actions and thus my behaviour is unconscionable. If we say I am not controlled by conscience or I am unscrupulous, this admits of the possibility that I may understand morally what the objective standard requires of me, but I have ignored or overridden it. For example, I understand that it is wrong to take my neighbour's car. However, I deliberately ignore or override this message from my conscience and take it anyway. Again, my behaviour is unconscionable but this time I understand morally that I am doing wrong.

***Unconscientiousness***

The idea of unconscionability may be usefully compared to the idea of unconscientiousness. The dictionary definition of 'unconscientious' is 'not conscientious; not scrupulous or careful'.[104] 'Conscientious' means 'obedient to conscience, (habitually) governed by a sense of duty; done according to conscience; scrupulous, painstaking; of or pertaining to conscience.'[105] Clearly there is an overlap between unconscionability and unconscientiousness: I behave unconscientiously or unconscionably if I fail to obey or act in accordance with what conscience requires, i.e. I fail to act morally. We have seen that a failure to act in accordance with what the objective standard of morality requires, irrespective of whether that failure is deliberate or not, is

[103] Trumble and Stevenson, *Shorter Oxford English Dictionary* vol 2 (n 100) 3464, 2718.
[104] Ibid 3421.
[105] Trumble and Stevenson, *Shorter Oxford English Dictionary* vol 1 (n 73) 491.

sufficient to attract the label of unconscionability. However, the word 'unconscientious' is capable of bearing a slightly different meaning.

Very occasionally, society is prepared to make exceptions for a departure from the objective standard on the basis of an individual's sincerity of belief in the rightness of her actions, i.e. because she behaves in accordance with her own sincere interpretation of what the objective standard requires. Take someone who for reasons dictated by her own moral convictions refuses to conform to a rule or regulation, such as one that requires her to fight in a foreign war. We would often refer to this person as a 'conscientious objector' and depending on the circumstances, she might be excused from fighting.[106] Taking a more banal example, we can explore what this exception tells us about the relationship between unconscientiousness and unconscionability. Assume I do not believe in private property as a moral good and I take my neighbour's car without permission, sincerely believing that I am morally entitled to take it. We would be entitled to conclude that my behaviour is *unconscionable* because a finding of unconscionability does not depend on why I breach the objective standard; the term is wide enough to encompass inadvertent and innocent breaches. However, if this were a situation where society was prepared to excuse my behaviour because I have acted in accordance with what I believe to be morally true, we might also say that my behaviour is nevertheless *conscientious* (and therefore not *un*conscientious). Therefore, whilst the idea of unconscionability refers to my failure to comply with the objective standard of morality, the idea of conscientiousness admits of the possibility that such a breach may be excused because although I have failed to comply with the objective standard, I did so in the sincere belief that I was acting morally. The idea of unconscientiousness may therefore be understood in two senses. In its wide sense it refers to a failure to comply with the objective standard, i.e. a failure to act morally or in accordance with good conscience. In its narrow sense it refers to a failure to comply with the objective standard, which cannot be excused on the basis that I thought what I was doing was right.

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[106] Ibid 491; R. Vischer, *Conscience and the Common Good, Reclaiming the Space between Person and State* (Cambridge University Press 2010) 16 gives the example of the draft exemptions under the First Amendment to the United States Constitution.

## RELATED CONCEPTS

Because the ideas of unconscionability and unconscientiousness are used so much in law, it is important to distinguish them from related concepts such as bad faith, dishonesty and unreasonableness. The differences in ordinary meaning are discussed below. They will become important in later chapters, as the courts sometimes fail to distinguish adequately between unconscionability or unconscientiousness and these related concepts.

### *Bad Faith*

Bad faith is defined as 'treachery; intent to deceive'.[107] Its definition suggests that bad faith is limited to consciously culpable conduct. Although it suggests a negative moral judgement, this is specific to a narrower range of behaviour than that encompassed by the labels of unconscionability or unconscientiousness. For example, if I take my neighbour's car, knowing that what I am doing constitutes theft and is wrong, my behaviour is unconscionable or unconscientious and I may also be said to be acting in bad faith. However, if my conscience sends me no message at all about the moral quality of my actions, I may lack the intent to deceive necessary to constitute bad faith but my behaviour is still unconscionable because I have failed to comply with the objective standard. It is also unconscientious in both senses, as society will not make an exception for me simply because I thought I was acting morally.

### *Dishonesty*

Like bad faith, the idea of dishonesty also involves a moral judgement, but it also relates to a narrower range of behaviour than unconscionability or unconscientiousness. 'Dishonest' means (of a conduct or statement), 'not straightforward or honourable; (now chiefly) fraudulent, of the nature of or involving theft, lying or cheating'; and (of a person), 'lacking in probity or integrity, untrustworthy; (now chiefly) apt to steal, cheat, lie, or act

[107] Trumble and Stevenson, *Shorter Oxford English Dictionary* vol 1 (n 73) 917.

fraudulently'.[108] This emphasis on lying, stealing and cheating reflects our ordinary understanding of the term 'dishonest'. If asked what 'dishonest' means or to give an example of dishonest conduct, the specific examples of lying, stealing or cheating spring to mind. Usually, when we say someone is 'honest', we mean that they do not lie, cheat or steal. If this is right, then again my behaviour may be unconscionable or unconscientious but not dishonest. For example, if I deliberately take my neighbour's car without permission, we would say my behaviour is both unconscionable or unconscientious *and* dishonest. However, if I practice eugenics, my conduct is not necessarily dishonest as we would ordinarily understand it, i.e. in the sense of being deceptive or fraudulent, but it is likely to be unconscionable as it runs counter to what the objective standard requires. It is also unconscientious in both senses, as society is unlikely to excuse my behaviour because I think I am acting morally.

***Unreasonableness***

Finally, unconscionability and unconscientiousness must be distinguished from the idea of unreasonableness. Unreasonable means:

> 1 Not endowed with reason; irrational. *Rare*.
> 2 Not based on or acting in accordance with reason or good sense.
> 3 Going beyond what is reasonable or equitable; excessive.[109]

The first two definitions of unreasonable refer to matters of rational rather than moral judgement. Thus, it may be entirely rational for me to take my neighbour's car without permission because I have crashed my own car and cannot afford to fix it or buy a new one. However, because society requires me not to take my neighbour's car without permission, by taking it, I fail to meet the objective standard of right and wrong and so I have acted unconscionably or unconscientiously. The third definition of unreasonable appears to overlap with unconscionable as meaning unreasonably excessive. It also refers to what is 'equitable', i.e. what is 'characterised by equity or

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[108] Ibid 700.
[109] Trumble and Stevenson, *Shorter Oxford English Dictionary* vol 2 (n 100) 3460.

fairness; fair, just'.[110] This could be read as meaning that a judgement that something is unreasonable involves a moral judgement. However, arguably, this is not the case and unreasonable is better read as referring to the rationality or the fairness of behaviour or a situation or outcome. For example, I may choose to give a gift of £5,000 to one of my two children and £20 to the other. There is nothing to suggest that my decision would be unconscionable or unconscientious, i.e. immoral. Nevertheless, the child who received £20 might well complain that my gift to the first child was unreasonable because it was excessive by comparison with what she received. She might also complain that my decision was unfair in the sense of not being unbiased or impartial.

## THE HISTORICAL DEVELOPMENT OF CONSCIENCE IN EQUITY

This section outlines the development of the idea of conscience in equity. It argues that the idea of conscience in equity closely resembled our ordinary understanding of conscience. When the courts were making judgments of conscience they were making moral judgments, which presupposed the existence of objective moral truth. There were three main stages of development of the idea of conscience in equity. In the medieval period when equity was administered by the ecclesiastical chancellors, the Thomist idea of conscience was influential.[111] Its influence was also visible in the work of St German in the sixteenth century. In the seventeenth century Lord Nottingham shaped the idea of conscience in law further by distinguishing between justiciable and non-justiciable conscience. The biggest change over time related to the content of the objective standard by reference to which judgments of conscience were made. Initially, the courts appealed to what they considered to be the universal moral truths laid down by divine law in order to explain decisions, which were not mandated by the common law at the time. By the end of the seventeenth century, the relevant objective standards

[110] Trumble and Stevenson, *Shorter Oxford English Dictionary* vol 1 (n 73) 850.
[111] Drakopoulou (n 77) 351; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 34. On the ecclesiastical origins of the equitable jurisdiction relating to uses and certain aspects of contract law: O. Holmes Jr, 'Early English Equity' (1885) 1 LQR 162.

had largely been incorporated into the case law. This meant that the objective standard was eventually informed by what equity (rather than God) required.

During the medieval period, the idea of conscience developed and was used in two ways. At this time, the common law did not allow for proof of the court's or the defendant's private knowledge of facts. However, Chancery procedure permitted the defendant's private knowledge of facts to be admitted by subpoena. The idea of conscience was important insofar as the requirement of an oath operated directly on the defendant's conscience.[112] Thus, if her conscience was operating properly, she would speak the truth. From this the court could direct its own conscience as to the correct result.[113] During this period the idea of conscience was also used to ensure that justice was achieved in individual cases. Initially the common law and equity were largely undifferentiated,[114] but by the fourteenth century the common law had become increasingly rigid and a distinct equitable jurisdiction developed so as to enable the king through his Council to dispense justice outside the confines of the common law.[115] In the fourteenth and fifteenth centuries, as the ecclesiastical Chancellors gradually took over the King's Council's work in dealing with matters of equity,[116] the ideas of reason and conscience became prominent justifications for equitable intervention.[117]

The medieval idea of conscience in equity drew heavily on the ecclesiastical idea of conscience. Klinck tells us that during the medieval period the ecclesiastical idea of conscience was largely objective[118] in the sense that divine law provided a single external truth or standard for conscience, which

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[112] M. Macnair, 'Equity and Conscience' (2007) 27 OJLS 659.
[113] Ibid.
[114] G. Adams, 'The Origin of English Equity' (1916) 16 Colum L Rev 87, 89, 91-92; L. Owen Pike, 'Common Law and Conscience in the Ancient Court of Chancery' (1885) 1 LQR 443.
[115] L. Knafla, 'Conscience in the English Common Law Tradition' (1976) 26 UTLJ 1, 3, 4; Endicott (n 75) 552; Adams (n 114) 96-98.
[116] G. Adams, 'The Continuity of English Equity' (1916-1917) 26 Yale LJ 550 554.
[117] Ecclesiastical ideas of conscience also found their way into English common law: Knafla (n 115). Doe gives examples, including the concern for a juror's soul if a false verdict was returned: N. Doe, *Fundamental Authority in Late Medieval English Law* (CUP 1990) 137, 130-40, 144, 147-8.
[118] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 31.

was 'something outside' conscience 'but accessible to it'.[119] In other words, the ecclesiastical idea of conscience involved adherence to an objective standard, which was informed by the divine. Daily use of the canon law procedure known as the *denunciatio evangelica* as a supplement to the common law meant that '[T]he duties of conscience, as determined by Christian ethics' provided the standard for decision making in many cases.[120] The ecclesiastical Chancellors believed that it was appropriate to interfere in individual cases in order that justice in accordance with natural law[121] or the law of God, should be achieved,[122] 'even at the cost of dispensing (if necessary) with the law of the state.'[123] Conscience provided the bridge or vehicle by which the Chancellors could apply the law of God and the law of reason to individual cases.[124]

The Chancellors interpreted their own role as being twofold. First, their job was inform the King's conscience,[125] i.e. to interpret (and apply) the divine law on behalf of the King, which formed the objective standard by which litigants' behaviour was judged. Secondly, they were concerned to protect the souls of wrongdoing defendants and help them avoid mortal sin, thus giving rise to the idea that equity acts *in personam*[126] and *on* the conscience. Thus, the idea of conscience used by the Chancellors in performing this role 'connoted what we now call the moral law as it applied to particular individuals for the avoidance of peril to the soul through mortal sin'.[127]

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[119] Ibid 31, 32.
[120] H. Coing, 'English Equity and the Denunciatio Evangelica of the Canon Law' (1955) 71 LQR 223, 230-1; Endicott (n 83) 554. Coing explains that if the plaintiff could establish her claim and the defendant had acted in bad faith, the penalty was excommunication, which was a serious matter.
[121] S. Dobbins, 'Equity: The Court of Conscience or the King's Command, the Dialogues of St. German and Hobbes Compared' (1991) 9 JL& Relig 113 118-119.
[122] H. Potter, *An Introduction to the History of Equity and its Courts* (Sweet & Maxwell 1931) 38.
[123] W. Holdsworth, 'The Early History of Equity' (1914-1915) 13 MichLRev 293, 295.
[124] Ibid 294-295.
[125] Endicott (n 75) 556.
[126] A. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon 1975) 398-399. On how this might be thought to give equity an extra ethical character, see J. Ames, 'The Origin of Uses and Trusts' (1907-1908) 21 Harv L Rev 261, 261-2.
[127] Simpson (n 126) 398.

During the Reformation in the sixteenth century, the idea of sincerity of belief came to be highly valued and the practice of conscientious religious objection took hold.'[128] According to Klinck, this is likely to have resulted in the erosion of a single, universal concept of morality and the corresponding growth of a diversity of moral views. The Protestant idea of conscience emphasised 'personal introspection and individual moral accountability' and therefore contained 'within itself a tendency towards subjectivism and relativism'.[129] However, this move towards relativism did not really change the idea of conscience in law, which continued to be referable to compliance with an objective standard of morality.

St. German's work[130] diminished the idea of conscience in equity as a purely separate, external and divine force and secularised it.[131] Although some suggest that during this period equity still exhibited concern for the soul of the defendant,[132] it seems clear that St. German's work marked a shift towards the idea of equity as an integral part of the law[133] by virtue of which it corrected[134] and supplemented itself.[135] In St. German's view, conscience 'must always be groundyd vpon some law'[136] – the law of God, the law of reason or the law of man (insofar as this was not 'contrary to the lawe of reason nor the law of

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[128] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 77.
[129] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 586.
[130] T. Plucknett and J. Barton (eds), *St. German's Doctor and Student* (Selden Society 1974).
[131] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 581.
[132] W. Holdsworth, *A History of English Law* (7th edn, Methuen & Co. Ltd, Sweet & Maxwell 1966) vol V, 337, 338; W. Jones, *The Elizabethan Court of Chancery* (Clarendon Press 1967) 424; and Simpson (n 126) 400, who suggests that after St. German the ideas of conscience (in the form of judicial concern for men's souls) and *epieikeia* (as the tool for softening the rigour of the common law) remained separate. See also *Eyston v Studd* (1573) 2 Plow 459; 75 ER 688, [466]/698 where Plowden distinguishes between equity as 'a moral virtue which corrects the law' and equity as *epieikeia*.
[133] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 47; Dobbins (n 130) 114, 124; Endicott (n 75) 563, 564; Holdsworth, *A History of English Law* vol IV (n 132) 279-280; Drakopoulou (n 77) 361; Guy (n 14) 19-20; Pollock (n 14) 286-287.
[134] This was not a new idea. It was rooted in the ancient idea of *epieikeia*: Aristotle, *The Nichomachean Ethics* (J. Thomson tr, Penguin 1953) 198-199; C. Allen, *Law in the Making* (7th edn, Clarendon Press 1964) 391-392, 394-396; Endicott (n 75) 563; Dobbins (n 121) 124. Dobbins points out that a similar idea was present in Catholic doctrine, although it emphasised the use of God's law and the law of reason as a corrective: see also Plucknett and Barton (n 130) xlviii.
[135] For examples of the use of the idea of equity as *epieikeia* in statutory interpretation, see C. Hare, 'Inequitable Mistake' (2003) 62 CLJ 29; D. Friedmann, 'The Objective Principle and Involuntariness in Contract and Restitution' (2003) 119 LQR 68; *Eyston v Studd* and Plowden's notes to same (n 132).
[136] Plucknett and Barton (n 130) 167.

god').[137] Where the law of man did not conform to the law of God, the law of God would prevail and in the absence of a remedy at common law, equity could supplement it to provide a remedy or conclusion in accordance with the dictates of conscience and hence, divine law.[138] Here, again, divine law provided the objective standard, which came to be incorporated into the doctrines of equity.

St German's idea of conscience focused extensively on moral understanding[139] and it broadly echoed the Thomist idea of conscience, with its emphasis on the combination of *synderesis* and *conscientia*.[140] St. German differentiated between *synderesis*, as the faculty which allows us to understand 'objective certain truth',[141] and conscience, which he interpreted as meaning 'knowledge with something else' or with 'some particular act', i.e. the process of applied knowledge. This process took the form of synthesis of precepts derived from *synderesis* with factual knowledge so as to reason towards a moral conclusion.[142] For St German conscience 'was not simply an act of subjective moral judgment whose "sincerity" vindicated the individual actor'.[143] It was 'a collective and objective form of applied knowledge and must always be founded upon some law.'[144] In other words, St. German's idea of conscience incorporated the idea of synergy between the process by which individuals made moral judgements and the objective standard, which was, ultimately, informed by the law of God.

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[137] Ibid 111.
[138] Ibid xxvi, xlviii, 95, 97, 103, 111, 113; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 57; Vinogradoff (n 81) 379.
[139] Plucknett and Barton (n 130) 87.
[140] Endicott (n 75) 561-62; Dobbins (n 121) 127; Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 579-80; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 53-56.
[141] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 54; Plucknett and Barton (n 130) xxvi.
[142] Plucknett and Barton (n 130) xvi, 89; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 54. cf Endicott (n 75) 559, who puts it slightly differently – conscience 'is presented as merely the motive, based on *synderesis* and reason, to do a particular act'.
[143] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 580.
[144] Dobbins (n 121) 127.

Klinck tells us that during the seventeenth century the process of individualization of conscience continued at a philosophical and religious level, such that by the end of the century the decision where to find the universal moral truths on which conscience depended had become a very personal activity.[145] At the same time, however, the idea of conscience in law retained its objective flavour and the courts were starting to delineate more clearly the boundaries between justiciable and non-justiciable conscience. The key figure in this process was Lord Nottingham, who emphasized the importance of the idea of conscience,[146] but distinguished between 'such a conscience as is only *naturalis et interna*', which was non-justiciable, and conscience '*civilis et politica*, and tied to certain measures',[147] which was justiciable.

Klinck argues that broadly speaking, conscience *civilis et politica* could be seen as a justiciable sub-set of conscience *naturalis et interna*,[148] and he identifies four distinctions between Lord Nottingham's ideas of justiciable and non-justiciable conscience. They are the distinction between internal and external acts, private actions and public order, charity and justice and the difference between a private and a regulated conscience. These distinctions are important. Arguably, they did not affect the meaning of conscience. Rather, they can be understood as having set the parameters of the objective standard to which equity would give effect. In other words, equity would not punish or grant relief for all forms of unconscionable behaviour. This reflects the view that whilst we may expect all laws to be moral, we do not expect all issues of morality to be governed or reinforced by law.

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[145] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 135, 193, 197, 217.
[146] *Burges v Skinner* (1673) Rep t Finch 91; 23 ER 49; *Lawrence v Berney* (1678) Rep Ch 127; 21 ER 636.
[147] *Cook v Fountain* (1733) 3 Swanst 585; 36 ER 984, [600]/990 (Lord Nottingham).
[148] D. Klinck, 'Lord Nottingham and the Conscience of Equity' (2006) 67 Journal of the History of Ideas 123,127; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 229-230.

The first distinction is between what Klinck calls 'internal dispositions and external acts'.[149] Lord Nottingham's conscience *civilis et politica* was more concerned with a person's external acts[150] than her state of mind. Thus, equity could not intervene in respect of a matter that was internal to the defendant and therefore unknowable to the court unless the defendant revealed it. So, for example, in the case of *Cook v Fountain*,[151] a secret trust was alleged but there was no evidence of it and the defendant had denied its existence. Lord Nottingham held that whether or not the trust existed was a matter 'between a man and his confessor' (i.e. God) and continued by saying that 'with such a conscience that is only *naturalis et interna* the Court has nothing to do'.[152] As Klinck points out, this example is to do with lack of proof, but the idea of (non-justiciable) conscience *naturalis et interna* would also extend to matters that are 'intrinsically internal', such as the making of a mental resolution to hold property on trust[153] without any external indication to that effect. Arguably, it would also extend to the converse, i.e. the making of a mental reservation *not* to hold property on trust, whilst externally executing a written declaration of trust.[154] Finally, it is clear that the idea of conscience *civilis et politica*, i.e. justiciable conscience *did* extend to cases where there was clear evidence of the defendant's state of mind, such as where a defendant relied on the *bona fide* purchase defence.[155]

The second distinction was between private actions and public order. Klinck suggests that this meant that conscience in equity involved a focus on behaviour that had a social rather than merely a private impact.[156] He goes on to argue that 'a plausible concomitant' of this focus was 'the fiction that the judging conscience is not the chancellor's own conscience but a disembodied

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[149] Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 127.
[150] Ibid 127-132; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 234-240.
[151] *Cook v Fountain* (n 147) [600]/990 (Lord Nottingham).
[152] Ibid.
[153] Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 129.
[154] As happened in *Commissioner of Stamp Duties (Queensland) v Jolliffe* (1920) 28 CLR 178.
[155] Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 131-2; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 237-238.
[156] Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 137.

personal conscience that is *per se* public.'[157] He adds that Lord Nottingham saw himself as administering not his own personal conscience, but 'the more abstract and impersonal "conscience of the court"'[158] and conscience 'is spoken of as if it had independent existence, apart from any person's particular conscience.'[159] However, given that by Lord Nottingham's time equity was becoming much more rule-based,[160] the idea that the 'conscience of the court' was abstract and impersonal was perhaps less fictional than it might have been before. Lord Nottingham was concerned that matters of justiciable conscience should be rule-based and those rules were to be consistently applied.[161] Therefore, it is arguable that by his time, the idea of the conscience of the court was *in fact* a more disembodied conscience. The standards by reference to which decisions in Chancery were now made increasingly involved the interpretation and application of settled case law, rather than a direct channelling of the divine through the Chancellor's personal conscience. Put another way, the objective standard was now informed by the corpus of equity rather than the spirit of the divine.

The third distinction was between spiritual and civil matters. Justiciable conscience was concerned with 'the conscience dictated by natural reason'[162] but not with matters that were predominantly spiritual or religious, although clearly the development of conscience in equity up to that point had been heavily influenced by and was rooted in religious doctrine.[163] Finally, Lord Nottingham's idea of justiciable conscience did not extend to enforcing 'beneficence, benevolence, and forgiveness': thus, there was a distinction between charity and justice.[164] This tells us something important about the

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[157] Ibid 138.
[158] Ibid 139.
[159] Ibid 140.
[160] By the end of the seventeenth century equity had been largely systematised: W. Winder, 'Precedent in Equity' (1941) 57 LQR 245.
[161] *Cook v Fountain* (n 147) [600]/990 (Lord Nottingham); Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 142-146, esp 143; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 252-261.
[162] Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 134.
[163] Ibid 132-136; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 240-246.
[164] Klinck, 'Lord Nottingham and the Conscience of Equity' (n 148) 141; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 247-252.

parameters of justiciable conscience: equity was unlikely to interfere in the absence of a requirement of a *quid pro quo*.[165] Outside limited exceptions, such as fiduciary relationships, parties were entitled to behave selfishly[166] and could take advantage of each other's folly as long as the bargaining process itself was fair. Thus, even if a bargain was a harsh one, as long as a person entered into it with his eyes open, 'equity will not relieve him on this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement …'[167] Therefore, the objective standard allowed parties to engage in self-interested bargaining.

By the end of the seventeenth century, the idea of conscience as a juridical principle in its own right had diminished. This was because equity itself had evolved in a syllogistic way through the formation of normative conclusions derived from application of higher precepts drawn from *synderesis*. Those normative conclusions were then applied to individual cases and became rules. As more rules were generated, the need to resort to higher-level principles diminished,[168] and the objective standard increasingly took its content from general equitable principles laid down in the case law.[169]

The doctrinal analysis that follows demonstrates that the idea of conscience closely resembles its ordinary meaning. When the English courts make judgments of conscience they are making moral judgments by reference to the objective standard. They are not usually interested in whether the defendant thought she was acting morally or not. When they determine that something is unconscionable or unconscientious, they mean simply that it does not comply with the objective standard of morality. Such a finding does not necessarily depend on whether the failure to comply was conscious or deliberate. As

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[165] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 250; *The Earl of Oxford's Case in Chancery* (1615) 1 Ch Rep 1; 21 ER 485, [5]/486.
[166] Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 51.
[167] *Willis v Jernegan* (1741) 2 Atk 251; 26 ER 555 (Lord Hardwicke).
[168] Holdsworth, *A History of English Law* (n 132) vol VI, 668-669; Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (n 75) 257, 273.
[169] For a very recent account of the development of conscience in equity, see R. Havelock, 'The Evolution of Equitable 'Conscience'' (2014) 9 Journal of Equity 128.

Klinck puts it, '[A]t most it might be said that the court orders the person to act in the way that it thinks a sound or properly instructed conscience would act.'[170]

The objective standard of equity is informed by the detailed principles of legal and equitable doctrine and in particular, often explicitly, by reference to what constitutes commercially acceptable conduct.[171] The conscience of equity therefore reflects 'a norm of common people',[172] i.e. community values.[173] For it to work in law, it must 'relate to objective values that can be quoted to other members of the community as reasons for action over and above the special significance they hold for the individual.'[174] It is 'a repository of values and standards whereby the conduct of suitors is tested'[175] and litigants are taken to know what the objective standard of equity requires.[176] It remains narrower than the objective standard of moral conscience.

## OUTLINE

The remainder of this thesis considers the meaning and function of conscience in a number of legal doctrines, which have an impact on commercial life. Chapters 2-4 analyse the idea of conscience in the context of trusts. Chapter 2 examines Lord Browne-Wilkinson's statement of the relationship between trusts and conscience in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[177] particularly as it relates to express and resulting trusts. Chapter 3 considers a number of non-express trusts that arise in a commercial context

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[170] Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 604; also *Jones v Morgan* [2001] EWCA Civ 995, p.9 of transcript (Chadwick LJ); J. Chan, 'Dishonesty and Knowledge' (2001) 31 HKLJ 283, 297.
[171] A view supported by Klinck, 'The Unexamined 'Conscience' of Contemporary Canadian Equity' (n 26) 606-7.
[172] Jones (n 132) 419.
[173] F. Pollock, *Essays in Jurisprudence and Ethics* (Macmillan & Co. 1882) 310; Allen (n 134) 421-22; P. Finn, 'Commerce, The Common Law and Morality' (1989) 17 MULR 87; E. Thomas, 'The Harkness Henry Lecture: The Conscience of the Law' (2000) 8 Waikato LRev 1, 3, 4; Halliwell (n 12) 153.
[174] Samet (n 21) 20.
[175] P. Keane, 'The 2009 Wa Lee Lecture in Equity: The Conscience of Equity' (2010) 10 QUTLJ 106, 114.
[176] *Nocton v Lord Ashburton* (n 27) 954 (Viscount Haldane).
[177] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 6).

and are currently referred to as resulting trusts, i.e. the trusts that arise in response to mistaken payments, other defective transfers and theft, the *Pallant v Morgan*[178] equity and trusts of fiduciary profits. Chapter 4 focuses on the position of third parties under the equitable proprietary claim and through the doctrines of knowing receipt and dishonest assistance.

From the analysis in Chapters 2-4, a number of points emerge. First, when the courts use the language of conscience in relation to trusts, they use it consistently with its etymology and ordinary meaning, i.e. to refer to the internal process by which we make moral judgements, the standards by reference to which we make them and the moral quality of behaviour and outcomes. Secondly, Lord Browne-Wilkinson's idea of conscience does have some explanatory force in relation to trusts. It reminds us that in recognising and enforcing trust obligations, equity is underwriting moral obligations. It tells us further that equity will not give effect to such obligations unless the legal owner of the property is in a position to comply with them. This will only be the case where she has knowledge of the relevant facts, i.e. that someone else is entitled to the property, because only then can she identify - through the operation of her conscience – what she ought to do with the property, i.e. deliver it to that other person or hold it for her benefit. At this stage (and not before) equity will underwrite her moral obligations with the force of law. In this way, all trust obligations have their root in conscience. Thirdly, however, beyond this the language of conscience tells us nothing and leaves a number of important questions unanswered. Of itself, it cannot tell us why or when the beneficiary gets equitable title to the property (despite Lord Browne-Wilkinson's assertion to the contrary in *Westdeutsche*). Similarly, it does not help us to identify the content of the obligations to which the legal owner is subject or what or how much she must know before they will arise. To answer these questions, we need direct argument as to the principles the law does and/or should embody in this area of law. The invocation of conscience without reference to its explanatory limits can be dangerous, as it often obscures the fact that these questions need answering at all.

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[178] *Pallant v Morgan* [1953] Ch 43 (Ch).

Chapters 5-7 consider the meaning and function of conscience as it appears in a number of doctrines relating to the formation of contracts, e.g. mistake and misrepresentation (Chapter 5), unconscionable bargains (Chapter 6) and lawful act duress and undue influence (Chapter 7). As in the case of trusts, here the language of conscience bears its ordinary meaning, but its function is even more limited. Where the only question is whether rescission is justified, arguably the language of conscience plays no explanatory role at all beyond reminding us that moral principles ground relief. In principle, rescission can and should follow if the claimant's consent to the relevant transaction has been impaired or distorted and the defendant either caused the problem with her consent (misrepresentation, undue influence, duress) or knew about it (unilateral mistake, unconscionable bargains). Where the defendant's knowledge *is* relevant, it is relevant only to whether it is fair to displace the defendant's interest in security of receipt; there is no sense in which equity is requiring the defendant to comply with moral standards. For this reason, the language of conscience adds little if anything to our understanding of why relief is granted. It therefore seems wrong to say, as some have argued,[179] that conscience plays a 'corrective justice' function in contract,[180] on the basis that the defendant must have sufficient knowledge of the problem with the claimant's consent before the contract will be set aside.

The language of conscience may have slightly greater explanatory force where the claimant seeks to rectify a contract for unilateral mistake or compensation or disgorgement for the commission of a wrong. In the case of rectification, the question is not whether the defendant is entitled to enforce the contract on the terms as she understands them to be but whether she is *obliged* to perform it in accordance with the claimant's terms. Therefore, the language of conscience is not out of place: as in the case of trusts, the defendant's knowledge is highly relevant as a precondition of the imposition of the relevant obligation. Again, however, the explanatory force of conscience is limited, as

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[179] Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part 1' (n 21); Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part II' (n 60).

[180] Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part 1' (n 21) 17.

it cannot tell us what or how much the defendant must know, nor does it identify the moral principles with which the defendant is expected to comply. Moreover, if and to the extent that undue influence and unconscionable bargains may be said to involve the commission of a wrong by the defendant, again the language of conscience is of limited relevance. It reminds us that the defendant has behaved in a morally unacceptable way by breaching a pre-existing obligation to the claimant (of which she had reason to know) but it tells us little more than that. In particular, it cannot help us to identify the principles that govern the grant of relief nor what constitutes morally unacceptable conduct for these purposes. Chapter 8 concludes by considering the implications of these findings for the coherence of commercial law in general.

# CHAPTER 2: *WESTDEUTSCHE* AND THE CONSCIENCE-BASED EXPLANATION OF TRUSTS

## INTRODUCTION

The trust is ubiquitous in commercial life and probably ranks as equity's greatest invention;[1] it also has clear historical links to the idea of conscience. The law of trusts therefore provides a good starting point for the investigation of the meaning and function of conscience in commercial law doctrine. The modern express trust is a powerful, hybrid creature, which offers the beneficiary a range of advantages. She has the ability to recall the property from the trustee on demand.[2] She is also entitled to trace it into and claim substitute property in the trustee's hands.[3] She gets priority in the trustee's insolvency[4] and may follow and claim the property itself or any traceable substitutes back from third parties who have received the trust property as volunteers or for value without notice of her interest.[5] These are usually referred to as the proprietary aspects of a trust. The trust also gives rise to personal obligations: the trustee is obliged as an express fiduciary to account to the beneficiary for the trust property, which requires her, amongst other things, to restore the property if she misapplies it[6] and disgorge any unauthorised gains she has made as a result of her position as trustee,[7] including any gains made directly from the property or its substitutes.[8]

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[1] J. Brunyate, *F. Maitland, Equity, a Course of Lectures,* (A. Chaytor and W. Whittaker eds, Cambridge University Press 1936) 23.
[2] In accordance with the rule in *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.
[3] *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102, 110 (Lord Browne-Wilkinson), 115 (Lord Hoffmann), 129, 131 (Lord Millett).
[4] *Finch v Earl of Winchelsea* (1715) 1 P Wms 277; 24 ER 387, [282]/389 (*obiter* as on the facts the trust was not established); *Hunter v Moss* [1994] WLR 452 (CA); *Foskett v McKeown* (n 3), 130 (Lord Millett).
[5] *Foskett v McKeown* (n 3) 130 (Lord Millett).
[6] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL), 434 (Lord Browne-Wilkinson); *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2014] 3 WLR 1367.
[7] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557-559 (judgment of the court); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.
[8] *Foskett v McKeown* (n 3) 110 (Lord Browne-Wilkinson), 115 (Lord Hoffmann), 130-131 (Lord Millett).

The decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[9] is the most important modern statement of the relationship between trusts and conscience. Lords Browne-Wilkinson and Goff held that no trust can arise to give the party claiming to benefit from it an equitable proprietary interest in the property or subject the alleged trustee to fiduciary obligations unless the claimant can point to: (i) identifiable trust property in the hands of the alleged trustee; and, at the same time, (ii) that the alleged trustee's conscience is affected by knowledge that she was intended to hold the property for the benefit of another (express and implied trusts) or by knowledge of whatever other facts are alleged to affect her conscience (constructive trusts). Lord Browne-Wilkinson's judgment offers the most important modern explanation of the relationship between trusts law and the idea of conscience.

This chapter starts by reviewing the briefly the historical relationship between trusts and conscience. It then considers Lord Browne-Wilkinson's idea of conscience and argues that it is entirely consistent with our ordinary understanding of conscience, as described in Chapter 1. The chapter goes on to consider the function of conscience in trusts law doctrine, with particular reference to express and resulting trusts. It argues that, although perhaps historically accurate, it is no longer right to say that the legal owner's conscience must always be affected by knowledge before the proprietary aspects of a trust can arise. In fact, the language of conscience tells us nothing about why the beneficiary gets equitable title under an express or resulting trust. By contrast, the language of conscience plays some role in explaining the personal aspects of trusteeship. It reminds us that trust obligations are moral obligations and the trustee cannot be expected to comply with them unless she knows she has reason to do so. To know this, she needs to know both the relevant moral principles and the relevant facts, so as to be able to identify (through the process of moral reasoning) what she ought to do in the circumstances. However, beyond this the language of conscience tells

[9] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL).

us little, if anything. In particular, it cannot help us to identify what moral principles underpin trusts; nor can it tell us what or how much the individual must know before she will be subject to the relevant obligation, or even what the content of that obligation is. To answer these questions, we need to engage in direct argument about what principles the law does and/or should embody.

## THE HISTORICAL CONNECTION BETWEEN TRUSTS AND CONSCIENCE

The original justification for the basic trust obligation, i.e. to hold property for the benefit of someone else, was a moral one, rooted in the idea of conscience. 'The modern trust developed from the ancient use'[10] and both were said to have 'the same parents, fraud and fear; and the same nurse, a court of conscience.'[11] The use was a device by which one person (the feoffor) could transfer legal title to property to another (the feoffee) to hold for the specific purpose of benefiting either the transferor herself or a third party (the *cestui que use*). The central idea common to uses and trusts was that the recipient of the property then came under a duty to apply it in accordance with the stipulated purpose.[12] Initially, that duty was enforceable only as a matter of honour and conscience,[13] i.e. it was a personal moral duty, which arose out of the trust and confidence placed by the feoffor in the feoffee to administer the property for the *cestui que use*. No use could arise at all 'unless at the time of its creation there was someone in whom the creator of the use had reposed his confidence. There could be no use which attached simply to the land and not to some person.'[14] If the feoffee failed to perform the use, the *cestui que use* had no remedy at law because the common law treated the recipient as

[10] Brunyate (n 1) 23.
[11] This argument was made in *Attorney General v Sands* (1679) Hardres 488; 145 ER 561, [491]/563. A notable example of the use of the language of conscience in a trusts context is Lord Nottingham's judgment in *Cook v Fountain* (1733) 3 Swanst 585; 36 ER 984, [601]/990.
[12] W. Holdsworth, *A History of English Law* (7th edn, Methuen & Co. Ltd, Sweet & Maxwell 1966) vol IV 410; O. Holmes Jr, 'Early English Equity' (1885) 1 LQR 162, 163; A. Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) 173.
[13] Simpson (n 12) 176.
[14] Ibid 181.

absolute owner in law[15] and 'left no place for the separation of beneficial enjoyment from legal title'.[16]

Over time, the ecclesiastical courts[17] and subsequently the courts of Chancery underwrote the feoffee's moral obligation with the force of equity and allowed the *cestui que use* to enforce the use against the feoffee personally 'in the name of good conscience'.[18] The Chancellor's role in relation to uses 'was to see that persons acted honestly according to the precepts of good morality, and, in accordance with the principle that equity acts *in personam*, he did not hesitate to proceed against feoffees who disregarded the moral rights of the *cestui que use*.'[19] Whilst a legal property interest is enforceable against the world,[20] initially the right of a *cestui que use* was a personal right[21] enforceable against the feoffee alone.[22] Because the common law gave no remedy to the *cestui que use*, the only remedy equity could provide was to compel the feoffee to convey title to the property to her or hold it for her benefit.[23]

Gradually, the use began to take on proprietary characteristics, as equity extended the personal liability of the feoffee to other recipients of the property,[24] and initially these proprietary characteristics were also referable to conscience. The key to the extension of liability beyond the trustee was whether the third party had been affected by the personal confidence originally reposed by the feoffor in the feoffee to hold the property for the benefit of the *cestui que use*;[25] if not, the Chancellor would not enforce the use against the

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[15] J. Ames, 'The Origin of Uses and Trusts' (1907-1908) 21 Harv L Rev 261, 265.
[16] Simpson (n 12) 175.
[17] R. Helmholz, 'The Early Enforcement of Uses' (1979) 79 Colum L Rev 1503; R. Helmholz, *The Oxford History of the Laws of England*, vol I (J. Baker ed, Oxford University Press 2004) 422-3.
[18] Simpson (n 12) 176.
[19] E. Burn and J. Cartwright, *Cheshire and Burn's Modern Law of Real Property* (18th edn, Oxford University Press 2011) 67.
[20] Ibid 80.
[21] Sir Francis Bacon, *Reading on the Statute of Uses* (Garland Publishing Inc. 1979) 401.
[22] Stephen, *Commentaries on the Laws of England*, vol 1 (L. Warrington ed, 21st edn, Butterworth & Co. 1950) 119.
[23] Burn and Cartwright (n 19) 67, citing Ames, *Select Essays in Anglo-American Legal History*, vol ii, 741.
[24] *Gilbert on Uses and Trusts* (3rd edn, W. Reed 1811) 51; J. Penner, 'The "Bundle of Rights" Picture of Property' [1995] UCLA LRev 711, 813, n 242.
[25] W. Hayes, *An Introduction to Conveyancing*, vol 1 (5th edn, S. Sweet 1840) 42.

third party.[26] Thus, the underlying question was whether the circumstances in which the third party acquired the trust property were such that she 'ought in conscience to be held responsible.'[27] At first, anyone who purchased the property from the feoffee with notice of the use was bound in conscience to respect it,[28] as she knew or had the means of knowing about the use, e.g. through a proper investigation of title or reasonable inquiries.[29] Because she knew or had the ability to know about the existence of the use, she was party to the feoffee's fraud on the *cestui que use*.[30] Someone who purchased the property from the feoffee *without* notice of the *cestui que use's* interest in it 'was considered as coming to the possession with a clear conscience, and by a new right, founded on contract, which entitled him to hold the land for his own benefit, discharged of the [trust]'.[31] The use in favour of the *cestui que use* was extinguished and the purchaser obtained legal title.[32]

Eventually, uses became trusts[33] and subsequently, those who inherited the property from the trustee[34] and those who received it from her by way of gift[35] were also bound to carry out the trust, even though they may have had no actual or constructive notice of it. The strict liability of volunteers seems to have derived from the practice of landowners transferring legal title to their land to *feoffees*, and only subsequently declaring the use on which the land was to be held. This gave rise to a presumption that the *feoffees* held the land for the grantor's benefit under a resulting use (the doctrine of presumed uses). Where the *feoffee* transferred land subject to a use to a volunteer, the general rule of resulting uses was altered so that the volunteer recipient held directly to

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[26] Burn and Cartwright (n 19) 81.
[27] Ibid.
[28] YB 5 Ed IV, pl 16, fo 7; L. Warmington, *Stephen's Commentaries on the Laws of England* (21st edn, Butterworth & Co. 1950) 120.
[29] Burn and Cartwright (n 19) 85.
[30] Simpson (n 12) 180.
[31] Hayes (n 25) 42, 43; Burn and Cartwright (n 19) 82.
[32] Simpson (n 12) 180.
[33] Burn and Cartwright (n 19) 81.
[34] YB 14 Hen VIII, pl 5.
[35] Stephen (n 22) 119-120; Blackstone, *Commentaries on the Laws of England*, vol 2 (M. Kerr ed, 4th edn, J. Murray 1876) 282; Burn and Cartwright (n 19) 81, citing *Chudleigh's Case* 1 Co Rep 113b, 122b.

the use of the *cestui que use*.[36] It is said that equity treated the trustee's gratuitous transfer of the property to a volunteer as insufficient to interrupt the obligations of trust and confidence that went with it,[37] so that those obligations were taken to affect the volunteer's conscience as a matter of course. The transaction was regarded as 'a change of the person of the legal owner, without any alteration of the legal title. That confidence which had been expressly reposed in [the trustee], was tacitly communicated to [the third party].'[38] In other words, where the third party received the trust property by way of gift or inheritance, it was presumed that she had notice of the trust[39] and her conscience was thereby affected. The relevant moral precept seems to have been that 'it was against conscience for one man to retain what was clearly intended for another'.[40]

As the beneficiary's rights under a trust became enforceable not only against the trustee but against almost everyone[41] in whose hands the trust property could be found (except a *bona fide* purchaser for value without notice), the explanation of trusts changed. It is now the case that some third party recipients are bound to recognise the beneficiary's entitlement to enjoy the beneficial interest in the trust property, irrespective of whether they gave any undertaking to hold it for her and/or their conscience is affected. Therefore, although the original explanation of the effect of trusts on third parties was rooted in the idea that they were affected by the moral obligations owed by the trustee, now we would simply say that the beneficiary's right follows the thing itself, i.e. it is an enforceable proprietary interest just like any other.

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[36] Simpson (n 12) 177, 180; W. Swadling, 'A New Role for Resulting Trusts?' (1996) 16 LS 110, 114.
[37] Hayes (n 25) 43.
[38] Ibid.
[39] C. Harpum, 'The Stranger as Constructive Trustee' (1986) 102 LQR 112 , 140, n75, citing DEC Yale (ed), *The Prolegomena of Chancery and Equity*, Chap XV, s.1, 253.
[40] Burn and Cartwright (n 19) 76.
[41] By the late seventeenth century, trusts had also become enforceable against the trustee's creditors: ibid 81.

## THE *WESTDEUTSCHE* CASE

In the *Westdeutsche* case, a bank and a local authority had entered into an interest rate swap agreement whereby the bank made large payments to the local authority. Subsequently, it was held elsewhere that interest rate swaps were *ultra vires* local authorities and such contracts were therefore void. The local authority had no knowledge at the time it received the payments from the bank that the swaps contract was void. By the time it had gained such knowledge it had disposed of the money and no traceable proceeds remained. The bank wanted to recover from the local authority not only the money it had paid under the void contract but also compound interest. To recover compound interest it had to establish that the local authority was 'a trustee or otherwise in a fiduciary position'.[42] The bank argued that the payment was made as a result of a mistake and/or pursuant to a void contract (and therefore in respect of a consideration which had failed), and that a presumed resulting trust arose in order to reverse the local authority's unjust enrichment.

The claim for compound interest failed because the House of Lords held that neither authority[43] nor principle supported the recognition of a resulting trust in the circumstances. In particular, they held that a trust could only arise if, at a time when the local authority still had the money or its traceable proceeds, its conscience was affected by knowledge of the factors alleged to give rise to the trust, i.e. the contract was void.[44] In fact, the money became untraceable before the parties became aware that the contract was void.[45] Their Lordships could see no moral or legal reason why the bank should be given the additional benefits which flowed from an equitable proprietary claim, such as priority in the local authority's insolvency, nor why the local authority should be treated as personally liable to account as a fiduciary at a time when nobody knew the contract was void.[46]

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[42] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 702 (Lord Browne-Wilkinson).
[43] Ibid 689-90 (Lord Goff), 708, 713-5 (Lord Browne-Wilkinson).
[44] Ibid 690 (Lord Goff), 705, 706, 709 (Lord Browne-Wilkinson).
[45] Ibid 689-90 (Lord Goff), 706 (Lord Browne-Wilkinson).
[46] Ibid 684 (Lord Goff), 704-5 (Lord Browne-Wilkinson).

Lord Browne-Wilkinson held that the idea of conscience underpins trusts law as follows:

> (i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust). (ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.[47]

In Lord Browne-Wilkinson's view (with which Lord Goff agreed[48]), it followed that a trust could only arise if while the legal owner held identifiable trust property or its traceable substitutes, her conscience was affected by knowledge either that she was intended to hold the property for the benefit of another (express or implied trusts) or of the factors alleged to affect her conscience (constructive trusts).[49] If both those conditions were satisfied, a trust was established. By this their Lordships meant that from that date, the beneficiary had an equitable proprietary interest in the trust property enforceable against third parties[50] and the legal owner was personally accountable as a trustee. Conversely, if one or other of those conditions was not satisfied, the beneficiary had neither an equitable proprietary interest in the property nor a personal claim in equity against the legal owner.[51] In other words, in the view of the House of Lords the personal and proprietary aspects of the trust stood or fell together; it was not possible for the beneficiary to acquire equitable title to the trust property unless the trustee's conscience was affected by knowledge.

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[47] Ibid 705.
[48] Ibid (n 9) 690 (Lord Goff).
[49] Ibid 705, 706, 709 (Lord Browne-Wilkinson).
[50] Ibid 705.
[51] Ibid 690 (Lord Goff), 714 (Lord Browne-Wilkinson).

## CONSCIENCE - MEANING

Lord Browne-Wilkinson's use of the language of conscience is entirely consistent with its ordinary meaning as described in Chapter 1. His proposition that the equitable jurisdiction to enforce trusts depends upon the conscience of the legal owner being affected reminds us that in recognising and enforcing trusts, equity is underwriting obligations of good conscience,[52] i.e. moral obligations.[53] This is consistent with the idea that legal duties presuppose and give effect to underlying moral duties.[54] The legal owner's conscience will not be affected unless the owner has knowledge of 'the facts alleged to affect his conscience', i.e. knowledge that 'he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.'[55] This tells us that even if there are good moral reasons for requiring the legal owner to hold the property for the beneficiary, we cannot reasonably expect her to do this – and so she should not be viewed as in breach of any moral obligation if she fails to do it – unless she knows of the facts which support this requirement. Without knowledge of the material facts, the legal owner is not in a position to work out what she *ought* (morally) to do with the property. Conversely, if she has knowledge of the material facts, she is able – through the process of moral reasoning – to identify what the objective standard of morality requires of her. If the legal owner acquires the relevant factual knowledge while she still has the property, she is subject to a moral obligation to hold the property for the beneficiary, which equity underwrites with the force of law. It follows that if the legal owner breaches the obligation, she may be said to have acted unconscionably and equity will grant relief.

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[52] T Watkin, 'Changing Concepts of Ownership in English Law During the Nineteenth and Twentieth Centuries' in G. Griffiths and M. Dixon (eds), *Contemporary Perspectives on Equity, Property and Trusts Law* (Oxford University Press 2007) 143-4.
[53] *Sekhon v Alissa* [1989] 2 FLR 94 (Ch), 99 (Hoffmann J).
[54] S. Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Law and Jurisprudence 157, 163.
[55] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 705 (Lord Browne-Wilkinson).

## CONSCIENCE - FUNCTION

Lord Browne-Wilkinson held that unless and until the legal owner's conscience is affected by knowledge of the relevant facts, a beneficiary cannot acquire equitable title to property under a trust and the legal owner does not come under any obligations in respect of the property. These claims are considered below, with particular reference to express and resulting trusts. As critics have argued,[56] the case law suggests that Lord Browne-Wilkinson's first claim is incorrect. The idea that the legal owner's conscience had to be affected before the beneficiary acquired equitable title is consistent with the historical development of trusts described earlier in this chapter, but it is no longer accurate. It follows that the language of conscience is unnecessary to explain the proprietary aspects of express and resulting trusts. By contrast, the language of conscience does have some explanatory force in relation to the personal aspects of trusts. It reminds us that trust obligations are moral obligations and it is not reasonable to treat the legal owner of the property as subject to them unless her capacity for moral reasoning has been invoked. However, even then the explanatory force of conscience is limited. In particular, it identifies neither the moral principles that inform the obligations to which the trustee is subject nor the content of the obligations themselves. Moreover, it cannot tell us what or how much the legal owner must know before she will be subject to the personal obligations of trusteeship.

### *Conscience and the Proprietary Aspects of Trusts*

In Lord Browne-Wilkinson's view the separation of legal and equitable title cannot occur so as to give rise to a trust *unless and until* the legal owner's conscience is affected by knowledge of the relevant facts so as to trigger her personal obligations.[57] In reaching this conclusion (with which Lord Goff

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[56] R. Chambers, *Resulting Trusts* (Clarendon Press 1997) 204-6; P. Birks, 'Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case' (1996) 4 RLR 3, 22-3; W. Swadling, 'The Law of Property' in P. Birks and F. Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press 2000) 260-1 (although he refers to some of the cases as examples of express trusts).

[57] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 706-7, 714 (Lord Browne-Wilkinson).

agreed[58]) he was clearly influenced by concerns that it would be inappropriate for the bank to enjoy the proprietary advantages associated with equitable title from the date of payment, such as the ability to avail of equity's tracing rules, claim the property from third parties and enjoy priority in the trustee's insolvency. He could see 'no moral or legal justification for giving such priority' to the bank in circumstances where if the swaps contract had been valid, it would have had purely personal rights against the local authority.[59] In his view, this could give rise to problems in a commercial context, such that 'a businessman who has entered into transactions relating to or depending upon property rights could find that assets which apparently belong to one person in fact belong to another'.[60]

Lord Browne-Wilkinson's explanation is consistent with the historical approach to trusts as described earlier in this chapter. However, it clearly conflicts with the current, generally accepted view that legal and equitable title may separate irrespective of the legal owner's knowledge so as to give rise to a trust in the proprietary sense.[61] The incidence of the trustee's personal obligations is treated as a separate question, which is referable to knowledge.[62] The different approaches to what constitutes 'a trust' may appear semantic but they point to a more serious debate about 'the relationship between the personal liabilities of trustees and the division of title'.[63] In fact, the law on

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[58] Ibid 690 (Lord Goff).
[59] Ibid 704 (Lord Browne-Wilkinson).
[60] Ibid 705.
[61] *Hardoon v Belilios* [1901] AC 118 (HL), 123 (Lord Lindley); Birks (n 56) 12; *Allan v Rea Brothers Trustees Ltd* [2002] EWCA Civ 85, 4 ITELR 627, [45]-[46] (Walker LJ); Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 403-405; S. Worthington, 'The Proprietary Consequences of Rescission' (2002) 10 RLR 28, 50; D. Hayton, P. Matthews and C. Mitchell, *Underhill & Hayton, Law of Trusts and Trustees* (17th edn, LexisNexis Butterworths 2006) 422-3.
[62] *Lonrho v Fayed (No. 2)* [1992] 1 WLR 1, 12 (Millett LJ); *R v Chester and North Wales Legal Aid Area Office (No. 12), Ex p. Floods of Queensferry Ltd* [1998] 1 WLR 1496, 1500 (Millett LJ); L. Smith, 'Constructive Fiduciaries?' in P. Birks (ed), *Privacy and Loyalty* (Oxford University Press 1997) 265-6; Chambers (n 56) 209, 210.
[63] Birks (n 56) 11. Some argue that a contract/obligations analysis best explains trusts: see, e.g. J. Langbein, 'The Contractarian Basis of the Law of Trusts' (1995-1996) 105 Yale LJ 625; P. Parkinson, 'Reconceptualising the Express Trust' (2002) 61 CLJ 657. Others argue that trusts are better justified by reference to their proprietary aspects: H. Hansmann and U. Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 New York University Law Review 434, especially 438, 454 et seq. See also R. Nolan, 'Equitable Property' (2006) 122 LQR 232 (beneficiary's right under a trust described as primarily a right to exclude non-beneficiaries from enjoyment of the benefit of trust assets); and B. McFarlane,

express and resulting trusts demonstrates that in principle, the separation of legal and equitable title can occur before the trustee's conscience is affected by knowledge. Moreover, tying the recognition of equitable title to the date the legal owner acquires knowledge of the relevant facts makes it difficult to say when the proprietary aspects of a trust arise, so in practice Lord Browne-Wilkinson's approach may increase commercial uncertainty rather than reduce it.[64]

*Express Trusts*

In the case of express trusts, the beneficiary (B) may acquire equitable title to the property even where the trustee (T) is entirely unaware that the settlor (S) wishes her to hold the property for someone else. To understand why the beneficiary's equitable title arises, we need to ask what moral principle or event[65] generates it. In the case of express trusts, the positive intention of S to create a trust is sufficient to result in the separation of legal and equitable title. Arguably, this reflects the moral concern that we ought to respect the wishes of property owners because they and they alone are entitled 'to determine the disposition of the asset and hence who may receive, use and benefit from it'.[66]

Assume S wishes to create an express trust over the sum of £100 in favour of B, with T as trustee. We saw earlier in this chapter that historically, the key question was whether a relationship of trust and confidence had arisen between S and T, so as to subject T to moral obligations, which B could enforce. However, since the re-characterisation of trust interests as proprietary interests,

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'The Centrality of Constructive and Resulting Trusts' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 203; B. McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 214-215 (trusts described as depending on duty-burdened rights). On the appropriate classification of trusts: N. McBride and A. Hughes, 'Hedley Byrne in the House of Lords: An Interpretation' (1995) 15 LS 376; and Parkinson (n 63).

[64] Chambers (n 56) 206; Birks (n 56) 20; Swadling, 'The Law of Property' (n 56) 263.

[65] P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1, 42; P. Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 21-22.

[66] C. Webb, 'Intention, Mistakes and Resulting Trusts' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 330; also C. Webb, 'Property, Unjust Enrichment and Defective Transfers' in R. Chambers, C. Mitchell and R. Penner (eds), *The Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 368.

there has been a change in emphasis.[67] Now, two factors are relevant to whether B gets equitable title to the property. First, equity requires evidence that clearly shows S intended to create a trust[68] of that particular £100[69] in favour of that particular person, B.[70] Secondly, S must take the formal steps necessary to constitute the trust by clothing the legal title to the property with the vestments of trusteeship. She may do this by appointing T trustee of the £100 for B and transferring the legal title to the £100 to T on that basis.[71] The completion of these steps by S is sufficient to separate the title to the property, so that the legal title vests in T pending her acceptance of the office of trustee[72] and B acquires the equitable title. If S has done everything within her power to transfer the property to T, equity will not allow the trust to fail for want of formality; S will hold the property on constructive trust for T pending completion of the relevant formalities.[73] In any case, evidence of intention and completion of the formalities (subject to the caveat above) is all that is required to constitute the trust.

Once S appoints T as trustee of the £100, T must choose whether to accept the office of trustee or disclaim it.[74] Acceptance may be express[75] or it may result from conduct on T's part.[76] If T accepts the office, she is subject to the personal obligations of trusteeship. If she disclaims it, she disclaims both the obligations of trustee and the legal title to the property.[77] However, there is

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[67] Simpson (n 12) 181, 206.
[68] J. Martin, *Hanbury and Martin, Modern Equity* (19th edn, Sweet & Maxwell 2012) 71; *Re Schebsman* [1944] Ch 85 (CA), 89 (Lord Greene MR).
[69] C. Mitchell, *Hayton and Mitchell; Commentary and Cases on the Law of Trusts and Equitable Remedies* (13th edn, Sweet & Maxwell 2010)60.
[70] *Knight v Knight* (1840) 3 Beav 148; 49 ER 58, [173]/68. Certain statutory formalities must also be complied with if the property in question is land.
[71] *Milroy v Lord* (1862) 4 De G F & J 264; 45 ER 1185, [274]-[275]/1189-90 (Turner LJ). The requisite formalities depend on the type of property involved.
[72] *Smith v Wheeler* (1671) 1 Lew 279; 86 ER 88; *Siggers v Evans* (1855) 5 E & B 367; 119 ER 518; *Re Arbib & Class's Contract* [1891] 1 Ch 601 (CA).
[73] *Re Rose* [1952] Ch 499 (CA), 510-1 (Evershed MR); *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 WLR 2075, 2088, [59] (Arden LJ); J. McGhee QC (ed) *Snell's Equity* (33rd edn, Sweet & Maxwell 2014) 610, [22-047].
[74] *Robinson v Pett* (1734) P Wms 249; 24 ER 1049; *Fortex Group v Macintosh* [1998] 3 NZLR 171, 174 (Tipping J); Brunyate, *F. Maitland, Equity, A Course of Lectures* (n 1) 55; P. Pettit, *Equity and the Law of Trusts* (12th edn, Oxford University Press 2012) 68.
[75] *Doe, d. Chidgey v Harris* 16 M & W 517; 153 ER 1294.
[76] *Jones v Higgins* (1866) LR 2 Eq 538.
[77] *Re Birchall* (1889) 40 Ch D 439.

authority to the effect that *even if* T disclaims, this does not necessarily destroy B's equitable interest in the trust property and the court will treat the settlement as fully constituted.[78] These cases support the view that B's equitable proprietary interest in the property arises independently of T's knowledge and acceptance of the office of trusteeship.[79] Similarly, if a testator fails to appoint a trustee of her will[80] or the trustees of a will trust all predecease the testator,[81] equity will not permit the trust to fail for want of a trustee but will appoint a new trustee if necessary to give effect to it. Here, B's equitable proprietary interest arises even before the new trustee has been identified, let alone acquired knowledge of S's intentions. In both the disclaimer and the will trust cases, B is treated as having an equitable interest in the property from the date the trust was constituted. Therefore, they directly undermine Lord Browne-Wilkinson's suggestion that T's conscience must be affected by knowledge before an express trust can arise. Instead, they demonstrate that the key to the creation of B's equitable proprietary interest in express trusts is S's positive intention that B should benefit from the property. There is no need for T to know of S's decision or intentions regarding the property in order for B's equitable interest to arise.

*Presumed Resulting Trusts*

Similarly, the state of T's conscience has nothing to do with the creation of B's equitable proprietary interest under a presumed resulting trust. Here again the relevant moral principle seems to be that we should respect the wishes of property owners as to how their property is to be dealt with. However, there has been extensive debate as to whether the resulting trust arises because it is presumed B positively intended to create a trust in her own favour or it is presumed that she did not intend T to benefit from the property. If the latter, then B cannot be said to have consented properly to the transfer of the property to T and the trust arises to reverse T's unjust enrichment at her expense.

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[78] *Mallott v Wilson* [1903] 2 Ch 494, 502-503 (Byrne J). P. Matthews, 'The Constitution of Disclaimed Trusts Inter Vivos' [1981] Conv 141 suggests that by analogy with gifts, in the case of a voluntary settlement the legal estate should be treated as never having vested in T.
[79] Chambers (n 56) 204-5.
[80] *Dodkin v Brunt* (1868) LR 6 Eq 580 (Ch).
[81] *Re Smirthwaite's Trusts* (1870-71) LR 11 Eq 251 (Ch).

On Lord Browne-Wilkinson's analysis, presumed resulting trusts come into existence only when the trustee's conscience is touched by knowledge that the beneficiary is intended to benefit from the property. However, as Chambers has suggested,[82] this conclusion is clearly inconsistent with four cases[83] ('the no-knowledge cases'), which were cited in support of the proposition that a presumed resulting trust could arise even where the trustee had no idea that the property had been transferred to her with an intention that someone else should benefit from it. In each case, B had transferred property to a relative (T) without telling her, and the evidence showed that B's intention at the time of transfer was to enjoy the benefit of the property herself and that she subsequently did so. After B and T had both died, the question was whether B's heirs could assert an equitable interest in the property as against T's heirs, who had inherited legal title to the property from T. In all four cases the court held that B's heirs were entitled to an equitable interest in the property.

The no-knowledge cases demonstrate that the key factor that gives rise to B's proprietary interest under a presumed resulting trust has nothing to do with T's conscience, but is referable to B's intention. The reason behind B's heirs' entitlement was expressed slightly differently in each of the no-knowledge cases: e.g. it was because B had not intended to part with the equitable interest in the property;[84] or because the intention had been that T would hold the property as trustee;[85] or because T held the property on resulting trust for B.[86] However, in all four cases B's equitable interest arose in circumstances where T never knew the property had been transferred to her, let alone that in making the transfer B intended to enjoy the benefit of the property herself. Therefore, they arose before T's conscience was affected by knowledge of the facts that would require her to hold the property for B's benefit.

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[82] Chambers (n 56) 204-6.
[83] *Birch v Blagrave* (1755) Amb 264; 27 ER 176; *Childers v Childers* (1857) 1 De G & J 482; 44 ER 810; *Re Vinogradoff* [1935] WN 58; *Re Muller* [1953] NZLR 879.
[84] *Birch v Blagrave* (n 83) 265 (Hardwicke LC).
[85] *Childers v Childers* (n 83) [492]/814 (Knight Bruce LJ).
[86] *Re Vinogradoff* (n 83); *Re Muller* (n 83) 882 (Northcroft J).

Lord Browne-Wilkinson purported to rationalise the no-knowledge cases as being consistent with his conscience-based explanation of trusts. In his view they were explicable on the basis that 'by the time [the] action was brought, [T] or his successors in title have become aware of the facts which gave rise to a resulting trust; his conscience was affected as from the time of such discovery and thereafter he held on a resulting trust under which the property was recovered from him.'[87] However, this attempt to square the circle has been rightly criticised as inconsistent with the reasoning in the cases, which clearly suggests the trust arose irrespective of T's knowledge and before the legal title to the property passed by succession to T's heirs.[88] In fact, the no-knowledge cases clearly suggest that B's equitable proprietary interest in the property arose immediately because she positively intended to keep the beneficial enjoyment of the property and/or immediately started to take the fruits of the property for herself.

If B's entitlement to the property under a presumed resulting trust is referable to intention, the question then is whether it arises because of a *positive* intention on B's part to take the benefit of the property herself (as in the case of express trusts) or because of an *absence* of any intention on her part to benefit T. Before *Westdeutsche* there were two main explanations of the basis on which B's equitable proprietary interest under a resulting trust arose.[89] On one view, the trust arises because it is presumed that this was what B had positively intended. It would follow that any evidence inconsistent with an intention to create a trust would defeat B's claim to equitable title.[90] This would restrict the scope of the proprietary effects of resulting trusts. On another view, the trust arises because it was presumed that B did not intend to benefit T and therefore to reverse T's unjust enrichment. If so, then only

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[87] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 705 (Lord Browne-Wilkinson).
[88] Chambers (n 56) 205-6; Birks, 'Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case' (n 56) 22-3; Swadling, 'The Law of Property' (n 56) 260-1 (although he refers to some of the cases as examples of express trusts).
[89] Others suggested that the resulting trust operated simply as part of the default rules of property to locate the beneficial interest in the property where that was unclear: C. Rickett, 'The Classification of Trusts' (1999) 18 NZULR 305, 317.
[90] Swadling, 'A New Role for Resulting Trusts?' (n 36) 113-4, 116, 117; W. Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 76.

evidence inconsistent with the absence of an intention to benefit T would suffice to deprive B of equitable title.[91] This would widen the circumstances in which B could acquire equitable title under a resulting trust.

The bank in *Westdeutsche* relied on the unjust enrichment analysis in support of its claim that the local authority held the money for it on a resulting trust. However, Lord Browne-Wilkinson rejected this argument and concluded that the presumption in resulting trust cases was that the transferor of property *positively* intended to create a trust in her own favour, such that any evidence inconsistent with an intention to create a trust could rebut the presumption. In his view, there was such evidence on the facts: although the parties mistakenly believed the contract was valid, the mistake did not affect their intention that the money should become the absolute property of the local authority upon payment and this was sufficient to rebut the presumption that the bank intended the local authority to hold the money for its benefit.[92] Both he and Lord Goff saw the unjust enrichment argument as an attempt to extend the law on resulting trusts and neither was prepared to accept it.[93] Subsequently, in *Air Jamaica v Charlton*, Lord Millett held that resulting trusts arise in response to an absence of intention to benefit T and therefore to effect her unjust enrichment at B's expense.[94] However, he also appeared to accept the House of Lords' conclusion in *Westdeutsche* that the bank's intention to transfer the money to the local authority under the contract was sufficient to rebut the

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[91] P. Birks, 'Restitution and Resulting Trusts' in S. Goldstein (ed), *Equity and Contemporary Legal Developments*, vol 1 - Resulting Trusts and Equitable Compensation (Hebrew University of Jerusalem 1992), reproduced in P. Birks and F. Rose (eds), Restitution and Equity, Volume 1: Resulting Trusts and Equitable Compensation 265, 273; Birks, *Unjust Enrichment* (n 65) 304-307; Chambers (n 56) 19-35; R. Chambers and J. Penner, 'Ignorance' in S. Degeling and J. Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson 2008) 253. Cf. a new and slightly different argument from Chambers: R. Chambers, 'Is There a Presumption of Resulting Trust?' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 284, which suggests that the presumption of a trust arises in response to the absence of consideration and to counter the presumption of advancement, which will be rebutted by evidence that B did not intend to give the property to T.

[92] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 708 (Lord Browne-Wilkinson), 690 (Lord Goff); Millett (n 61) 412.

[93] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 689-90 (Lord Goff), 708-9 (Lord Browne-Wilkinson).

[94] *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (CA), 1412 (Millett LJ).

presumption that B did not intend to benefit T.[95] Therefore, the difference between his approach and Lord Browne-Wilkinson's would appear to be marginal.

Turning back to the no-knowledge cases, if we apply Lord Browne-Wilkinson's analysis of presumed resulting trusts, we can say the resulting trusts arose because the presumption was that B intended to create a trust of the property in her own favour and this presumption was not rebutted. Alternatively, applying the unjust enrichment analysis, we can say the trusts arose because the presumption was that B did not intend T to benefit from the property and this presumption was not rebutted. The *Westdeutsche* analysis represents current law and has attracted recent academic support on the basis that it is consistent with the doctrine of resulting uses, as described earlier in this chapter.[96] The important point for these purposes is that on *neither* analysis is T's conscience relevant to the creation of B's equitable proprietary interest. In both cases, the key factor is B's intention. This tells us that, as in the case of express trusts, the relevant moral concern is to ensure that the wishes of property owners as to how their property is disposed of are respected and consequently, if we know that someone does not intend us to benefit from their property in any way, we ought to give it back.

*Failed Trust Resulting Trusts*

Similarly, B may acquire equitable title to property under a failed trust resulting trust irrespective of whether T's conscience is first affected by knowledge. As in the case of presumed resulting trusts, the critical factor in deciding whether B gets equitable title is B's intention. Again, there is a difference in opinion as to whether the trust responds to a positive intention to create a trust or the absence of any intention on B's part to benefit T. However, as before, on neither view is the state of T's conscience relevant.

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[95] Millett (n 61) 401; P. Millett, 'Proprietary Restitution' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson 2005) 320.

[96] J. Mee, 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73 CLJ 85. Also: F. Maitland, *Equity* (2nd edn, Cambridge University Press 1936) 33; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) 274.

A failed trust resulting trust arises where an express trust settled by B fails from the outset, e.g. because its objects are uncertain.[97] It may also arise where an express trust fails to exhaust the full beneficial interest in the intended trust property, e.g. because it offends the rule against perpetuities but the trust fund contains a surplus, which requires to be reallocated.[98] In such cases there is no doubt that B set up the original express trust with the intention of benefiting someone other than herself and T, and T has agreed to act as a trustee of the whole property in accordance with the terms of the original trust. The only question for the court is who gets the beneficial interest in the trust property or the surplus: usually it reverts to B under a resulting trust. In other cases, it may be uncertain whether T is to hold all of the property as trustee or take some of it beneficially. The court answers this question by reference to B's intentions, which are to be construed by reference to the trust instrument.[99]

Different explanations are proffered for B's equitable proprietary right to the property under failed trust resulting trusts. Traditionally, it was held that the resulting trust arose automatically because B had failed effectively to alienate the beneficial interest in the property and therefore could be said to have retained it.[100] On this analysis, B originally transferred the property to T with the intention of making her a trustee, so T remains a trustee and the resulting trust arises simply to re-allocate the beneficial interest in the property to B in circumstances in which she never fully parted with it.[101] In *Westdeutsche* Lord Browne-Wilkinson held that a failed trust resulting trust may be regarded as

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[97] *Vandervell v IRC* [1967] 2 AC 291; McGhee QC, *Snell's Equity* (n 73) 685, [25-123].
[98] *Air Jamaica Ltd v Charlton* (n 94).
[99] *Re West, George v Grose* [1900] 1 Ch 84 (Ch); *Re Foord* [1922] 2 Ch 519 (Ch).
[100] *Vandervell v IRC* (n 97) 329 (Lord Wilberforce). Subsequently Megarry J described the trust as having arisen automatically as a result of Mr. Vandervell's failure to dispose of the option: *Re Vandervell (No. 2)* [1974] Ch 269 (Ch), 294 (Megarry J).
[101] J. Mee, ''Automatic' Resulting Trusts: Retention, Restitution or Reposing Trust?' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010), 208-9; C. Rickett and R. Grantham, 'Resulting Trusts - A Rather Limited Doctrine' in P. Birks and F. Rose (eds), *Restitution and Equity*, vol 1 - Resulting Trusts and Equitable Compensation (Mansfield Press 2000); J. Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 257-266; Hayton, Matthews and Mitchell (n 61) 431. McFarlane, 'The Centrality of Constructive and Resulting Trusts' (n 63) agrees that the retention theory has, at the least, some metaphorical utility in explaining resulting trusts.

'giving effect to the common intention of the parties'.[102] By this he might simply have been referring to the fact that the resulting trust arises so as not to frustrate the original intentions of B to set up a trust and T to act as trustee. However, if he actually meant that the resulting trust depends on a common intention that the beneficial interest should revert to B, this is incorrect. There are in fact cases in which a failed trust resulting trust has arisen despite the absence of any intention on B's part to take the beneficial interest, let alone a common intention that she should do so.[103] This suggests that B's equitable title does not depend on a positive intention to create a trust in her own favour. Rather, the resulting trust responds 'to the absence of any intention' on the B's part to pass a beneficial interest to T as recipient of the money[104] and arises so as to prevent T's unjust enrichment at B's expense.[105] Webb and Akkouh suggest that the unjust enrichment and retention explanations are mutually supportive. The unjust enrichment explanation emphasises that is only when B does not consent to T receiving the property or her consent is defective that she 'does or should retain an interest in that property', while the retention argument tells us that consent is important because B was originally the owner of the property 'and so it was for him, and him alone, to determine who should receive and benefit from that property.' [106] In any event, neither explanation of B's equitable title depends on the state of T's conscience. Although as a matter of practice in failed trust resulting trust cases T will usually know that she is not intended to keep the property and therefore we may say that her conscience is affected by such knowledge, this is not what generates B's equitable proprietary interest in the first place.

In light of the above, we can conclude that B can acquire equitable title under a trust even when T's conscience is unaffected by knowledge. This is

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[102] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 708 (Lord Browne-Wilkinson).
[103] C. Webb and T. Akkouh, *Trusts Law* (3rd edn, Palgrave Macmillan 2013)185, citing *Vandervell v IRC* (n 97) as an example of such a case.
[104] *Air Jamaica Ltd v Charlton* (n 94) 1412 (Lord Millett).
[105] Birks, 'Restitution and Resulting Trusts' (n 91) 277; Chambers, *Resulting Trusts* (n 56) 41-54; Webb and Akkouh, *Trusts Law* (n 103) 186-7. Cf. Swadling, 'Explaining Resulting Trusts' (n 90), who suggests that failed trust resulting trusts defy principled analysis altogether.
[106] Webb and Akkouh, *Trusts Law* (n 103) 187.

unsurprising, as B's title tells us nothing about what (if any) obligations T owes her. It seems that B's equitable title under an express trust derives from the moral principle that we ought to respect the intentions of an owner as to how she wishes to dispose of her property. Where the trust is a resulting trust, it seems to derive from either the same principle and/or the related principle that we ought not to keep that which we were not intended to receive. These principles support the recognition of B's equitable title notwithstanding that T is wholly ignorant of the relevant facts.

***Conscience and the Personal Aspects of Trusts***

If we also wish to know whether, in addition to B having equitable title to the trust property, T owes her any obligations, this *does* depend on whether T's conscience is affected by knowledge. Arguably, the language of conscience has a positive, albeit limited, role to play in helping us to understand how trust obligations arise. It reminds us that for T to come under any of the personal obligations of trusteeship, she must first know the relevant facts. In accordance with our ordinary understanding of conscience, her factual knowledge is relevant not merely for its own sake but because it is only when she has this knowledge that her capacity for moral reasoning is invoked. This enables her to work out what she ought to do with the property in order to comply with the requirements of the objective standard of morality. At this point – and not before - it becomes reasonable to treat her as being subject to the obligation and so equity underwrites it with the force of law. The requirement that T's conscience be affected tells us more than just that she must know the relevant facts. Rather, it indicates that before equity will recognise and underwrite any obligations in respect of the property, T must be in a position to identify, through the operation of her conscience, what she ought (morally) to do with it in the circumstances.

Critics argue that Lord Browne-Wilkinson takes it for granted that the conscience of equity 'is an artificially ordered conscience and always will

be',[107] while the use of the language of conscience may in fact encourage the belief 'that equity can be a licence to commune directly' with our own, personal, moral convictions.[108] However, Chapter 1 showed that properly understood, the idea of conscience is predicated on the existence of objective moral truth. It also demonstrated that somebody's behaviour may be described as unconscionable because it breached the objective standard of morality, irrespective of her own personal interpretation of the relevant moral principles and how they governed her situation. There is nothing artificial about this idea, nor does it suggest that equity deals in the application of individualised moral convictions. Lord Browne-Wilkinson's point is simply that equity embodies objective moral standards and assumes that our consciences, 'properly informed and instructed',[109] will lead us to comply with them. If we fail to comply, we may be held morally and legally responsible regardless of whether we interpreted the standards correctly or not. Nevertheless, the explanatory force of the language of conscience in relation to the personal obligations of a trustee is limited for the reasons given below.

Of itself, the language of conscience does not help us to identify the moral principles underpinning T's obligations. For this we need direct argument as to the moral principles underpinning trusts. In the previous section, it was argued that the principle at stake in express trusts is that S's intentions as to the use and disposal of her property should be respected. As a result of the decision in *Westdeutsche*, the same principle seems to inform presumed resulting trusts: the key is B's presumed intention to enjoy the beneficial interest herself. However, arguably there are good reasons for saying that what is (or ought to be) presumed is the *absence* of a positive intention to benefit T. On this analysis, we would simply say that owners of property should not be bound by dispositions of their property to which they did not truly consent.[110] It seems likely that this latter concern also informs failed trust resulting trusts.

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[107] Birks, 'Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case' (n 56) 20.
[108] Ibid.
[109] *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (HCA), [72] (Gummow & Lehane JJ).
[110] Webb, 'Property, Unjust Enrichment and Defective Transfers' (n 66); Webb, 'Intention, Mistakes and Resulting Trusts' (n 66).

Moreover, the language of conscience does not help us to identify the nature of T's obligations in any particular case. Starting from first principles, we know that if T is wholly unaware of the facts that make B entitled to the property, she is unable to reason morally that it is not hers to keep for her own benefit. It follows that at this stage, it would be wholly unreasonable to treat her as being under any moral obligation in respect of the property. At best, we can expect her respond appropriately *if* B asserts her entitlement to it or she learns in some other way that B is entitled to it. Once T becomes aware of B's (moral) entitlement to the property, she is able to work out that she ought not to keep the property for her own benefit. Therefore, at this point, we would expect her to do one of two things: return it *to* B or hold it and preserve it *for* B, pending its return to her.

Equity adopts the approach referred to above. B may have equitable title to the property but if T is ignorant of this fact and honestly and reasonably believes it is hers, she cannot be under a legal or equitable duty in respect of it.[111] Nevertheless, B's equitable title gives her the right to call on T to deliver the property up to her or apply it in accordance with her directions under the rule in *Saunders v Vautier.*[112] At this stage, T may come under a liability to B in respect of the property, even though she has no knowledge of B's entitlement to the property because liabilities do not presuppose the existence of an underlying moral obligation or duty.[113] Arguably, this liability crystallises into a live obligation once T acquires knowledge of the relevant facts. She may acquire this knowledge in one of two ways. B may exercise her power[114] or ability[115] under the rule in *Saunders v Vautier* to recall the property from T or direct T to apply it in a particular way. Alternatively, T may acquire knowledge from another source. Once T has this knowledge, she is obliged not to hold the property for her own benefit. This has been referred to as the

[111] McFarlane, *The Structure of Property Law* (n 63) 306.
[112] *Saunders v Vautier* (n 2).
[113] Smith, 'A Duty to Make Restitution' (n 54)163.
[114] McFarlane, *The Structure of Property Law* (n 63) 306-7, 309-310.
[115] Birke Hacker, 'Proprietary Restitution After Impaired Consent Transfers: a Generalised Power Model' (2009) 68 CLJ 324.

'core trust duty'.[116] Logically, it requires her to return the property to B or hold it for her benefit, as required, and equity will underwrite these obligations with the force of law if T fails to comply with them.

Ultimately, however, to say that T is obliged to hold the property *for* B's benefit merely begs the question as to what this entails. The language of conscience cannot answer this question, nor can it help us to identify what or how much T must know before she will be subject to any such duties. These questions are considered briefly in the context of express and resulting trusts below.

*Express Trusts*

According to Lord Browne-Wilkinson, in the case of an express trust, the trustee must know that she is intended to hold the property for the benefit of another. Then she comes under an obligation 'to carry out the purposes for which the property was vested in [her]'.[117] This statement is not particularly informative. In fact, as an express trustee, T is potentially subject to three different types of obligation. First, T comes under a 'custodial stewardship duty, that is, a duty to preserve the assets of the trust except in so far as the terms of the trust permit it'.[118] This requires T to 'account for and deliver trust property *in specie*'[119] to B. To do this, she must obtain possession of or 'get in' the trust property and preserve it for B's benefit.[120] For these purposes, the term 'the trust property' extends to the fruits inherent in the property itself (because B's claim extends to the whole property[121]) and the property's traceable substitutes.[122] As the law currently stands, if T disposes of the trust

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[116] McFarlane, *The Structure of Property Law* (n 63) 216, 551; McFarlane, 'The Centrality of Constructive and Resulting Trusts' (n 63) 184, 197.
[117] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 705 (Lord Browne-Wilkinson).
[118] *AIB Group (UK) plc v Mark Redler & Co Solicitors* (n 6) 1381, [51] (Lord Toulson JSC).
[119] C. Mitchell and S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 122.
[120] *Re Brogden* (1888) 38 ChD 546 (CA), 571 (Fry J); *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75; McGhee QC, *Snell's Equity* (n 73) 739, [29-004].
[121] Worthington (n 61) 61.
[122] *Foskett v McKeown* (n 3) 128 (Lord Millett).

property in an unauthorised fashion, she must reconstitute the trust fund *in specie* or if she cannot, compensate the trust for any loss caused by T's breach of trust.[123] Secondly, T must also 'manage the trust property with proper care'[124] in accordance with the trust instrument (if there is one), and this may involve specific investment[125] and administrative duties. Similarly, if this duty is breached, T must personally compensate the trust fund for any loss caused by it.[126] Thirdly, T may be subject to the fiduciary duty of loyalty, 'which prohibits the trustee from taking any advantage from his position without the fully informed consent of the beneficiary or beneficiaries.'[127] If T is a fiduciary she must disgorge any unauthorised profits she makes from the breach, 'which ought therefore properly to be held on behalf of [B]'.[128] She is also liable to pay compound interest.[129] The custodial, management and fiduciary duties of a trustee have different purposes and should not be elided. On the one hand, T's custodial duties are directed at ensuring that she does not 'exceed the terms of her authority when dealing with the property'.[130] Her management duties are imposed to ensure she exercises proper care when administering the property in accordance with the terms of her authority. By contrast, her fiduciary duties require her to act loyally in the furtherance of B's interests and put B's interests before her own, should they conflict.

Usually, the terms of an express trust are contained in a trust instrument. Therefore, once T has accepted the transfer on the basis of what she thinks is a genuine trust instrument, she will be 'conscience-bound to hold … her legal title to the property for the benefit of the beneficiaries in accordance with that

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[123] *AIB Group (UK) plc v Mark Redler & Co Solicitors* (n 6) 1384, [64] (Lord Toulson JSC). Cf. C. Mitchell, 'Stewardship of Property and Liability to Account' [2014] Conv 215, 223-4 who argues that in fact T is liable not simply to compensate for loss caused by the breach but to restore the value of the trust fund (by reference to current market value).
[124] *AIB Group (UK) plc v Mark Redler & Co Solicitors* (n 6) 1381, [51] (Lord Toulson JSC).
[125] These duties are governed by Part II of the Trustee Act 2000: McGhee QC, *Snell's Equity* (n 73) 741-2, [29-007].
[126] *AIB Group (UK) plc v Mark Redler & Co Solicitors* (n 6) 1384, [64] (Lord Toulson JSC).
[127] Ibid 1381, [51] (Lord Toulson JSC); also *Boardman v Phipps* [1967] 2 AC 46 (HL), 123 (Lord Upjohn).
[128] *AIB Group (UK) plc v Mark Redler & Co Solicitors* (n 6) 1384, [64] (Lord Toulson JSC). These extend to profits made from the trust property itself or its traceable proceeds and T's position as a trustee: *Foskett v McKeown* (n 3) 110, 130 (Lord Millett); 115 (Lord Hoffmann), 130-131 (Lord Millett); *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 7).
[129] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9).
[130] Mitchell, 'Stewardship of Property and Liability to Account' (n 123) 217.

trust instrument'[131] and abide by its terms. However, sometimes it may be unclear whether T has accepted or disclaimed the office of trustee. In these circumstances, it seems that what will suffice to constitute acceptance may depend on the nature of the obligations in issue. For example, authority suggests that if S conveys the legal estate to T in accordance with the terms of an express settlement and T does nothing to disclaim the office of trustee, she is presumed to have *accepted* the trust.[132] On the other hand, there is also authority that suggests that T's inaction for a long period gives rise to a presumption that T has *disclaimed* the trust.[133] The apparent inconsistency in approach may be explicable on the basis that where T was presumed to have accepted the trust, her duties were primarily custodial,[134] but where she was presumed to have disclaimed, the trust involved immediate, active management and investment duties and T had done nothing for thirty years.[135] If this is right, then it may be the case that some positive act of acceptance is necessary before it is reasonable to treat T as bound by active managerial obligations. Intuitively, this seems correct.

Where T, with notice of the trust but without expressly accepting it, receives the trust property, she must then account for it to B. In *Conyngham v Conyngham*[136] T was named in a will as trustee of the rents, profits and produce of a West Indian plantation for the legatees. He received the trust property under the will but instead of accounting for the rents and profits to the legatees under the will, allowed them to be remitted to the testator's son and heir at law, Daniel, who lived in a different country. The legatees sought an

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[131] *Re Reynolds: Official Assignee v Wilson* [2008] NZCA 122; (2007-2008) 10 ITELR 1064, [118] (Robertson J), citing Lord Browne-Wilkinson's judgment in *Westdeutsche* (n 9).
[132] *Re Birchall* (n 77) 439 (Lindley MR); *Mallott v Wilson* (n 78) 502.
[133] *In Re Clout & Frewer's Contract* [1924] 2 Ch 230 (HL).
[134] *Re Birchall* (n 78) (duty to hold land on certain trusts for the benefit of the plaintiffs during their lives and after the death of the survivor upon trust to sell and apply the proceeds as therein mentioned); *Mallott v Wilson* (n 78) (duty to hold certain hereditaments, furniture, railway stock and effects on trust for the settlor's wife, and after her death, for the settlor's children, their heirs, administrators, executors and assigns, and to do such acts as to enable them to obtain possession of the furniture).
[135] *In Re Clout & Frewer's Contract* (n 133) 232 (duty to convert and invest testator's personal estate in securities and pay the income to his wife, to hold his real estate on trust for her and pay her the income from it after outgoings and repairs, and after her death to stand possessed of the residuary estate upon trust for sale and conversion).
[136] *Conyngham v Conyngham* (1750) 1 Ves Sen 522; 27 ER 1181.

account of the rents and profits and the defendant alleged that he was merely acting as Daniel's agent. The Lord Chancellor held that 'the court ought to take [the defendant] to have acted with notice of this trust, on the foot of it, and to account for it.'[137] Otherwise 'the trustee might materially act and dispose of all the profits of the estate, and yet not be accountable, but the *cestui que trust* would be turned against the heir or tenant for life though in another country.'[138] It was incumbent on the defendant to have refused to act as trustee if he did not want to. Instead, however, he went on receiving the rents and profits. The Lord Chancellor concluded that, 'Having notice of the will and the plaintiff's demand, and substantially the directions of the will as far as could be, in receiving from the hands of Daniel, without telling that he renounced the trust, it would be very dangerous to discharge him, and leave the plaintiff to pursue a remedy I know not where.'[139] This case suggests that if T has notice of a trust and receives the trust property, this is sufficient to subject her to custodial duties and render her personally liable to account for it to B, even if she never formally accepted the terms of the trust. The incidence of fiduciary obligations is discussed in the context of resulting trusts below.

*Resulting Trusts*

According to Lord Browne-Wilkinson, resulting trusts work in the same way as express trusts. If T knows she is intended to hold the property for another, she comes under an obligation to carry out the purposes for which it was vested in her.[140] However, this does not necessarily mean that she will be subject to all the obligations of an express trustee. Where the trust is a failed trust resulting trust, T's conscience is already affected by knowledge because she accepted the terms of the original express trust. Therefore, she has already accepted an obligation to hold the trust property for someone else in

[137] Ibid [523]/1182.
[138] Ibid.
[139] Ibid [524]/1182.
[140] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 9) 705 (Lord Browne-Wilkinson).

accordance with those terms, even if the objects of the trust were uncertain.[141] For this reason, it seems right to say that the obligations to which T is subject under a failed trust resulting trust probably *do* correspond to those to which she would have been subject under the original express trust.[142]

Where the trust is a presumed resulting trust, the nature and extent of T's obligations are less certain. It has been argued that presumed resulting trusts are bare trusts,[143] 'meaning that the trustee's primary duty is to convey the trust property to (or at the direction of) the beneficiary'[144] in accordance with the rule in *Saunders v Vautier.*[145] On this analysis, once B recalls the property from T, T acquires knowledge, 'which moves the trust up the scale of fiduciary obligations to include a duty to preserve the trust property and possibly other duties, depending on the circumstances'.[146] However, to say that T is under an *obligation* in respect of the trust property in the absence of knowledge is inaccurate; at best she is under a liability. Moreover, it is wrong to equate a bare trust with the absence of fiduciary obligations. Although it is right to say that the key to a bare trust is the absence of management duties,[147] this does not mean T is necessarily free of the core fiduciary obligation of loyalty to B,[148] at least where she has accepted the terms of the trust.

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[141] *Vandervell v IRC* (n 97) demonstrates that T need not know precisely who she was intended to hold the property for under the original express trust: it is sufficient for her to know that she held it for someone else.
[142] Chambers, *Resulting Trusts* (n 56) 199.
[143] Ibid 94. Authority and opinion supports this: *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, 281 (Gummow J). See also Paul Matthews, 'All About Bare Trusts: Part 1' [2005] Private Client Business 266, 271-272; Martin, *Modern Equity* (n 68) 75; Smith, 'Constructive Fiduciaries?' (n 62) 264-265.
[144] Chambers, *Resulting Trusts* (n 56) 94.
[145] *Saunders v Vautier* (n 2).
[146] Chambers, *Resulting Trusts* (n 56), 209, 210. Smith, 'Constructive Fiduciaries?' (n 62) 264-5 adopts the same approach.
[147] *Christie v Ovington* (1875) 6 Ch D 279, 281 (Hall VC); *Re Docwra* (1885) 29 Ch D 693, 696 (Bacon VC); *Re Cunningham and Frayling* [1891] 2 Ch 567, 572 (Stirling J); *Herdegen v Federal Commissioner of Taxation* (n 143) 282 (Gummow J).
[148] *Brown v Inland Revenue Commissioners* [1965] AC 244 (HL), 265 (Lord Upjohn); *China National Star Petroleum v Tor Drilling* [2002] SLT 1339 (Court of Session); *Persey v Bazley* (1984) 47 P & CR 37 (CA), 44 (May LJ); *Protheroe v Protheroe* [1968] 1 WLR 519; *Clarence House Ltd v National Westminster Bank plc* [2010] 1 WLR 1216, [43] Ward LJ (if the relationship between the parties had constituted a bare trust, fiduciary obligations would have been owed by T to B). Also: M. Conaglen, *Fiduciary Loyalty* (Hart Publishing 2010) 198-200; P. Matthews, 'All About Bare Trusts: Part 2' [2005] Private Client Business 336, 342.

Nevertheless, it seems correct to say that T's knowledge is sufficient to trigger a duty to preserve the property pending its return to B. Arguably, this duty arises whether we treat presumed resulting trusts as responding to B's presumed intention to create a trust for herself or the presumed absence of any intention on her part to benefit T. On either analysis, T needs to know the facts that indicate that the property she received from B is not property B intended her to enjoy for her own benefit. If T has this knowledge, it seems reasonable to oblige her to return the property *in specie* and take care of it[149] pending its return to B. If, despite her knowledge that someone else is entitled to it, she disposes of it in the meantime, it seems reasonable to require her personally to make good the loss.[150]

As in the case of express trusts, it is more difficult to say that T's knowledge that she has property belonging to someone else makes it reasonable to oblige her to manage or invest the property. For it to be reasonable to subject her to these more onerous obligations, we might well require evidence of something more, for example that T held herself out as being prepared to undertake such duties. The same may be said of fiduciary obligations. There is a wide diversity of views as to what precisely justifies a fiduciary obligation.[151] It is said that fiduciary duties 'arise because a person has come under an obligation to act in the interests of another. They are not the source of a positive obligation to act in the interests of another and no breach arises per se from a

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[149] As Webb and Akkouh, *Trusts Law* (n 103) 267 suggests.

[150] Whether this means T is subject to the full extent of custodial duties owed by an express trustee is a question beyond the scope of this thesis.

[151] L. Sealy, 'Fiduciary Relationships' [1962] CLJ 69, 75-6 (suggests that a fiduciary relationship arises where T has control of property which equity views as belonging to B); E. Weinrib, 'The Fiduciary Obligation' (1975) 25 UTLJ 1, 7, 15 (focuses on the fact that one party is 'at the mercy of the other's discretion'); J. Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 LQR 51, 75 (they are based on receipt of a power subject to a duty to use it in the best interests of another); L. Wedderburn, 'Trust, Corporation and the Worker' (1985) 23 Osgoode Hall Law Journal 203, 221 (their purpose is social); P. Finn, 'The Fiduciary Principle' in T. Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989) 46-47 (fiduciary loyalty is characterized by the idea that one party is entitled to expect that the other will act in her interests); S. Worthington, 'Fiduciaries: When is Self-Denial Obligatory?' (1999) 58 CLJ 500 505 (they should only be imposed when the function of one party within the relationship demands self-denial); P. Birks, 'The Content of Fiduciary Obligation' (2002) 16 TLI 34, 41-44 (they are based on altruism); Conaglen (n 148) 245 (they are based on one party's legitimate expectation that the other party will act in her interest).

failure to act in the interests of another.'[152] The question is what gives rise to that obligation. It is said that equity will require a person to act in another's interests if she has put herself in a position that requires her to act for or on behalf of another.[153] Thus it is said that '[A] fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.'[154] This is not to say that equity will only recognise fiduciary obligations where they arise by consent; it will impose them where necessary. However, it would seem reasonable to do so only where T either intentionally assumes a responsibility to act in B's best interests[155] or holds herself out as doing so.

Finally, it is worth mentioning that the language of conscience does not tell us *how much* the legal owner must know in order to be subject to the obligations of a trustee. This question did not arise on the facts of *Westdeutsche* because the contract only became void as a result a change in the law, about which neither of the parties had reason to know. However, in view of Lord Browne-Wilkinson's approach, it is possible that he would say there is nothing unreasonable in subjecting an individual to an obligation on the basis of constructive notice because if she had acquired the factual knowledge she ought to have acquired, she would have been in a position to discern and comply with the obligation. Against this, it could be argued that if an individual is being asked to take positive steps to comply with a moral standard, then it is only fair to require her to do so when she has actual knowledge of the relevant facts.[156] In the chapters that follow it will be seen that where the courts are concerned to give effect to obligations, they do tend to require actual knowledge. Either way, this question is a moral one for the courts, the answer to which cannot depend on the idea of conscience *per se*.

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[152] P. Parkinson, *Principles of Equity* (P. Parkinson ed, 2nd edn, Lawbook Co. 2003) 347.
[153] Wedderburn (n 151); Conaglen (n 148), 61, 62, 75-76.
[154] *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).
[155] P. Finn, *Fiduciary Obligations* (The Law Book Co. Ltd 1977) 9; J. Edelman, 'When do Fiduciary Duties Arise?' (2010) 126 LQR 302, 316; L. Hoyano, 'The Flight to the Fiduciary Haven' in P. Birks (ed), *Privacy and Loyalty* (Oxford University Press 1997); Millett, 'Proprietary Restitution' (n 95) 309, 310.
[156] In accordance with the first three categories of knowledge outlined in *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* [1993] 1 WLR 509 (Ch).

## CONCLUSION

Lord Browne-Wilkinson's invocation of conscience in *Westdeutsche* has been widely criticised. To the extent he claims that the idea of conscience underpins the proprietary aspects of trusts, these criticisms are justified. The law on express and resulting trusts clearly indicates that B may acquire equitable title to property of which T is the legal owner, irrespective of whether T's conscience is affected by knowledge. To insist that equitable title can only arise from the date of knowledge is wrong as a matter of principle and likely to lead to uncertainty as to the incidence of property rights in practice. B can acquire title under an express or resulting trust even where T is unaware of the relevant facts, because B's title to the property need not depend on T coming under any obligations towards her in respect of it. If B does acquire title in circumstances where T is unaware of the facts, she acquires an immediate claim to the return of the property but arguably at this stage T is merely under a liability to return the property to B if called upon to do so.

By contrast, the language of conscience does tell us something about T's obligations as a trustee. It reminds us that when T comes under an obligation she is being required to comply with certain moral standards. Lord Browne-Wilkinson tells us it is unreasonable to expect T to comply with these standards unless she has knowledge of the relevant facts, i.e. that she is in possession of property to which someone else is entitled. The acquisition of factual knowledge is a prerequisite to the process of moral reasoning, whereby she applies her innate understanding of the relevant moral principles to her knowledge of the facts. Without it she is unable to identify and comply with what she ought (morally) to do with the property in the circumstances and it would be inappropriate to treat her as subject to any obligation in respect of it. Once she has this knowledge, she is in a position to discern that she ought to return the property to B or hold it for her benefit. At this stage (and not before) equity underwrites her moral obligations with the force of law and will grant relief if T fails to comply with what the objective standard of morality requires of her in the circumstances.

However, beyond this, the language of conscience tells us precious little. Of itself, it cannot help us to identify what moral principles underpin trust obligations. Similarly, it cannot tell us what type of obligations affect T, or the content or extent of her knowledge. These are all important questions, which require direct argument as to the principles the law does or should embody in this area and how they are to be applied. Unfortunately, as Lord Browne-Wilkinson's judgment demonstrates, to invoke the language of conscience without paying due attention to the limits of its explanatory power can cause real confusion. For this reason, it is important to be very clear as to what conscience means and what, if any, function it plays within trusts doctrine. Otherwise, the use of the language of conscience may well distract us from the rigorous analysis demanded by the questions it *cannot* answer.

# CHAPTER 3: CONSCIENCE AND CONSTRUCTIVE TRUSTS

## INTRODUCTION

This chapter considers the meaning and function of conscience in the context of constructive trusts. In particular, the chapter considers five non-express trusts, which have been described as constructive trusts and may arise in a commercial context: trusts over mistaken payments, trusts that arise upon rescission, trusts that arise in response to theft, the *Pallant v Morgan* equity and trusts over unauthorised fiduciary profits. The chapter makes two arguments. First, it argues that the use of the language of conscience to describe how constructive trusts work generally tells us nothing more than that they arise because moral reason requires it. Secondly, it argues that the idea of conscience plays the same role in the trusts considered in this chapter as it does in the context of express and resulting trusts. It reminds us that trust obligations are moral obligations and it is unreasonable to treat T as bound by them before she has knowledge of the relevant facts because it is only then that she is in a position to discern and comply with what morality requires her to do with the property. However, it never explains why B acquires equitable title to the property or T comes under an obligation in respect of it in the first place, nor can it help us identify the content or scope of T's obligations.

## CONSCIENCE AND CONSTRUCTIVE TRUSTS - MEANING

The language of conscience is often used at a very general level to describe the purpose of constructive trusts. Where it is used in this way, it bears its ordinary meaning: it tells us that these trusts arise for moral reasons. For example, it has been remarked that 'the constructive trust is the formula through which the conscience of equity finds expression.'[1] All this can mean is that when equity recognises a constructive trust, it does so because moral reason requires it. Similarly, constructive trusts have been said to arise when

[1] *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380, 386 (Cardozo J).

under the circumstances it would be 'inequitable'[2] or 'unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another.'[3] This means simply that a constructive trust arises when it would be morally unacceptable to allow the legal owner of the property to ignore someone else's equitable claim to it. Again, putting it slightly differently, '[A] constructive trust cannot be imposed unless the defendant's conduct is considered unconscionable and so, in this respect, unconscionability appears to be a pre-condition of the imposition of the trust.'[4] This tells us nothing more than that a constructive trust cannot be imposed unless the defendant has behaved in a morally unacceptable manner.

In *Westdeutsche*[5] itself, Lord Browne-Wilkinson held that constructive trusts do not arise before T has knowledge 'of the factors alleged to affect his conscience'.[6] When T acquires this knowledge, she must 'carry out the purposes … which the law imposes on [her] by reason of [her] unconscionable conduct'.[7] If we deconstruct this, all it means is that the trust does not arise before T has knowledge of the facts, which enables her to work out, through the process of moral understanding, what she ought to do with the property (i.e. deliver it *in specie* to B, or hold it for her benefit). When T obtains this knowledge, she must do what the law tells her to do because she has behaved in a morally unacceptable manner (presumably by not doing what she ought to have done, i.e. deliver the property to B). At best, this tells us that when equity imposes a constructive trust, it is underwriting T's moral obligation to give the property to B or hold it for her benefit. As before, however, the language of conscience tells us nothing about *why* T is so obliged, or what or how much she must know before she comes under such an obligation. Moreover, Lord Browne-Wilkinson's comments tell us even less about the proprietary aspects of constructive trusts. All we know is that in his view B

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[2] *Gissing v Gissing* [1971] AC 886 (HL), 905 (Lord Diplock).
[3] P. Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 400.
[4] N. Hopkins, 'How Should We Respond to Unconscionability?' in G. Griffiths and M. Dixon (eds), *Contemporary Perspectives on Equity, Property and Trusts Law* (Oxford University Press 2007) 9.
[5] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL).
[6] Ibid 705 (Lord Browne-Wilkinson).
[7] Ibid.

does not acquire equitable title before T's conscience is affected by knowledge of the relevant facts so as to bring her under the relevant obligation.

Finally, the tendency to characterise constructive trusts as trusts that are particularly closely associated with the idea of conscience is problematic for the following reasons. First, as the last chapter showed, the idea of conscience is relevant to *all* trusts. Indeed, Lord Browne-Wilkinson's argument in *Westdeutsche* was that no *resulting* trust could arise in the circumstances because T's conscience was unaffected by knowledge at a time while it still held the money. To suggest that constructive trusts are uniquely linked to or based on the idea of conscience is therefore misleading. Secondly, it follows that the idea of conscience does not provide a basis for differentiating between types of trusts. If we wish to do this, we must do it by reference to the principles that support them. Thirdly, general appeals to conscience fail adequately to distinguish between the personal and proprietary aspects of trusts. The idea of conscience points to the moral nature of T's obligations as trustee and reminds us T's knowledge of the relevant facts is a precondition to that obligation arising. However, the rationale for the recognition of both B's equitable title and T's obligations is always some moral principle towards which T's faculty for moral reasoning should point her. The remainder of this chapter considers the role of conscience in the five non-express trusts referred to at the outset.

## CONSCIENCE AND CONSTRUCTIVE TRUSTS ARISING IN RESPONSE TO MISTAKEN PAYMENTS

According to Lord Browne-Wilkinson in *Westdeutsche,* B may have an equitable proprietary claim to money paid by mistake to T under a constructive trust once T has knowledge of the mistake.[8] In principle, however, there are good reasons for saying that the fact that B does intend T to benefit from the payment is sufficient to give her equitable title to the property and the ability to recall it *in specie* from T on the ground that otherwise T would be unjustly

[8] Ibid 714-5.

enriched. On this analysis, B would acquire equitable title to the money at the date of payment irrespective of the state of T's conscience. The language of conscience would have a limited explanatory role in relation to T's obligations in respect of the money. It would remind us that it is unreasonable to treat T as coming under any obligations in respect of the money before the date on which she learns of B's mistake because only at that point could T determine, through the process of moral reasoning, what she ought to do with the money, i.e. return it to B.

***Conscience and the Personal Claim to Recover a Mistaken Payment***

Where B mistakenly pays T, e.g. in respect of a non-existent debt,[9] the law of unjust enrichment allows B to recover the amount of the enrichment as money had and received. There may be no contract involved at all, or as in the case of *Westdeutsche* B may believe that the contract pursuant to which she makes the payment is valid, when in fact it is void. During the nineteenth century, some of the cases on money had and received used the language of conscience to describe the fact that it would be unjust for T to retain the benefit of the payment.[10] For example, in *Kelly v Solari*[11] Rolfe B held that 'wherever [money] is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it.'[12] Kremer has argued that the cases support a more general principle of unconscientious receipt.[13] However, his definition of this principle as 'informed by the interests equity is seeking to protect' and operating 'by reference to substantive principles' which 'form the substantive body of equitable jurisprudence'[14] is so general as to be meaningless. By contrast, Birks suggests that the use of the language of conscience here has the potential to confuse insofar as it might be thought to suggest 'bad behaviour at the time

[9] Birks refers to this as the core example of unjust enrichment: P. Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 3.
[10] *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676.
[11] *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24.
[12] Ibid [59]/26 (Rolfe B).
[13] B. Kremer, 'Restitution and Unconscientiousness: Another View' (2003) 119 LQR 188.
[14] Ibid 191.

of receipt'[15] or that T's knowledge of the mistake formed a necessary precondition to B's cause of action. The action for money had and received was never fault-based[16] and the language of conscience is used in a conclusory sense only, i.e. to describe 'the prior determination that other facts require restitution to be made'.[17] In other words, in *Kelly v Solari* Rolfe B was simply emphasising that it would be morally unacceptable if a recipient of a mistaken payment were to be permitted to retain it, i.e. because ultimately she is morally obliged to repay it.

The language of conscience does not tell us *why* T ultimately comes under a moral obligation to return a mistaken payment. We can certainly say that morality requires T to give up that which is not hers to keep. But we need to go further and ask why it is not hers to keep and in mistake cases, the reason is that B did not consent or intend T to have it.[18] It follows that from the date on which B makes the mistaken payment she has a claim to recover it and T becomes liable to return it to her. However, it is difficult to see how any moral *obligation* to return the money arises before T knows the facts which enables her to determine that she ought to return it to B.[19] In mistaken payment cases there is therefore a tension: B becomes immediately entitled to the money because she never intended T to have it, yet it cannot be reasonable to subject T to an obligation to return it before she is aware of the mistake. The common law deals with this tension by treating B as entitled to recover the mistaken payment from the date on which it was made – thus, it is said that T is strictly liable to return it – but allowing T to rely on the defence of change of position[20] to the extent that she uses the money for her own benefit before learning of the

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[15] Birks (n 9) 5.
[16] Sir William Evans, 'An Essay on the Action for Money Had and Received (1802)' (1998) 6 RLR 3.
[17] Birks (n 9) 6.
[18] R. Chambers, *Resulting Trusts* (Clarendon Press 1997) 125-132; P. Birks, *An Introduction to the Law of Restitution* (revised edn, 1989) 140, 147; A. Burrows, *The Law of Restitution* (Oxford University Press 2010) 203-4. Cf. Birks, *Unjust Enrichment* (n 9) 101-160, who suggests the true basis for all unjust enrichment claims is an absence of basis for the transaction.
[19] Cf. S. Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Law and Jurisprudence 157, 173.
[20] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL), 579.

mistake. Even if, as some argue,[21] T comes under no positive obligation at all in respect of the money before judgment, the extent of her ultimate obligation is nevertheless limited by reference to the date on which her conscience was affected by knowledge that the money was not hers to keep.

***Conscience and the Proprietary Response to Mistaken Payments***

Arguably, there are good reasons why we should accept that the principle against unjust enrichment gives B equitable title to the money from the date of a mistaken payment. As Webb explains, ownership interests 'provide exclusive use privileges and control powers', which means that others may benefit from an asset only where the owner consents. Consent is important because the owner is exclusively entitled to decide how the asset should be used. If T obtains money from B without T's consent, she obtains something to which she is not entitled and to which B is entitled. In Webb's view, '[T]his justifies, where possible, the return of what [T] has obtained. Restitutionary claims arising out of defective transfers rest on and give effect to [B]'s exclusive interest in what [T] received or obtained.'[22] Therefore, where B does not intend to benefit T, there is no obvious reason why B should not be able to bring a claim 'asserting that very interest.'[23] Mistakes are significant because they mark out 'contingencies to which [B]'s intentions do not extend'.[24] What justifies recovery 'is not that [B] was mistaken but the fact that he had no applicable intention to transfer the asset to [T]. Establishing a mistake is just a means to that end.'[25] For these reasons, in principle a proprietary response to mistake from the date of payment seems justifiable. In the last chapter, we saw that resulting trusts can arise to give B equitable title irrespective of the state of T's conscience and there is judicial support for the view that they may

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[21] Smith (n 19), 173-6.
[22] C. Webb, 'Property, Unjust Enrichment and Defective Transfers' in R. Chambers, C. Mitchell and R. Penner (eds), *The Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 352-3; S. Worthington, *Equity* (2nd edn, Oxford University Press 2006) 292.
[23] Webb (n 22) 369.
[24] C. Webb, 'Intention, Mistakes and Resulting Trusts' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 325. Alternatively, the reason T's enrichment is unjust is because any basis that might have justified it failed from the start: Birks, *Unjust Enrichment* (n 9) 116, 125, 126, 131.
[25] Webb, 'Intention, Mistakes and Resulting Trusts' (n 24) 327.

arise in response to an absence of intention to benefit T, i.e. to reverse unjust enrichment.[26] Therefore, the most obviously appropriate vehicle for the proprietary response to mistaken payments would seem to be the resulting trust.

Originally, authority[27] seemed to support the idea that B's lack of consent to the transfer was sufficient not only to generate a right to reverse T's enrichment but also a right to recover the money itself from T.[28] In *Westdeutsche*, however, Lord Browne-Wilkinson rejected this idea, so the authority is now of doubtful effect.[29] In accordance with Lord Browne-Wilkinson's view that conscience necessarily underpins both the personal *and* the proprietary aspects of trusts, he held that B could not have acquired equitable title on the date of payment because at that stage T was unaware of the mistake. Nevertheless, he held that '[A]lthough the mere receipt of moneys, in ignorance of the mistake, gives rise to no trust, the retention of moneys after [T] learned of the mistake may well have given rise to a constructive trust.'[30] This finding has been applied subsequently[31] and represents current law. This approach makes proof by B that T's conscience has been affected by knowledge of the mistake a necessary precondition to the proprietary claim. For the reasons given above, however, there is no reason in principle why the proprietary claim should work in this way.

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[26] *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (CA).

[27] *Sinclair v Brougham* [1914] AC 398 (HL) (from which the House of Lords departed in *Westdeutsche*); *Chase Manhattan NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (mistake); *Nesté Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658 (absence of consideration).

[28] D. Hayton, 'Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?' in T. Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989) 214.

[29] Millett (n 3) 412-3 agrees with this conclusion for the same reason he agreed with the outcome in *Westdeutsche*. In his view, the plaintiff in *Chase Manhattan* 'had intentionally though mistakenly parted with all beneficial interest in the money' and this was 'inconsistent with the existence of a resulting trust'.

[30] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 5) 715 (Lord Browne-Wilkinson).

[31] *Friends Provident Life Office v Hillier Parker May & Rowden* [1997] QB 85, 106 (Auld LJ) (mistake); *Nesté Oy v Lloyds Bank plc* (n 27) (failure of consideration); *Bank of America v Arnell* [1999] Lloyd's Rep Bank 399, 404-5 (Aikens J); *Papamichael v National Westminster Bank Plc* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341, [220] (HHJ Chambers QC); *Commerzbank Aktiengesellschaft v IMB Morgan Plc* [2005] 1 Lloyd's Rep 298, 304, [38] (Lawrence Collins J); *Re Farepak Food and Gifts Ltd (in administration)* [2006] EWHC 3272 (Ch), [2008] BCC 22, 35, [40] (Mann J); approved by Warren J in *Re Farepak Food and Gifts Ltd (No. 2)* [2009] EWHC 2580 (Ch), [2010] BCC 735, 741, [25] (mistake).

Insofar as Lord Browne-Wilkinson's conscience-based approach may have been motivated by concerns to prevent T from unwittingly owing any obligations in respect of the property, requiring proof of T's knowledge as a precondition to establishing B's equitable title is unnecessary to achieve this. We know that if B's claim is personal, T becomes liable to make restitution from the date of payment, while the change of position defence limits the extent of her obligation by reference to the date on which she acquired knowledge of the mistake. In accordance with the arguments made in the last chapter, B's equitable proprietary claim would work in a similar fashion as against T. B would acquire equitable title to the money under a resulting trust at the date of the mistaken payment, which would enable her to recall the money from T *in specie*. However, because at this stage T would know nothing that would tell her the money was not hers to keep, it would be unreasonable to treat her as being under a moral obligation to take active steps to return it. Therefore, if T disposed of any of it before learning of B's claim, B could not recover that portion from T. However, once T's conscience became affected by knowledge of the mistake, so that she could determine (through the process of moral reasoning) that she ought to return the property, it would be reasonable to treat her as bound by an obligation to preserve and return to B whatever she had left of the money and/or its traceable proceeds. However, for the reasons given in Chapter 2, T's knowledge would not necessarily be sufficient to generate management or fiduciary obligations.

In rejecting the idea that B could acquire equitable title from the date of payment, Lord Browne-Wilkinson was also clearly influenced by concerns that it would be inappropriate for B to enjoy the proprietary advantages associated with equitable title from the date of payment, such as the ability to avail of equity's tracing rules, claim the property from third parties and enjoy priority in T's insolvency. He could see 'no moral or legal justification' for B being granted these advantages before T's conscience was affected by knowledge of the mistake.[32] These concerns derive from the fact that in *Westdeutsche* the apparent existence of the contract, combined with the invisibility of B's

[32] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 5) 704.

equitable title,[33] suggested to the rest of the world that there was in fact a valid reason for the payment from B to T, so as to give T absolute title to the money.

However, Lord Browne-Wilkinson's concerns may be overstated or, at least, could be addressed in a different way. As far as his concerns about tracing are concerned, two points can be made. First, if, as seems to be the case, it is right that B can acquire equitable title to property without T knowing about it, so as to give B a right to recall it *in specie*, then as a matter of principle this ought to be sufficient to entitle B to avail of equity's identification rules, so that she can locate what is after all *her* property.[34] Secondly, to the extent that B's entitlement to claim a proportionate share of any traceable substitutes held by third parties[35] might be thought to be unfair,[36] the problem could be addressed by limiting B's claim against third parties to a lien over the substitute to the value of the original trust property.[37] Moreover, as Worthington also points out, 'proprietary rights generated by unjust enrichment claims will only prevail against volunteers or third party purchasers who have notice of the claimant's interests.'[38] As far as the reluctance to afford B priority in T's insolvency is concerned, Lord Browne-Wilkinson's analysis seems to suggest that if T is under no moral duty to give the property up to B or hold it for her benefit, then there is no reason why she should be expected to ring-fence it from her creditors so as to take it out of her estate for insolvency purposes. The difficulty of course is that priority in insolvency is an attribute of legal or equitable ownership of property,[39] i.e. it is referable to B's entitlement to the property rather than any obligations T may owe her in respect of it.

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[33] On the difficulties associated with the invisibility of equitable title, see L. Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 430-441.
[34] J. McGhee QC (ed) *Snell's Equity* (33rd edn, Sweet & Maxwell 2014) 787, [30-054] suggests that a fiduciary relationship *or* a distinct equitable title will suffice, citing *Re Diplock* [1948] Ch 465 (CA), 520.
[35] *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102.
[36] Chapter 4, p 114, text to n 5.
[37] S. Worthington, 'Justifying Claims to Secondary Profits' in E. Schrage (ed), *Unjust Enrichment and the Law of Contract* (Kluwer 2001).
[38] Worthington, *Equity* (n 22) 292. P. Birks, 'The End of the Remedial Constructive Trust' [1998] TLI 202, 214 suggests they could also avail of the change of position defence.
[39] C. Webb and T. Akkouh, *Trusts Law* (3rd edn, Palgrave Macmillan 2013) 22.

The effect of Lord Browne-Wilkinson's conscience-based limitation is therefore to reinforce a 'commitment to fault-based restitution'[40] in circumstances where it may not be necessary or justified. Arguably, it also distorts our proper understanding of how conscience works in the context of trusts. Lord Browne-Wilkinson's approach is confusing, as it may well lead us to think that T's knowledge is the *reason* why the trust arises and B gets equitable title to the property, when in fact it is merely a condition for T's obligations to arise.

## CONSCIENCE AND THE PROPRIETARY RESPONSE TO OTHER DEFECTIVE TRANSFERS

The language of conscience is not often used in the context of non-express trusts that arise on rescission. In any event, it tells us nothing about why the trust arises and B gets equitable title to the property; it merely reminds us that T's knowledge is a precondition to the recognition of trust obligations. B may transfer, or enter into a contract to transfer a benefit to T in circumstances where her intention to do so is impaired by other factors, such as undue influence, the fact that she suffers from a special disadvantage of which T is aware (unconscionable bargains), misrepresentation or duress. If the transaction is contractual, it is voidable at common law (for fraud and duress only) or in equity and B may choose to set it aside. Until B chooses to rescind, B has a personal claim to recover title to it when rescission occurs.[41] This is a mere equity, i.e. something less than a full-blown equitable interest under a trust.[42] At the date of election, equitable title to the property re-vests in B retrospectively[43] under a non-express trust, so as to give her a full equitable

[40] P. Birks, 'Trusts Raised to Reverse Unjust Enrichment: The Westdeutsche Case' (1996) 4 RLR 3, 21-22, 26; P. Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1, 71.
[41] *Bristol & West Building Society v Mothew* [1998] Ch 1, 11-12 (Millett LJ); S. Worthington, 'The Proprietary Consequences of Rescission' (2002) 10 RLR 28, 38-40; D. O'Sullivan, S. Elliott and R. Zakrzewski, *The Law of Rescission* (2nd edn, Oxford University Press 2014) 330, [16.12];
[42] Worthington, 'The Proprietary Consequences of Rescission' (n 41) 38, 39, 40.
[43] *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281.

interest under a non-express trust,[44] and enable her to trace in equity.[45] B's election may take the form of direct communication with T or it may be implied from her conduct[46] and in exceptional cases, where T is guilty of fraudulent misrepresentation, it may be sufficient if T hears about B's election from a third party.[47] Once B elects to rescind, T comes under the obligation to preserve and return the property *in specie* to B.

To understand why B gets equitable title to the property, we have to ask what moral principle justifies setting the contract aside. The role of conscience in rescission for misrepresentation, undue influence, lawful act duress and unconscionable bargains is considered in Chapters 5-7. There it is argued that in all these doctrines, as a matter of principle, the reason why B is entitled to rescind is that her intention to transfer the benefit to T (and thus her consent to the transaction) was impaired and distorted. It is true that for relief to be granted, T must have either caused the problem with B's consent (e.g. innocent misrepresentation) or know about it (e.g. unconscionable bargains), but this additional factor simply tells us that in the circumstances it would not be unfair to displace T's interest in security of receipt. It does not tell us why B is entitled to rescind in the first place. In some cases, e.g. where T makes a fraudulent misrepresentation or puts pressure on B by threatening to do something unlawful, there may be a second reason why B is entitled to set aside the transaction, i.e. because otherwise T would benefit from her wrongful conduct. In such cases, T will know or intend that B's consent will be impaired. However, this does not detract from the fact that, independent of T's wrongful conduct or fault, we can say that T should not be entitled to retain the benefit because B never properly intended her to have it and thus T would be unjustly enriched. In light of the above, it follows that even if T's knowledge is present it is not a ground of B's claim. Therefore, it is unnecessary for T's

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[44] *Latec Investments v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 (HCA), 290-291 (Menzies J); *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387-390 (Brennan J).
[45] *Lonrho v Fayed (No. 2)* [1992] 1 WLR 1, 11-12 (Millett J); *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch), 713 (Millett J); *Bristol & West Building Society v Mothew* (n 41) 23 (Millett LJ).
[46] O'Sullivan, Elliott and Zakrzewski (n 41), 235, [11.04]; *Shalson v Russo* (n 43), [120], [127] (Rimer J).
[47] *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA); O'Sullivan, Elliott and Zakrzewski (n 41) 242, [41.33].

conscience to be affected by knowledge in order for B to acquire equitable title to the property.

Unjust enrichment scholars argue that the impairment of B's consent[48] at the date of the transfer immediately entitles her to equitable title under a non-express trust (which they would say is a resulting trust) and that such a trust should not be postponed to the date of election.[49] Applying what we know about conscience to this analysis, we can say that the acquisition of equitable title by B at the date of the contract would mean that T would be subject to an immediate liability to return the property to her if required. However, that would not necessarily translate into an immediate obligation on T's part to deliver the property *in specie* to B or hold it for her benefit, as it would not be reasonable to treat T as subject to such a (moral) obligation before she had knowledge of the relevant facts, i.e. that B's consent to the transaction was impaired. Of course, in circumstances where B's consent was impaired as a result of, e.g. fraud or duress or because the bargain was unconscionable, T *would* know this at the date of the contract and therefore she would become subject to trustee obligations at the same date B acquired equitable title. However, this would be a coincidence of timing and nothing more.

There may be at least two reasons why, as the law stands, the non-express trust does not arise before the date B elects to rescind the contract. First, the contract gives T legal title to the property and provides an independent reason for her to retain any benefits received under it. Therefore, B cannot at the same time leave the contract on foot and argue that the retention by T of any benefits is unjust.[50] In other words, as long as the contract exists, it is difficult to say that B has been unjustly enriched. Secondly, the requirement of election protects third parties who deal with T on the basis that she has good title to the benefits she received under the contract. Before election, B's mere equity ranks behind interests acquired by *bona fide* purchasers for value of the legal

[48] Chambers (n 18) 125-139.
[49] Ibid (n 18) 171-4, 182-3; Birks, *Unjust Enrichment* (n 9) 192.
[50] *Daly v Sydney Stock Exchange Ltd* (n 44); E. Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 476.

or equitable estate.[51] Rescission does not undo any transactions between T and third parties that take place before the date of election.[52] Therefore, a third party who acquires the property from T before election takes it free and clear to the extent that her interest in it takes priority over B's mere equity. By contrast, if B were to acquire a proprietary interest at the date of the contract, this would trump the interests of *bona fide* purchasers, who, in reliance on the appearance of T's good title to the property received under the contract, subsequently took equitable security over it, e.g. in the form of an equitable charge or mortgage.

In some cases, e.g. of innocent misrepresentation or undue influence, T may not know that there was any problem with B's consent to the transaction until B notifies her of her intention to rescind the contract through the process of election. Therefore, it might be said that the requirement of election also protects T against any unwitting trustee obligations. In *Bristol and West Building Society v Mothew*[53] the question arose as to whether T, who had made an innocent misrepresentation to B which allowed her to rescind the contract, could be held personally liable for disposing of money received by her in accordance with the contract *before* B elected to rescind. Millett LJ held that T could not be held liable in this way. In his view, 'on rescission the equitable title does not revest retrospectively so as to cause an application of trust money which was properly authorised when made to be afterwards treated as a breach of trust.'[54] On the facts, before the date of election T was unaware that he had misled B and therefore until B elected to rescind, T had no idea that he had no authority to deal with the money he had received from B. T 'could not be bound to repay the money to [B] so long as he was ignorant of the facts which had brought his authority to an end, for those are the facts which are alleged to

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[51] *Phillips v Phillips* (1861) 4 De G F & J 208, 218 (Lord Westbury LC); *Latec Investments v Hotel Terrigal Pty Ltd* (n 44) 277 (Kitto J), 291 (Menzies J); *Bristol & West Building Society v Mothew* (n 41) 22-23 (Millett LJ); *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 (CA), [99] (Potter LJ).

[52] *Shalson v Russo* (n 43) 323, [126] (Rimer J). B. Hacker, 'Rescission and Third Party Rights' (1996) 14 RLR 21, 31, 35 suggests that in practice B will be left to pursue any potential claims for damages or disgorgement of profits against T, who has parted with the property.

[53] *Bristol & West Building Society v Mothew* (n 41).

[54] Ibid 23 (Millett LJ).

affect his conscience and subject him to an obligation to return the money to [B]'.[55]

However, T would be equally well protected against unwitting obligations were the trust to arise immediately at the date of transfer. In accordance with the arguments in the last chapter, although B would acquire equitable title immediately (so as to subject T to a liability to return the property), it would not be reasonable to treat T as coming under any obligation to preserve and return the property before her conscience was affected by knowledge of the problem with consent. Therefore, she would not come under any obligations at all in respect of the property before she acquired knowledge of the facts upon which B's entitlement to relief was based, i.e. that her consent had been impaired.

Moreover, the fact that B does not acquire equitable title – and thus T comes under no equitable obligations – before the date of election can operate harshly as between B and T. In some cases, such as fraudulent misrepresentation, T may be fully aware from the date of the transaction that B did not properly consent to the transaction. As a matter of principle it seems reasonable to treat her as subject to a moral obligation to preserve and return the property from that date. However, as the law stands, she comes under no such obligation until B elects to rescind and thereby acquires equitable title to the property. [56] As between B and T, this seems difficult to justify.[57] There are signs that at least in some cases of fraud the courts agree. We know that B will be taken to have elected to rescind even if T learns about her decision from a third party,[58] and a trust has been found to arise immediately where the contract itself is the instrument of fraud.[59] Ultimately, however, it may be that the prejudice caused to third parties by the recognition of an immediate equitable interest

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[55] Ibid.
[56] *Lonrho v Fayed (No. 2)* (n 45) 11-12 (Millett J); *Collings v Lee* [2001] 2 All ER 332 (CA), 337 (Nourse LJ); *Shalson v Russo* (n 43) [108], [119] (Rimer J).
[57] B. McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 302.
[58] Text to n 47.
[59] *Halley v The Law Society* [2003] EWCA Civ 97, [47] (Carnwath LJ); T. Wu, 'Proprietary Relief Without Rescission' (2004) 63 CLJ 30.

justifies the delay in the recognition and enforcement of T's moral obligation to B.

In light of the above, we can say that in the case of non-express trusts arising in response to defective transfers, the idea of conscience is really only relevant for the purpose of reminding us that T's obligation to preserve or return the property to B is a moral one, to which it is not reasonable to subject T unless she has the factual knowledge that will enable her to identify and comply with such an obligation. Beyond this, as elsewhere, the language of conscience adds little to our understanding of what is going on. It tells us nothing about why B acquires equitable title to the property: this depends on the principle against unjust enrichment. It does not help us to identify the type of trust that arises, which has been referred to variously as a constructive trust[60] and a resulting trust.[61] On balance, as the trust responds to unjust enrichment, the resulting trust classification is probably better. Moreover, the language of conscience does not help us to identify the content or extent of T's obligations. Millett LJ has held that when B elects to rescind, T's 'fiduciary' obligations do not extend beyond those to which a vendor is subject as a constructive trustee when she sells property.[62] These obligations require her to preserve and care for the property as a prudent owner would.[63] This means that she is personally responsible for depredations to or loss of the property pending its return to B.[64] Furthermore, if the property is of the sort that needs managing, such as land, she must manage it appropriately in B's interests pending its transfer to B.[65] For the reasons given in Chapter 2, the obligation to preserve and care for the property and make good any depredations or loss is better viewed as a custodial, rather than a fiduciary obligation. Moreover, it seems questionable whether, absent any assumption of responsibility or acceptance by T, she should be subject to any active management obligations in respect of the

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[60] *Lonrho v Fayed (No. 2)* (n 45) 11-12 (Millett J); Millett (n 3) 416; Worthington, 'The Proprietary Consequences of Rescission' (n 41) 38.
[61] *El Ajou v Dollar Land Holdings plc* (n 45) 714 (Millett J).
[62] *Lonrho v Fayed (No. 2)* (n 45) 12 (Millett LJ).
[63] *Phillips v Silvester* (1872-73) LR 8 Ch App 173 (CA), 177 (Lord Selborne LC).
[64] *Raffety v Schofield* [1897] 1 Ch 937 (Ch), 944-5 (Romer J).
[65] *Abdulla v Shah* [1959] AC 124 (PC), 131, 132 (Lord Somervell); *Earl of Egmont v Smith* (1877) 6 Ch D 468, 475-6 (Lord Jessel MR).

property. Finally, the language of conscience cannot help us to answer the difficult question of whether the proprietary response to *all* defective transfers (i.e. those which render a contract void, such as mistake, and those which render a contract voidable, as discussed here) should be the same and if so, what approach the law should adopt. To answer all these questions, we need direct argument as to what principles the law does or should embody in this context.

## CONSCIENCE, CONSTRUCTIVE TRUSTS AND THEFT

According to Lord Browne-Wilkinson in *Westdeutsche*,[66] if T steals or fraudulently takes B's money,[67] T immediately becomes a trustee of the money under a constructive trust. Australian authority also supports this view.[68] Here, as elsewhere, the idea of conscience tells us something about the circumstances in which T comes under a positive obligation to return the property to B (i.e. when she acquires knowledge of the facts), but it does not explain why B gets equitable title to the property in the first place.

The first reason we might say that a trust arises is that T commits a wrong and equity should offer a proprietary response to that wrong. When T steals B's property, B retains legal title to it and this entitles her to recover the property in a common law action for conversion. However, if left to a common law remedy, B might well find it difficult to recover her property, particularly if it were money, as the common law tracing rules would not permit her to trace or follow the money through mixed funds or into and out of bank accounts. Therefore, we might say that a trust is justified in order to allow B to avail of equity's more favourable tracing rules.[69] We can therefore justify equity's intervention on the basis that it supplements the common law's inadequate

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[66] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 5) 716 (Lord Browne-Wilkinson); *Collings v Lee* (n 56).
[67] As distinct from inducing her to enter into a contract by fraudulent misrepresentation, where the trust arises only at the date B elects to rescind. Cf. *Halley v The Law Society* (n 59).
[68] *Black v Freedman* (1910) HCA 58, (1910) 12 CLR 105; *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584; *Creak v James Moore & Sons Pty Ltd* (1912) HCA 67, (1912) 15 CLR 426; *Zobory v Commissioner of Taxation* [1995] FCA 1226; *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75.
[69] D. Waters, *The Constructive Trust* (The Athlone Press 1964) 66.

protection of B's rights. On this analysis, B acquires equitable title because T should not be entitled to profit from her wrongdoing and equitable intervention is required to ensure this does not happen. B's equitable title allows her to trace the property in equity into substitutes in T's hands and/or follow it into the hands of third parties (except *bona fide* purchasers for value) where necessary. Here, as elsewhere, the idea of conscience is relevant to the imposition of personal obligations on T. However, apart from reminding us at the most general level that T has breached the universal moral duty not to steal, the idea of conscience does not really contribute to our understanding of why B acquires equitable title. It does not tell us what the nature and extent of T's obligations should be. Arguably, her knowledge is sufficient to subject her to the basic custodial duty to preserve and return the property to B and, as a wrongdoer, she would also be liable to account for profits. Whether it is also necessary or appropriate to treat her as a fiduciary[70] is a difficult question and not one that the idea of conscience can help us answer.

The second reason we might say equity should offer proprietary relief is that in cases of theft B does not know of, let alone consent to T taking her property and therefore T is unjustly enriched at her expense.[71] Therefore, as in the case of mistake or other defective transfers, a resulting trust should arise in her favour to give her equitable title and make T liable to return the property *in specie* (or restore its value). On this analysis, the idea of conscience does not explain why B's equitable title arises: the fact that the property is not T's to keep entitles B to recover. Again, the idea of conscience is relevant only to T's obligations and, as before, its explanatory force is limited.

Whichever analysis applies, there is a potential problem with Lord Browne-Wilkinson's suggestion that a trust arises at the date of the theft. First, the

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[70] Other than for the purposes of facilitating an entitlement to trace insofar as that might be necessary (as to which cf. n 34).

[71] P. Birks, 'Trusts Raised to Reverse Unjust Enrichment' [1996] RLR 3, 16; Chambers (n 18) 117-118; R. Chambers, 'Trust and Theft' in E. Bant and M. Harding (eds), *Exploring Private Law* (Cambridge University Press 2010); *Robb Evans of Robb Evans & Associates v European Bank Ltd* (n 68) 100, [112]-[113] (Spiegelman CJ).

authorities[72] relied on by Lord Browne-Wilkinson do not offer direct support for the recognition that a trust arises.[73] Secondly, because a thief does not acquire legal title to stolen property, T cannot hold the legal title on trust for B (as B retains it).[74] In response, it has been argued that although B retains legal title to the stolen money, T is unjustly enriched by the acquisition of possessory title,[75] which constitutes a property interest and can therefore be held on trust for B.[76] On the other hand, it might be said that not only does B have legal and beneficial title but also already the better possessory title to the money. The true position may therefore be that the trust arises only when B *loses* legal title to T, e.g. where money is stolen and used as currency or transferred into T's bank account.[77]

If it is correct that the trust can only arise at the date B loses legal title to the property, it means that at the date of the theft T is clearly aware that the property is not hers to take from B, let alone keep, which surely makes it reasonable to treat her as bound by an immediate moral obligation to preserve and return the property. However, even though the common law's means of enforcing T's moral obligation seems inadequate, equity cannot step in and supplement it until the date on which B loses legal title. This would appear to be unfortunate. It is therefore unsurprising that the courts are prepared to recognise an immediate trust[78] for the purpose of facilitating the recovery of stolen funds, especially in fraud cases.[79] This is likely to continue until such time as the equitable tracing rules are given universal application.[80]

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[72] *McCormick v Grogan* (1869) LR 4 HL 82, 97-98; *Bankers Trust v Shapira* [1980] 1 WLR 1274; *Stocks v Wilson* [1913] 2 KB 235; *R. Leslie Ltd v Sheill* [1914] 3 KB 687.
[73] *Halifax Building Society v Thomas* [1996] Ch 217, 228 (Peter Gibson J); *Shalson v Russo* (n 43) 317-318, [111] (Rimer J).
[74] *Shalson v Russo* (n 43) 317, [110] (Rimer J); S. Barkehall-Thomas, 'Thieves as Trustees: The Enduring Legacy of *Black v S Freedman & Co Ltd*' (2009) 3 Journal of Equity 52, 58; B. McFarlane, 'Trusts and Knowledge: Lessons from Australia' in J. Glister and P. Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) 174-175.
[75] Burrows (n 18) 196-7.
[76] J. Tarrant, 'Property Rights to Stolen Money' (2005) 32 UWAL Rev 234; J. Tarrant, 'Thieves as Trustees: In Defence of the Theft Principle' (2009) 3 Journal of Equity 170, 173, 178-179; D. Fox, *Property Rights in Money* (Oxford University Press 2008) 142-143.
[77] Chambers, 'Trust and Theft' (n 71).
[78] E.g. *Re Holmes* [2005] 1 ALL ER 490, [21]-[22] (Stanley Burnton J).
[79] E.g. *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) [125]-[129] (Stephen Morris QC).
[80] As suggested by Lord Millett in *Foskett v McKeown* (n 35) 128.

## CONSCIENCE AND THE *PALLANT V MORGAN* EQUITY

Where two parties, B and T, enter into an informal agreement or arrangement to acquire property jointly and T goes on to acquire the property, in certain circumstances the courts will treat T as a constructive trustee of the property for B. The trust that arises in such circumstances is known as the *Pallant v Morgan* equity.[81] The courts regularly use the language of conscience in their descriptions of why the trust arises. For example, it is said that B 'alleges that the circumstances in which the defendant obtained control [of the property] make it unconscionable for him thereafter to assert a beneficial interest in the property';[82] and '[T]he trust is imposed on [T] by operation of law since it would be unconscionable for him to repudiate the agreement by claiming the entire benefit of the property for himself.'[83] However, this is merely to say that the circumstances in which T obtained the property make it morally unacceptable for her subsequently to deny B an interest in it; it does not tell us why this is the case. For this we need direct argument as to the relevant moral principles that justify the acquisition of equitable title by B and the imposition of obligations on T. The best explanation of why B gets equitable title to the property is that the parties agreed she would have a share in the property[84] and T undertakes to acquire it for and on behalf of B, i.e. *qua* fiduciary. Implicitly, therefore, from the date of the undertaking, T's conscience is affected by knowledge of the facts (i.e. that she has consented to acquire the property *for* B) and this enables her to determine what she ought (morally) to do, i.e. share it with B once she acquires it. Therefore, once she acquires it she comes under an immediate moral obligation to preserve and transfer B's share *in specie* to her, which equity will underwrite. However, as elsewhere, beyond this the idea of conscience tells us nothing.

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[81] *Pallant v Morgan* [1953] Ch 43 (Ch).
[82] *Paragon Finance Plc v D.B. Thakerar & Co (A Firm)* [1998] EWCA Civ 1249, [1999] 1 All ER 400 (CA), 408 (Millett LJ).
[83] McGhee QC, *Snell's Equity* (n 34) 668, [24-040].
[84] C. Rickett, 'The Classification of Trusts' (1999) 18 NZULR 305, 327.

The *Pallant v Morgan* doctrine has developed in two stages. First, in *Pallant v Morgan* itself[85] B and T were neighbouring domestic landowners, who reached an informal agreement that T only would acquire the property and then sell part of it to B. Harman J held that a trust arose because the evidence showed that T's agent 'was bidding for [B and T] on an agreement that there should be an agreement between the parties on the division of the lot if he were successful.'[86] He therefore declared that T held the land on trust for himself and B and, if they could not reach agreement, it would be sold and the proceeds divided equally subject to the making of an adjustment for the purchase price in T's favour. Harman J relied on only one authority, *Chattock v Muller*,[87] which involved almost identical facts. In that case Mallins V-C held that T 'attended the auction partly on his own account and partly as [B]'s agent'. This meant that when he purchased the property he held it on trust for B and the failure to sell part of it to B as agreed 'was a flagrant breach of duty, which in this Court has always been considered as a fraud'.[88] Thus, the original rationale for such a trust was based on a finding that on the evidence the relationship between B and T vis-à-vis the acquisition of the property was a fiduciary one. This meant that T was not entitled to keep for herself property she should have acquired for herself *and* B, so in accordance with the principles of fiduciary law a constructive trust arose to prevent her from doing so. In *Pallant v Morgan* itself, B gave T an advantage in relation to the acquisition of the first parcel of land by standing back and allowing him to bid, but T had no such advantage in bidding for the second parcel and was entitled to hold that parcel for himself.[89]

The second stage in the development of the doctrine is marked by the judgment of Chadwick LJ in *Banner Homes Group Plc v Luff Developments Ltd*,[90] which has been interpreted as authority for the proposition that the

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[85] *Pallant v Morgan* (n 81).
[86] Ibid 50 (Harman J).
[87] *Chattock v Muller* (1878) 8 Ch D 177.
[88] Ibid 181 (Mallins V-C), citing *Lees v Nuttall* (1856) 1 Russ & M 53; 39 ER 21; *Heard v Pilley* (1869-69) LR 4 Ch App 548 (CA) (both cases of express agency).
[89] McFarlane, *The Structure of Property Law* (n 57) 271.
[90] *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 (CA).

rationale for the trust is in fact common intention.[91] This represents a departure from the original formulation of the rule. On the facts of *Banner Homes* B and T were negotiating a commercial joint venture to acquire and develop a site and were going to use a joint venture company to purchase the property. Towards the end of the negotiations, at a stage when most matters had been agreed in principle but the shareholders' agreement for the new company had not been signed, T got cold feet. It knew that if it told B it was pulling out, B might bid independently for the site, so it purchased the site through the joint venture company, which it had incorporated and wholly owned. Chadwick LJ held that for a constructive trust to arise: (i) the parties needed to have entered into a pre-acquisition arrangement or understanding that T would take steps to acquire the property and if it did so, B would obtain some interest in it; and (ii) B needed to have taken some steps in reliance on the arrangement or understanding, giving rise to detriment to it or an advantage to T in relation to the acquisition of the property.[92] Both factors were present in the case: there was an agreement in principle and although B had suffered no detriment, it might have bid for the property itself if it had known T did not wish to go ahead with the joint venture and so T could be said to have acquired an advantage. T therefore held the property on trust for itself and B in equal shares.

Chadwick LJ clearly saw conscience as playing a role in the recognition of B's equitable interest under the trust. He held:

> 'It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it … What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the

[91] *Kilcarne Holdings Ltd v Targetfellow (Birmingham) Ltd* [2005] EWCA Civ 1355; *Crossco No. 4 Unlimited v Jolan Limited* [2011] EWCA Civ 1619, [2012] 1 P & CR 16, [122] (McFarlane J) and [129]-[130] (Arden LJ).
[92] *Banner Homes Group plc v Luff Developments Ltd* (n 90), 397-398 (Chadwick LJ).

> arrangement or understanding on which the non-acquiring party has acted.'[93]

Here, the language of unconscionability simply tells us that if the parties have reached an informal arrangement that T would acquire the property for both of them, it would be morally unacceptable for T to retain the property for herself if B has conferred an advantage on her or acted to her detriment in some way, e.g. by foregoing the opportunity to obtain the property herself.[94] However, this analysis seems inadequate to explain why B should get equitable title to the property, particularly in a commercial context. Subsequently, it was suggested that the constructive trust arose in order to keep T to an undertaking, subject to which she acquired the property.[95] This may be true but again, it does not really tell us why the trust is necessary. It was also argued that the trust responded to B's detrimental reliance, as she had foregone the opportunity to secure a binding joint venture agreement with T or someone else.[96] The difficulty with this argument is that it can be raised in respect of every joint venture negotiation that falls short of a contract.

The concerns about the inadequacy of the *Banner Homes* explanation may be reflected in the courts' subsequent reluctance to allow B to rely on the doctrine to assert equitable title to property that was to be acquired in the course of a joint venture that failed to materialise, particularly where the negotiations were subject to contract. Thus, it has been held that '[I]n general, it is not unconscionable for a party to negotiations, which are expressly stated to be "subject to contract", to exercise a reserved right to withdraw from the negotiations before a final agreement has been concluded.'[97] This suggests that where it is clear the negotiations are not binding, it will not be morally

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[93] Ibid 398, 399 (Chadwick LJ); *Baynes Clarke v Corless* [2010] EWCA Civ 338, [40], [41] (Patten LJ).
[94] E.g. *Island Holdings v Birchington Engineering Ltd* 7 July 1981 (Ch) (Goff J).
[95] B. McFarlane, 'Constructive Trusts Arising on a Receipt of Property Sub Conditione' (2004) 120 LQR 667; cf McFarlane, *The Structure of Property Law* (n 57) 267, 271.
[96] S. Gardner, 'Reliance-Based Constructive Trusts' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 72-4.
[97] *London and Regional Investments Ltd v TBI Plc* [2002] EWCA Civ 355. In *Button v Phelps* [2006] EWHC 53 (Ch), [79] (Robert Englehart QC) there was no arrangement or understanding that T would not participate in a rival bid and so no trust arose.

unacceptable for one of the parties to withdraw. In *Cobbe v Yeoman's Row*[98] Lord Scott put it another way. He held that where the parties are dealing with each other in a commercial context and negotiating towards the joint acquisition of property, it *may* be 'unconscionable', i.e. morally unacceptable for T to take the property for herself, but this alone will not suffice to give B an interest in the property when B knows the agreement is binding in honour only.[99] In other words, although it may be 'discreditable' or morally dubious for one party to withdraw at the last minute,[100] where commercial parties know the risks they are running if a contract fails to materialise, equity does not treat T as coming under a positive moral obligation to acquire the property for B.

In *Crossco No. 4 Unlimited v Jolan Ltd* Etherton LJ held that *Banner Homes* should be reinterpreted on the basis that the *Pallant v Morgan* equity will only arise if fiduciary duties can be inferred from the nature of the relationship between B and T.[101] In his view, the cases in which the equity is said to arise 'can all be explained and, in my judgment, ought to be explained in wholly conventional terms by the existence and breach of fiduciary duties.'[102] In Etherton LJ's view, it made sense in terms of policy for the *Pallant v Morgan* line of cases to be explained as and confined to cases of breach of fiduciary duty because, 'by contrast with the common intention constructive trust, such a policy recognises the need for certainty in commercial transactions'.[103] On this analysis, the *Pallant v Morgan* cases '[C]an be seen as cases in which the Court is, pursuant to the constructive trust, depriving the defendant of the advantage obtained in breach of trust. The irrelevance of lack of complete agreement, whether documented or not, is then easily explained, as is the latitude with which the Court devises the best way to deprive the defendant of the unconscionable advantage …'[104] Although Arden LJ agreed with Etherton

[98] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752.
[99] Ibid [37] (Lord Scott).
[100] *Benedetti v Sawiris* [2009] EWHC 1330 (Ch), [514], [515] (Patten J).
[101] *Crossco No. 4 Unlimited v Jolan Limited* (n 91), [88]-[96] (Etherton LJ).
[102] Ibid [88].
[103] Ibid [94].
[104] Ibid [95].

LJ's approach,[105] the majority in *Crossco* held that it was not possible to depart from *Banner Homes* in this way, so it remains good law.[106]

There is academic support for the fiduciary rationale[107] and arguably, it makes good sense.[108] Where T and B agree informally that T will acquire the property on behalf of them both and B will stand back and not compete to acquire it, as in cases such as *Chattock v Muller*[109] and *Pallant v Morgan*[110] itself, T may be taken to have consented to acquire the property for and on behalf of B, i.e. *qua* fiduciary. The question is whether the evidence suggests that T is negotiating for B as a direct purchaser of the property, rather than merely negotiating for herself with the intention afterwards to offer to sell some of the property to B.[111] In other words, T will be treated as a fiduciary if it is clear that she put herself under an obligation to share the property with B.[112] In the case of a commercial joint venture, T is unlikely to be treated as having assumed such a positive obligation towards B before the negotiations have culminated in an enforceable agreement. However, each case would turn on its own facts.

In light of the above, we can say that where the evidence suggests that T has expressly or implicitly agreed to purchase part of the property *for and on behalf* of B, when she enters into the transaction to purchase the property she does so *qua* fiduciary for B, as well as for herself. Once acquired, the property falls within the scope of the obligation she assumed towards B. On this

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[105] Ibid [128] (Arden LJ).
[106] It was recently applied in *Achom v Lalic* [2014] EWHC 1888 (Ch), [81]-[89] (Newey J).
[107] P. Finn, *Fiduciary Obligations* (The Law Book Co. Ltd 1977) 201-2; P. Millett, 'Remedies: The Error in Lister v Stubbs' in P. Birks (ed), *Frontiers of Liability*, vol 1 (Oxford University Press 1994) 53-54; S. Nield, 'Constructive Trusts and Estoppel' (2003) 23 LS 311, 315; T. Etherton, 'Constructive Trusts: a new Model for Equity and Unjust Enrichment' (2008) 67 CLJ 265, 285-6; T. Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] Conv 104, 122-3. Cf. M. Yip, 'The *Pallant v Morgan* Equity Reconsidered' (2013) 33 LS 549, 571.
[108] Cf. G. Allan, 'Once A Fraud, Forever a Fraud: The Time-Honoured Doctrine of Parol Agreement Trusts' (2014) 34 LS 419, 428, in which it is argued that that the trust arises because it would constitute a fraud for T to take the benefit of the property, knowing that B had relied on their agreement.
[109] *Chattock v Muller* (n 87).
[110] *Banner Homes Group plc v Luff Developments Ltd* (n 90).
[111] *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815, 832-3 (Hope JA).
[112] *Amalgamated Television Services Pty Ltd v Television Corporation Ltd* [1969] 2 NSWLR 257, 262 (Walshe JA).

analysis, we would say that the reason B acquires equitable title is that T consented to acquire the property in part on her behalf. Before T acquires the property, her conscience is affected by knowledge of the relevant facts (i.e. that she has undertaken to act *for* B in relation to the purchase of the property), which enable her to identify what she ought morally to do when she acquires it, i.e. share it with B. Therefore, at the moment T acquires legal title to the property she comes under an immediate, enforceable obligation to preserve and transfer the relevant part of the property *in specie* to B. If the parties cannot agree how the property is to be divided, the courts will direct T to sell it and transfer the relevant share of the proceeds of sale to B.[113] Importantly, because T is a fiduciary, she will also come under an obligation to account *in specie* to B for any profits she makes from the property.

## CONSCIENCE AND CONSTRUCTIVE TRUSTS OVER PROFITS MADE IN BREACH OF FIDUCIARY DUTY

In recent years, the courts have had to grapple with the controversial question whether, assuming B and T are in a fiduciary relationship and T makes profits for herself, B may claim equitable title to them under a constructive trust. There is little doubt that any property, which T already administers as a fiduciary for B, is trust property, so that if in breach of fiduciary duty, T uses the trust property for her own ends[114] or exchanges it for substitute property[115] and thereby makes a profit, B has an equitable proprietary claim to the gain. However, until recently it was unclear whether B was also entitled to assert equitable title to profits made by T as a result of a conflict of interest and duty, such as a bribe, or profits made by T simply because of her position (and not necessarily involving a conflict of interest). Since the decision of the Supreme

[113] *Pallant v Morgan* (n 81) 50 (Harman J); *Holiday Inns Inc v Broadhead* (1974) 232 EG 951 (Ch). Cf. *Thames Cruises Ltd v George Wheeler Launches Ltd* [2003] EWHC 3093, [122], [123] (Peter Smith J).
[114] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* [2011] EWCA Civ 347, [88] (Lord Neuberger MR).
[115] *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* [1997] Ch 159 (CA); *Foskett v McKeown* (n 35). Cf. Worthington, 'Justifying Claims to Secondary Profits' (n 37).

Court in *FHR European Ventures LLP v Cedar Capital Partners LLC*,[116] it is now clear that B does get title to all three different types[117] of profits under a constructive trust. The language of conscience has occasionally been invoked in support of the conclusion that B should get equitable title to the profits. However, it cannot tell us why this should be the case. At best, as elsewhere, the language of conscience reminds us that whatever obligations T is subject to *qua* fiduciary are moral obligations, which cannot arise absent her knowledge. However, it cannot tell us what T's obligations are or whether they should extend to delivering up *in specie* to B all profits made by virtue of her position as fiduciary.

The discussion of this issue has centred around whether B can claim equitable title under a constructive trust to a bribe received by T in breach of fiduciary duty. There was no difficulty in recognising B's equitable title where the bribe represented a deduction from the purchase price that would otherwise have been payable to T.[118] However, where the bribe was simply paid directly by a third party to T and did not constitute property that was *already* the subject matter of the fiduciary relationship between B and T, the question was more difficult. Originally, the courts took the view that T was only liable to account to B for the value of the bribe.[119] The reason given was that B could only claim equitable title to property or profits made from property that was already the subject matter of the fiduciary relationship between B and T, and a bribe did not fall within this category. This approach[120] – or variations of it[121] – had

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[116] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.

[117] On the distinction between the three types: S. Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (2013) 72 CLJ 720, 751.

[118] *In Re Canadian Oil Works Corporation (Hay's Case)* (1874-75) LR 10 Ch App 593 (CA); *Re Caerphilly Colliery Company (Pearson's Case)* (1877) 5 Ch D 336 (CA); *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch).

[119] *Boston Deep Sea Fishing & Ice Co v Ansell* (1889) 39 Ch D 339; *Metropolitan Bank v Heiron* (1879-80) LR 5 Ex D 319; *Lister v Stubbs* (1890) 45 Ch D 1.

[120] Birks, *An Introduction to the Law of Restitution* (n 18) 387-9; R. Goode, 'Property and Unjust Enrichment' in A. Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press 1991).

[121] G. Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 LQR 472, 478 (constructive trust only where T acted in bad faith); T. Youdan, 'The Fiduciary Principle: The Applicability of Proprietary Remedies' in T. Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989) (constructive trust only where T acquired bribe at B's expense); J. Edelman,

academic support. In particular, the concern was that it would be unfair to give B priority in T's insolvency in circumstances where she had not given value for the bribe and T's unsecured creditors, who had given value, would suffer a loss.[122] Therefore, the view was that B should be limited to a personal claim against T for the value of the bribe.

Subsequently, however, in *AG for Hong Kong v Reid*[123] the Privy Council held that B *did* get equitable title to the bribe under a constructive trust and Lord Templeman invoked the language of unconscionability in an effort to explain why this should be the case. The city of Hong Kong (B) successfully asserted equitable title to the profits arising out of a bribe, which T had accepted in breach of his fiduciary duty of loyalty. Lord Templeman described bribery as 'an evil practice which threatens the foundations of any civilized society'.[124] He went on to say that although legal title to the bribe vests in T:

> Equity, however, which acts *in personam*, insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of the bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty is owed.[125]

Lord Templeman's use of the language of unconscionability tells us that he saw it as morally unacceptable for T to receive and keep a benefit arising from a breach of fiduciary duty owed to B. It also suggests that T comes under a moral obligation towards B in respect of the bribe. Crucially, however, it fails to tell us *why* T comes under such a moral obligation or why the obligation is to deliver it *in specie* to B, rather than simply to pay its value to B. In other words, the language of unconscionability may tell that morally, T ought not to keep the bribe (because bribery is regarded as a social evil) but it tells us nothing about why *B* should receive the bribe itself. Rather, he seemed to take

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*Gain-Based Damages* (Hart 2002) 262-264 (constructive trust only where personal liability to account insufficient to deter fiduciaries from misconduct).

[122] G. Virgo, 'Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?' (2011) 70 CLJ 502, 503. Also Goode (n 120).

[123] *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (PC).

[124] Ibid 330-331 (Lord Templeman).

[125] Ibid 331 (Lord Templeman).

it as read that T is under an obligation to deliver the bribe *in specie* to B[126] and continued:

> 'As soon as the bribe was received it should have been paid or transferred *instanter* to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.'[127]

Lord Millett has been a strong supporter of the decision in *Reid*. Writing extra-judicially, he argues that the reason T must give up the bribe and any consequent profits to B is that T must account to B *in specie* for *all* benefits acquired as a result of T's fiduciary position. He suggests this is because equity disables defaulting fiduciaries from preferring their own interests to those of their principals. Why might this be so? In Lord Millett's view T is not entitled 'to obtain a benefit by holding himself out as acting for another, and keep it by insisting, however truthfully, that he was acting for himself.'[128] Therefore, on the analysis that T was never entitled to keep the gain in the first place, it is not unfair to T's creditors to exclude it from T's estate on insolvency,[129] especially if the gains made by T were secret and therefore not visible to her other creditors so as to mislead them.[130]

Although the decision in *Reid* was subsequently applied here[131] and a similar approach was adopted in Australia,[132] the Court of Appeal declined to follow it in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)*,[133] and so the pendulum swung back towards the

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[126] Webb and Akkouh, *Trusts Law* (n 39) 234.
[127] *Attorney-General for Hong Kong v Reid* (n 123) (Lord Templeman), applying *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223. *Keech* is discussed in detail by A. Hicks, 'The Remedial Principle of Keech v Sandford Reconsidered' (2010) 69 CLJ 287.
[128] Millett, 'Remedies: The Error in Lister v Stubbs' (n 107) 59.
[129] Ibid 52; *Daraydan Holdings Ltd v Solland International Ltd* (n 119) [86].
[130] A. Oakley, 'Proprietary Claims and their Priority in Insolvency' (1995) 54 CLJ 377, 390.
[131] *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] BCLC 461, 483, [44] (Morritt LJ); *Tesco Stores Ltd v Pook* [2003] EWHC 832 (Ch), [45] (Peter Smith J); *Mainland Holdings Ltd v Szady* [2002] NSWSC 699, [69]-[71] (Gzell J); *Primlake Ltd v Matthews Associates* [2006] EWHC 1227 (Ch), [335]-[336] (Lawrence Collins J).
[132] *Hospital Products Ltd v United States Surgical Corp* [1984] 156 CLR 41, 108 (Gibbs CJ); *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6.
[133] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* (n 114); *Cadogan Petroleum Plc v Tolly* [2011] EWHC 2286 (Ch).

*Lister v Stubbs* analysis. *Sinclair* was a case where B did not claim a proprietary interest in a bribe but rather profits made by T in the course of their relationship and as an indirect result of T's breach of fiduciary duty. In the view of Neuberger LJ, there was no obvious reason why 'the fact that a fiduciary can profit as a result of the breach of his duties to a beneficiary, without more, [should] give the beneficiary a proprietary interest in the property', not least because 'a proprietary claim is based on property law'.[134] The need to deter defaulting fiduciaries could potentially be addressed by an order for equitable compensation[135] and because of the impact of proprietary claims on other creditors, it was better not to extend such claims beyond 'what is established by authority and accords with principle.'[136]

The decision in *Sinclair* prompted yet more academic debate.[137] Those who preferred the logic of *Reid* emphasized the disability principle referred to by Lord Millett as the source of T's obligation to return the bribe or secret profit to B and, pending or failing that, to hold it for her benefit. On this analysis the personal obligation to account for the value of the bribe is a corollary of the obligation to give it up *in specie*; it only becomes relevant when T is unable to give it up because she has already dissipated it.[138] In other words, T's primary obligation is to account *in specie* to B for any benefits received in the course of her duty, in default of which she must restore their value to B. According to Lord Millett himself:

> The principal's beneficial interest in the profit is thus inherent in the very concept of a fiduciary relationship. It is an incident of the relationship that any advantage or profit which the fiduciary may obtain by virtue of the relationship is in the eyes of equity obtained for the benefit of his principal and belongs beneficially to him.[139]

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[134] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* (n 114) [52] (Neuberger LJ).
[135] Ibid [53].
[136] Ibid [54].
[137] E.g. Virgo (n 122).
[138] D. Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 LQR 487, 488.
[139] P. Millett, 'Bribes And Secret Commissions Again' (2012) 71 CLJ 583, 585.

Thus, in his view, the constructive trust arises 'to frustrate the unconscionable intention of the fiduciary to keep the profit for himself'.[140] Here again, the language of unconscionability tells us it is morally unacceptable for T to retain the profit, but it does not tell us why. On Lord Millett's analysis, there are two steps to the recognition of the constructive trust. First, we have to accept the disability principle i.e. that 'a fiduciary who places himself in a position where his interest conflicts with his duty will be treated as having acted in accordance with his duty'.[141] Then it follows that at the moment T receives the money, she comes under an obligation to return it to B.[142] Lord Millett argued further that the constructive trust is 'not based on property law' and was 'never confined to the vindication of property rights', but rather extended to 'a wide variety of cases where equity, acting on the defendant's conscience, enforces a personal obligation in relation to property'.[143] Here, the language of conscience merely tells us that equity is underwriting moral obligations in respect of property. Ultimately, Lord Millett's approach tells us it would be morally unacceptable for T, as a fiduciary, to retain for herself *any* advantage or profit obtained by virtue of her position because she is morally obliged to account *in specie* to B for *all* benefits received in the course of her duties. Consequently, whenever she receives a bribe, she comes under an immediate moral obligation to transfer it *in specie* to B or, failing or pending that, to hold it for B's benefit, which equity will underwrite.

The disability principle has been criticised as a fiction and it has been argued that the better view is that when T receives a bribe in breach of duty she commits a wrong and therefore is liable to pay its value to B. However, it is incorrect to say that she comes under a positive obligation in respect of it before judgment.[144] Nevertheless, in *FHR European Ventures LLP v Cedar Capital Partners LLC*[145] the Supreme Court chose to follow *Reid*. Cedar acted

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[140] Ibid 589.
[141] Ibid 591.
[142] Ibid 592.
[143] Ibid 599-600.
[144] W. Swadling, 'Constructive Trusts and Breach of Fiduciary Duty' (2012) 18 Trusts and Trustees 985; J. Penner, 'The Difficult Doctrinal Basis for the Fiduciary's Proprietary Liability to Account for Bribes' (2012) 18 Trusts and Trustees 1000.
[145] *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 116).

as B's agent in negotiating the purchase of a hotel through a joint venture agreement. It entered into an agreement with the vendor of the hotel for a €10m fee (a secret commission) payable upon completion. B sought to recover the sum from Cedar and the question was whether Cedar held it on constructive trust for B. The Court of Appeal held itself bound to apply *Sinclair* and rejected the constructive trust argument.[146] The Supreme Court held that for a number of reasons of principle and practicality Cedar did hold the bribe on trust for B. First, as a matter of principle, B was entitled to Cedar's undivided loyalty as agent and therefore to the *entire* benefit of its acts in the course of its agency. According to Lord Neuberger JSC:

> The agent's duty is accordingly to deliver up to the principal the benefit which he has obtained, and not simply to pay compensation for having obtained it in excess of his authority. The only way that legal effect can be given to an obligation to deliver up specific property to the principal is by treating the principal as specifically entitled to it.[147]

Cedar argued that a constructive trust could only arise where it had made a secret profit on a transaction acting for its principal or effected as a result of some knowledge or opportunity arising in the course of its agency. Lord Neuberger rejected this argument on the basis that the constructive trust approach was simpler[148] and it reconciled the circumstances in which B could get proprietary and personal relief.[149] In his view:

> If equity considers that in all cases where an agent acquires a benefit in breach of his fiduciary duty to his principal, he must account for that benefit to his principal, it could be said to be somewhat inconsistent for equity also to hold that only in some such cases could the principal claim the benefit as his own property.[150]

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[146] Discussed by R. Chambers, 'Constructive Trusts and Breach of Fiduciary Duty' [2013] Conv 241, 249; P. Buckle, 'Ariadne's Skein Again: Secret Profits in *Sinclair v Versailles* and *FHR v Mankarious*' (2014) 20 Trusts and Trustees 768.
[147] *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 116) [33] (Lord Neuberger JSC).
[148] Ibid [35].
[149] Ibid [36].
[150] Ibid.

The argument that the rule should not apply to the bribe because legally it could not have been received by or on behalf of B, was unattractive because it put Cedar in a position of conflict of interest and there was a real risk of disadvantage to B.[151] It would also lead to an inconsistent approach to shares and money.[152] As a matter of authority[153] and policy[154] the constructive trust remedy was justifiable. Finally, Lord Neuberger concluded that concerns regarding prejudice to unsecured creditors were overstated; they could be in no better position than their principal.[155]

The *FHR* analysis assumes that *all* gains which arise as a result of T's role as a fiduciary are within the scope of her fiduciary relationship with B and therefore properly the subject matter of her moral obligations to B, so as to be caught by the constructive trust. Why should this be the case? There is certainly authority that supports this view. [156] Arguably, the *FHR* approach derives from a strict application of the no profits rule as a separate stand-alone principle from the no conflicts rule.[157] On this analysis, there is one no profit rule, which is activated *not* by T's wrongdoing but as 'a direct implication of the fact that a fiduciary acts, within a sphere of activity, for and on behalf of the principal', so that everything that can be extracted from that sphere of activity is attributed, as between B and T, to B.[158] However, there may be good reasons to argue that the no profit rule is better treated as an aspect of the no conflict rule.[159] On this analysis, only profits arising from the use of B's property and profits which involve a conflict of duty and interest may be treated as falling within the scope of T's positive obligations towards B, so that

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[151] Ibid [37].
[152] Ibid [38].
[153] Ibid [40], [46].
[154] Ibid [42].
[155] Ibid [43].
[156] E.g. *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Guinness plc v Saunders* [1988] 1 WLR 863; and more recently, *O'Donnell v Shanahan* [2009] EWCA Civ 751.
[157] Millett, 'Bribes And Secret Commissions Again' (n 139) 589.
[158] L. Smith, 'Constructive Trusts and the No-Profit Rule' (2013) 72 CLJ 260
[159] *Regal (Hastings) Ltd v Gulliver* (n 156) 123 (Lord Upjohn, dissenting); D. Kershaw, 'How the Law Thinks About Corporate Opportunities' (2005) 25 Legal Studies 533.

B can say T ought to have acquired them *for* her[160] and therefore she should have equitable title to them under a constructive trust.[161]

Ultimately, as a result of *Reid* and *FHR*, it seems clear that B obtains equitable title to any benefits or gains made by T in the course of their fiduciary relationship because T is already under an obligation to deliver *in specie* to B all benefits and gains acquired in the course of his fiduciary activities for B. Although the language of conscience has been invoked to support this conclusion, it cannot explain it. As elsewhere, it can remind us that T's obligations are moral obligations, which cannot arise unless T has knowledge of the relevant facts so as to identify, through the process of moral reasoning, what morality requires her to do in the circumstances. However, of itself, the language of conscience cannot help us to identify the nature of T's obligations nor to what property they extend. This requires direct argument as to the principles that the no profit and no conflict rule embody and the relationship between them.

## CONCLUSION

This chapter has sought to demonstrate that the idea of conscience plays the very same role in constructive trusts as it does in express and resulting trusts. It cannot tell us why B acquires equitable title to the property or T comes under obligations in respect of it: for this we must engage in direct argument as to the principles the law does or should embody in the relevant context. However, the idea of conscience is relevant to all trusts in that it reminds us that in recognising trust obligations, equity is underwriting moral obligations. It also helps us to understand why T must have knowledge of the relevant facts before she will be subject to the obligations of a trustee. This is because it is not reasonable to require her to take positive steps to abide by moral standards unless she is first in a position to identify, through the operation of her conscience and the process of moral reasoning, what those standards are and

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[160] Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (n 117) 745.
[161] Ibid 751-2.

what she needs to do in order to comply with them. Only then can she be taken to have reason to know about the relevant obligation and only then can we expect her to comply with it. Beyond this, however, the idea of conscience tells us nothing. In particular, it does not help us to identify the nature and scope of T's obligations as trustee.

# CHAPTER 4: CONSCIENCE, TRUSTS AND THIRD PARTIES

## INTRODUCTION

This chapter considers the meaning and function of conscience as it arises in or may be relevant to the equitable proprietary claim and the doctrines of knowing receipt and dishonest assistance. Once a trust has arisen, these doctrines enable a beneficiary (B) to protect her equitable title to the trust property and her relationship with the trustee (T) from interference by a third party (X). Consider the situation where, once B has acquired equitable title to the property and T is obliged to her as a trustee, T without authority takes B's property[1] and transfers it by sale or gift to X. B's equitable title survives the transfer, unless X can demonstrate that she bought the property from T in good faith in circumstances where an honest and reasonable person would not have discovered B's interest in it. If X can do this, she gets good title to it and B's title is extinguished. If X no longer has the property when B makes her claim, equity may still compel her personally to restore its value and account for profits through the doctrine of knowing receipt.

The chapter argues that the idea of conscience has little if any role to play in helping us to understand why B's equitable title survives the transfer to T, but it does tell us something about X's obligations to B. If, while X has the property, she learns that B has an interest in it and T had transferred it to her without B's authority, arguably she comes under an immediate moral obligation to return the property to B *in specie* or hold it for B's benefit. If, despite her knowledge of B's interest, she disposes of the property, morality also requires that she make good its value to B. The idea of conscience reminds us that it is unreasonable to treat X as subject to any such obligations unless she has reason to know about them, and this will only be the case if she knows the facts, so as to be able to identify what morality requires of her in the

[1] For the purposes of this chapter, the phrase, 'equitable property' includes property in which B has an equitable interest under a trust or because someone such as a company director (see, e.g. *Russell v Wakefield Waterworks Company* (1875) LR 20 Eq 474 (CA)) owes her fiduciary duties in respect of the property.

circumstances. In other words, the language of conscience points to the fact that X's obligations are moral obligations, which equity underwrites and enforces. However, beyond this, the language of conscience leaves a range of important questions unanswered. It does not help us to identify the moral principles underpinning X's obligations, nor the content of them, nor what or how much X must know before she will become subject to them.

If, instead of or as well as receiving trust property from T, X assists T in a breach of trust, X may be liable to compensate for losses and/or account for any profits she makes through the doctrine of dishonest assistance. Historically, the language of conscience was also used to explain this doctrine, although recently the courts have eschewed it in favour of the language of dishonesty. The chapter argues that the language of dishonesty in fact suffers from some of the same explanatory limitations as unconscionability. Moreover, the test for establishing dishonesty for the purposes of the assistance claim and knowing receipt appear to be very similar, so that the labels may be interchangeable. Finally, the language of conscience may have some explanatory force in the context of dishonest assistance, to the extent that relief is predicated on the breach of a pre-existing (moral) duty about which X had reason to know.

## CONSCIENCE AND THE EQUITABLE PROPRIETARY CLAIM

If T transfers trust property or its traceable substitutes[2] without authority to X, B may assert her equitable title against X in order to exclude X from

[2] *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102, 108-9, 110 (Lord Browne-Wilkinson), 115 (Lord Hoffmann) and 129 (Lord Millett) (equitable property). This view has some academic support: P. Millett, 'Proprietary Restitution' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson 2005) 315-316; R. Calnan, 'Proprietary Remedies for Unjust Enrichment' in A. Burrows and E. Peel (eds), *Commercial Remedies: Current Issues and Problems* (Oxford University Press 2003); J. Penner, 'Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford Scholarship Online 2009) 325-327; L. Tucker, N. Le Poidevin and J. Brightwell, *Lewin on Trusts* (15th edn, Sweet & Maxwell 2015) 1997-99, [41-057].

interfering with or enjoying the benefits of the property,[3] on the basis that X's ownership of it is limited by her equitable title in the same way that T's ownership was limited.[4] The view that B's equitable title automatically inheres in traceable substitutes is controversial,[5] but it represents current law. For this reason, any references to the trust property hereinafter should be taken to include its traceable substitutes, as appropriate. B's equitable interest in the trust property binds X[6] unless X can show[7] that at the time of receipt she was a *bona fide* purchaser for value of the legal estate without notice[8] of B's interest in the property, in which case she takes good title to it.[9] If X is not a *bona fide* purchaser, she will be obliged to return the property *in specie to* B if she still has it when B asserts her claim.[10]

Up until fairly recently the language of conscience was still used to describe the operation of notice in the *bona fide* purchase defence. However, given that

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[3] Lionel Smith, 'Transfers' in P. Birks and A. Pretto (eds), *Breach of Trust* (Hart 2003) 136; R. Nolan, 'Equitable Property' (2006) 122 LQR 232, 236-238; J. McGhee QC (ed) *Snell's Equity* (33rd edn, Sweet & Maxwell 2014) 22, [2-005].

[4] Penner (n 2) 325-6.

[5] Some suggest B's equitable title arises as a new right to prevent X's unjust enrichment: P. Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 661; A. Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412; P. Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 35; A. Burrows, 'The Relationship Between Unjust Enrichment and Property: Some Unresolved Issues' in S. Degeling and J. Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson 2008) 338-9; R. Chambers and J. Penner, 'Ignorance' in S. Degeling and J. Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson 2008) 266-7. Cf. S. Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62 MLR 218; S. Worthington, 'Justifying Claims to Secondary Profits' in E. Schrage (ed), *Unjust Enrichment and the Law of Contract* (Kluwer 2001) 452, 462, 466-71 who argues that B should only get equitable title to the substitute if X owed her a pre-existing obligation, e.g. *qua* fiduciary.

[6] *Re Diplock* [1948] Ch 465 (CA), 522 (Lord Greene MR) (accepted without argument by both parties); affirmed, *sub nom Ministry of Health v Simpson* [1951] 1 AC 251 (HL); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA), 334 (Millett LJ); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), 705 (Lord Browne-Wilkinson).

[7] *Re Nisbet and Potts Contract* [1906] 1 Ch 386 (CA), 406 (Collins MR), 409 (Romer LJ) and 410 (Cozens-Hardy LJ); *Re Loftus* [2005] EWHC 406 (Ch) [169] (Lawrence Collins J).

[8] X must demonstrate absence of notice and good faith: *Pilcher v Rawlins* LR 7 Ch 259 (CA) 269 (James LJ); *Midland Bank Trust Company Limited v Green* [1981] AC 513 (CA) 528 (Lord Wilberforce).

[9] *Re Diplock* (n 6) 539 (Lord Greene MR); *Foskett v McKeown* (n 2) 129 (Lord Millett). However, if X subsequently sets aside the transaction by which she gave value, she may not avail of the defence: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [91] (Lloyd LJ).

[10] *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 (Ch), 290 (Millett J); *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783, [28]-[31] (Arden LJ); *NABB Brothers Limited v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch) [72] (Lawrence Collins J); P. Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 402.

today notice may not be sufficient to subject X to a positive obligation to return the property, there is no sense in which equity is requiring the defendant to take steps to comply with a particular moral standard and therefore the language of conscience adds nothing to our understanding of the *bona fide* purchase defence.

***Conscience and Volunteers***

The language of conscience tells us nothing about the survival of B's equitable title against X, where X is a volunteer who has received the trust property by way of gift or inheritance from T. B's equitable title survives the transfer to X even if at the date of receipt X had no knowledge or notice of B's interest in the property.[11] It takes priority over X's legal title and thus, B has an immediate right to demand the return of the property *in specie* from X. Therefore, we might say that at the date of receipt X comes under a liability towards B in respect of the property, but this liability extends only to the very property itself. If X disposes of the property before she acquires knowledge of B's claim that is B's tough luck She must now follow the property into the hands of the next recipient and assert her equitable title against that person. The language of conscience tells us nothing about X's liability to B, as the liability arises irrespective of knowledge.

Although X may be under a liability to B from the date of receipt, it is unreasonable to treat her as owing her any positive moral obligation to take steps to return the property before she acquires knowledge of B's claim. When X comes to know of B's interest in the property, either because B asserts her equitable title against X or X learns about B's interest from some other source, then she comes under an obligation to return the property *in specie* to B or, pending or failing that, hold it for her benefit. As Lloyd LJ recently explained as regards an innocent volunteer, '[X] would have been under no relevant duty as regards the money until she had notice of the interest of the beneficiaries. Once she had such notice, she would be under a duty not to part with the

[11] *Re Montagu's Settlement Trusts* [1987] 1 Ch 264 (Ch), 277 (Megarry VC).

remaining funds (and the traceable proceeds in her hands of any which had already gone) otherwise than by restoring them to or for the benefit of the beneficiaries'.[12] As will be seen in the section on knowing receipt, the better view is that actual knowledge (rather than notice, as Lloyd LJ suggests) is required to subject X to the duty to return the property to B and/or hold it for her benefit. In any event, the language of conscience has some limited relevance here in that it reminds us that X's obligations in respect of the property are essentially moral obligations, to which X will not be subject unless she has (moral) reason to know about them.

The courts have also used the language of conscience to explain how they balance the interests of B and X, where X holds a mixed fund containing some of her own money and some of the original trust money, which she received from T. As the law stands, the general rule is that where T wrongfully uses trust money to provide part of the cost of acquiring an asset, B may claim equitable title to a proportionate share of the asset or enforce a lien over it to secure the value of the trust money contribution. If T gives the new asset to X, the general rule is that B's claim to a proportionate share or a lien is still good against X because X received the asset gratuitously and can be in no better position than T.[13] However, where X herself has contributed to the acquisition of the asset, B's claim to a lien is limited by reference to the state of X's conscience. If, when X received the trust money and mixed it with her own, she had no knowledge of B's interest in the property, B and X are said to be 'competing contributors who are innocent of any wrongdoing' and equity treats them equally.[14] Thus, it is said that X is 'not in conscience bound to give precedence' to B[15] and thus she 'cannot be said to act unconscionably if [she] claims equal treatment for herself'.[16] This is consistent with our ordinary understanding of conscience: absent knowledge, it would be unreasonable to treat X as having come under any moral obligation towards B in respect of the trust money before she did the mixing. Therefore, X is entitled to recover from

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[12] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* (n 9) [76], [81] (Lloyd LJ).
[13] *Foskett v McKeown* (n 2) 132 (Lord Millett).
[14] Ibid.
[15] *Re Diplock* (n 6) 524 (Lord Greene MR).
[16] Ibid 539.

the mixture what she put into it and B's claim is limited to what is left. Conversely, if X *did* know about B's interest in the money before she did the mixing, it is reasonable to treat her as coming under a moral obligation towards B in respect of it, so that if by the time B makes her claim the mixture is inadequate to satisfy both it and X's claim, B should get her lien.

***Conscience and Purchasers***

Similarly, the language of conscience has no real explanatory force in relation to the circumstances in which B's equitable title survives a purchase of the property by X. If at the date of purchase X has no notice that B is asserting a proprietary interest in the property,[17] B's equitable title is extinguished. This means X takes good title to the property and, as a result, is exempt from any liability or obligation towards B in respect of it, even if she subsequently learns of B's interest. The effect of the *bona fide* purchase exemption is to favour the interests of good faith purchasers in security of receipt over the equitable property interests of trust beneficiaries. The reason may be that if X has paid for something in good faith only to be liable to return it, she is thereby unfairly prejudiced.[18]

Historically, the courts used the language of conscience to describe the effect of notice on X as a purchaser. In *Midland Bank Trust Company Ltd v Green*[19] Lord Wilberforce stated, 'In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience'[20] and the phrase, *bona fide* purchaser for value without notice 'was used to epitomise the circumstances in which equity would or rather would not do so.'[21] If X could show that at the time of purchase her conscience was unaffected by notice of B's claim, her title was unimpeachable[22] and B's

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[17] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* [2011] EWCA Civ 347, [109] (Neuberger LJ).
[18] K. Barker, 'After Change of Position: Good Faith Exchange in the Modern Law of Restitution' in P. Birks (ed), *Laundering and Tracing* (Oxford University Press 1995)196-7.
[19] *Midland Bank Trust Company Limited v Green* (n 8).
[20] Ibid 528 (Lord Wilberforce).
[21] Ibid.
[22] R. Eastwood, *Strahan's Digest of Equity* (6th edn, Butterworth & Co. Ltd 1939); *Pilcher v Rawlins* (n 8) 269 (James LJ).

beneficial interest was extinguished.[23] Thus, according to Strahan, '[I]f the legal owner obtains his title in such a way that his conscience is not affected by the equitable interest, he is in no way bound by it.'[24] It has also been said that equity takes away from a purchaser without notice 'nothing which he has honestly acquired.'[25] Here, the language of conscience simply tells us that if X had applied her moral reasoning to the facts, there would have been nothing to suggest to her that anyone else was entitled to the property. Therefore, there was no reason to displace X's interest in security of receipt as legal owner of the property and so B's title was extinguished.

If X *did* have notice of B's equitable interest, the position was different. Here the language of conscience was used to emphasise that X had behaved in a morally unacceptable manner by accepting a conveyance of property, when she had notice of the fact that someone else had an interest in it. According to Maitland, '[I]t is unconscientious – "against conscience" – to buy what you know to be held on trust for another'.[26] If X bought the property with actual notice of B's interest or deliberately refrained from making enquiries, she was 'considered to be guilty of fraud or, if one prefers to call it so, unconscionable behaviour.'[27] Originally, the test for establishing constructive notice turned on whether X had wilfully abstained from enquiry so as to avoid finding out about B's interest.[28] Although the language of gross or wilful negligence was also in use,[29] the key question seemed to be whether X was trying to avoid knowledge of the true state of the title.[30] If so, it was said to be unconscionable for her to

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[23] W. Cornish, *An Essay on Uses* (J. Butterworth & Son 1826) 17-18; W. Hayes, *An Introduction to Conveyancing*, vol 1 (5th edn, S. Sweet 1840) 42-3.
[24] Eastwood (n 22) 29. Also J. Strahan and G. Kerrick, *A Digest of Equity* (London 1905) 21.
[25] *Bailey v Barnes* [1894] 1 Ch 25 (CA), 34 (Lindley LJ); *Taylor v London and County Banking Company* [1901] 2 Ch 231 (CA), 256 (Stirling LJ).
[26] J. Brunyate, *F. Maitland, Equity, a Course of Lectures,* (A. Chaytor and W. Whittaker eds, Cambridge University Press 1936), 113-114. See also Story, *Commentaries on Equity Jurisprudence* (W. Grigsby ed, 2nd edn, Stevens & Haynes 1892) 257.
[27] *R. Griggs Group Ltd v Evans* [2005] Ch 153 (Ch), 166, [47], [48].
[28] *Espin v Pemberton* (1859) 3 De G & J 547; 44 ER 1380, [554]/1383 (Lord Chelmsford LC); *Jones v Smith* (1841) 1 Hare 43; 66 ER 943, [55-6]/948-9 (Wigram VC).
[29] *Hewitt v Loosemore* (1851) 9 Hare 449; 68 ER 586, [458]/590 (Turner VC).
[30] *Hunt v Elmes* (1860) 2 DF & J 578; 45 ER 75, [586-7]/748 (Turner LJ); *Ratcliffe v Barnard* (1871) LR 6 Ch App 652 (CA), 654 (James LJ); *The Agra Bank Ltd v Barry* (1874) LR 7 HL 135 (HL), 157 (Lord Selborne); *Bailey v Barnes* (n 25) 35 (Lindley LJ).

take the property.[31] The language of conscience tells us that because X knew or deliberately avoided acquiring notice of B's interest in the property, it was not unfair to displace her interest in security of receipt. Therefore, B's title survived the transfer and took priority over X's legal title, and from the date of purchase, X became liable (in the same way as a volunteer) to return the property to B if called upon to do so.

Towards the end of the nineteenth century, the law changed so that negligence would suffice to fix X with constructive notice.[32] Since then, the frequency with which the language of conscience was used to describe the effect of notice has gradually declined. Despite some initial concerns about the appropriateness of importing strict standards of notice that apply in the context of property transfers into a commercial context,[33] it is now accepted that 'the doctrine of notice lies at the heart of equity.'[34] The standard is that of the honest and reasonable person.[35] The court will ask what X actually knew and what further enquiries an honest and reasonable person would have made in the circumstances.[36] The key is what constitutes commercially acceptable conduct in the relevant context.[37] If in any particular case, an honest and reasonable person would not enquire as to whether T has good title, X is not fixed with constructive notice for failing to make such an enquiry and there is nothing unconscionable about her receipt of the property.[38] Although good

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[31] *Kettlewell v Watson* (1882) 21 Ch D 685 (Ch), 704-7 (Fry J).
[32] *Oliver v Hinton* [1899] 2 Ch 264 (CA), 273-4 (Lindley MR); *Hudston v Viney* [1921] 1 Ch 98 (Ch), 104 (Eve J); Cf. Section 3 of the Conveyancing Act 1882; *Bailey v Barnes* (n 25) Lindley LJ.
[33] *Manchester Trust v Furness* [1895] 2 QB 539 (CA), 545 (Lindley LJ); *Eagle Trust Plc v S.B.C. Securities Ltd* [1993] 1 WLR 484 (Ch), 507 (Vinelott J); and *Polly Peck International Plc v Nadir* [1993] BCLC 187 (CA).
[34] *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL), 195-6 (Lord Browne-Wilkinson). Applied: *Re Goldcorp Exchange Ltd* [1995] AC 74 1014 (Millett J); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* (n 17).
[35] *Re Goldcorp Exchange Ltd* (n 34) 1014 (Millett J).
[36] *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* (n 17) [100] (Neuberger LJ).
[37] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [122] (Stephen Morris QC).
[38] Such as the sale and purchase of classic cars: *Gray v Smith* [2013] EWHC 4136 (Comm), [139] (Cooke J). Cf. land transfer, where stricter standards apply: S. Gardner, 'Knowing Assistance and Knowing Receipt: Taking Stock' (1996) 112 LQR 56, 63.

faith is a separate requirement,[39] given that X can only establish the absence of notice by showing that she had no reason to know about B's interest because an honest and reasonable person would not have discovered it, any distinction between lack of notice and good faith has collapsed.[40]

These days the courts rarely invoke the language of conscience to describe the effect of notice on X for the purposes of the *bona fide* purchaser defence. There may be a number of reasons for this. First, the courts may be reluctant to equate a failure to exercise reasonable care with morally unacceptable conduct, and thus in their view such behaviour does not attract the epithet 'unconscionable'. Secondly, the language of negligence may simply be more apt to describe X's lack of care when she fails to make the enquiries that she ought to have made. There may also be a third reason. We know that during the nineteenth century the test for constructive notice for the purposes of the defence did not extend to a negligent failure to make enquiries: X must have deliberately or recklessly avoided learning about B's interest. At the same time, it seems that the threshold for liability in knowing receipt was notice, although if X acquired the property in the ordinary course of business proof of fraud or collusion was required.[41] Therefore, if X had notice for the purposes of the *bona fide* purchase defence, not only was she unable to claim immunity from liability, but she may also have come under an immediate positive obligation to return the property *in specie* to B or hold it for her benefit. In other words, the conditions for liability and obligation may have coincided. In those circumstances, the language of conscience was not out of place, as it

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[39] *Midland Bank Trust Company Limited v Green* (n 8); *Grindal v Hooper* 6 December 1999 (Ch) (J. Jarvis QC); *Re Loftus* (n 7).

[40] *Midland Bank Trust Company Limited v Green* (n 8) 528 (Lord Wilberforce); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership)* (n 17) [100] (Neuberger LJ); *Armstrong DLW GmbH v Winnington Networks Ltd* (n 37) [121] (Stephen Morris QC).

[41] *Bodenham v Hoskyns* (1852) 2 De G M & G 903; 42 ER 1125; *Mayor, etc. of Berwick-upon-Tweed v Murray* (1856-1857) 7 De G M & G 496; 44 ER 194; *Ernest v Croysdill* (1860) 2 De GF & J 175; 45 ER 589; *Gray v Lewis* (1869) LR 8 Eq 526; *Russell v Wakefield Waterworks Company* (n 1); *Blundell v Blundell* (1888) 40 Ch D 370 (Ch); *Thomson v Clydesdale Bank* [1893] AC 282 (HL), 290 (Lord Watson); *Bank of New South Wales v Goulburn Valley Butter Company Proprietary Ltd* [1902] AC 543 (HL). The cases are discussed in detail by C. Harpum, 'The Stranger as Constructive Trustee' (1986) 102 LQR 112 , 273, 276, 278, 281-2, 290; P. Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] LMCLQ 296, 318, 320.

pointed to the moral basis of X's obligation towards B. By contrast, nowadays notice for the purposes of the *bona fide* purchase defence includes a negligent failure to make enquiries, while, as will be seen below, the test for knowing receipt probably turns on actual knowledge. It follows that a purchaser with notice may be liable to B in respect of the property from the date of receipt but not come under any obligation to return it *in specie* or hold it for her benefit. In other words, as in the case of a volunteer recipient, the threshold conditions for liability and obligation are now detached. On this analysis, the presence or absence of notice goes only to the issue of whether X is immune from liability in respect of the property. Here, the only question is whether it is fair to displace X's interest in security of receipt. We are not concerned about whether she must take active steps to comply with certain moral standards. For this reason, the language of conscience does not have the same explanatory force that it has in relation to X's obligations.

Finally, it remains to mention that consistently with his view that no trust arises unless the recipient of the property is subject to fiduciary obligations in respect of it, Lord Browne-Wilkinson[42] would characterise B's right to assert her equitable title against X under the equitable proprietary claim as a specifically enforceable equitable right only. Others would describe X as holding the property on trust for B from the date she receives it, either under the terms of the original express trust or on a resulting trust,[43] or alternatively, as a constructive trustee.[44] In light of the arguments in Chapter 2 and above, arguably there is nothing wrong with stating that B holds equitable title under a trust, as long as it is accepted that at this stage X is under no obligations at all in respect of the property.[45] She is merely under a liability to return the

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[42] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 6) 707 (Lord Browne-Wilkinson); *Foskett v McKeown* (n 2) 108 (Lord Browne-Wilkinson).
[43] *Re Goldcorp Exchange Ltd* (n 35) 988-9 (Millett J); Tucker, Le Poidevin and Brightwell, *Lewin on Trusts* (n 2) 1680, [41-50].
[44] T. Lewin, *The Law of Trusts and Trustees* (1st edn, A. Maxwell 1837) 611; F. Maitland, *Equity, also the Forms of Action at Common Law* (A. Chaytor and W. Whittaker eds, Cambridge University Press 1909) 83-84; *Selangor United Rubber Estates Ltd v Cradock and Others (No. 3)* [1968] 1 WLR 1555 (Ch), 1582-3 (Ungoed-Thomas J); *Boscawen v Bajwa* (n 6) 334-5 (Millett J); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* (n 9) [80], [84] (Lloyd LJ).
[45] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* (n 9) [81]-[84] (Lloyd LJ).

property to B when called upon to do so. Ultimately, the language of conscience plays no necessary explanatory role in relation to X's liability as volunteer *or* purchaser. However, as will be seen below it does have a positive (albeit) limited explanatory role to play in the context of X's obligations to B.

## CONSCIENCE AND KNOWING RECEIPT

If, by the time B discovers that T has transferred trust property to X in breach of trust and calls upon X to return it, X has already used the property for her own benefit, spent it or transferred it to someone else, she is clearly unable to comply with B's demand. Nevertheless, if B can prove that X took the property with sufficient knowledge that it was traceable to a breach of trust[46] (or subsequently acquired that knowledge while the property was in her hands)[47] and then disposed of it on her own account, X may be compelled to restore the value of the trust property out of her own pocket. Arguably, here the language of conscience has a positive explanatory role to play. It reminds us that relief for knowing receipt is based on X's breach of a pre-existing moral obligation. It will only be reasonable to treat her as having been subject to such an obligation if she was in a position, through the application of her moral reasoning (which requires both moral understanding and factual knowledge), to identify and comply with what morality required of her in the circumstances. However, as elsewhere, beyond this, the language of conscience tells us little. Of itself, it cannot identify the moral principles underpinning the doctrine or the content of the obligation to which X is subject, nor does it tell us what or how much she must know in order for it to be reasonable to treat her as bound by that obligation.

### *Conscience and the Test for Liability*

It is said that in cases of knowing receipt 'equity is concerned with [X]'s knowledge of equitable interests because it is concerned with fastening upon

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[46] *El Ajou v Dollar Land Holdings Plc* [1994] 1 BCLC 464 (CA), 478 (Hoffmann LJ).
[47] *Agip (Africa) Ltd v Jackson* (n 10) 291 (Millett J).

the conscience of the person with that knowledge'.[48] X is said to be a constructive trustee and thus, the fundamental question for the purposes of establishing liability is said to be 'whether the conscience of the recipient is bound in such a way as to justify equity in imposing a trust on him'[49] or whether 'his conscience became … sufficiently affected for it to be right to treat him as bound by obligations in equity giving rise to an *in personam* claim against him as recipient to account for the money which came into his hands'.[50]

The modern statement of the test for liability is that stated by Nourse LJ in *BCCI v Akindele*,[51] i.e. whether X's state of knowledge is 'such as to make it unconscionable for him to retain the benefit of the receipt' of the trust property.[52] Despite having been criticised as too vague and uncertain to be helpful,[53] the *Akindele* test has been widely applied.[54] It tells us that equity will treat X as being under an obligation to restore the value of the property to B if her conscience is affected by such knowledge as makes it unconscionable for her to retain the benefit of the property. However, the language of unconscionability does not tell us what or how much X must know before she will be subject to such an obligation. Moreover, to say that it is unconscionable for X to retain the benefit of the receipt means nothing more than that it would be contrary to what good conscience - i.e., moral reason - requires for X to retain the benefit of receipt. The language of

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[48] *Selangor United Rubber Estates Ltd v Cradock and Others (No. 3)* (n 44) 1583, 1615 (Ungoed-Thomas J).
[49] *Re Montagu's Settlement Trusts* (n 11) 277 (Megarry VC).
[50] *Relfo v Varsani* [2012] EWHC 2168 (Ch), [78] (Sales J).
[51] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [1991] 1 Ch 437 (CA).
[52] Ibid 455 (Nourse LJ).
[53] P. Birks, 'Receipt' in P. Birks and A. Pretto (eds), *Breach of Trust* (Hart 2002) 226. Cf. S. Barkehall-Thomas, 'Goodbye Knowing Receipt: Hello Unconscientious Receipt' (2001) 21 OJLS 239, who suggests economic analysis can add certainty; R. Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life - Some Reflections on Accessory Liability and Knowing Receipt' [2005] Syd LR 187; R. Walker, 'Fraud, Fault and Fiduciary Duty' (2006) 10 JGL Rev 139.
[54] *Papamichael v National Westminster Bank Plc* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341; *Ali v Al-Basri* [2004] EWHC 2608 (QB); *Charter plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313; *Uzinterimpex J.S.C. v Standard Bank Plc* [2008] EWCA Civ 819, [2008] Bus LR 1762; *The Law Society of England and Wales v Habitable Concepts Ltd* [2010] EWHC 1449 (Ch); *Relfo v Varsani* (n 50); *Armstrong DLW GmbH v Winnington Networks Ltd* (n 37); *Arthur v Attorney General of Turks and Caicos* [2012] UKPC 30, [33] (Etherton LJ).

unconscionability does not help us to identify any particular moral principle or basis for liability for knowing receipt. All it says is that there *is* such a basis.

***Conscience and What X Must Know***

What must X know in order to come under an obligation to restore the value of the property to B? The idea of conscience itself tells us nothing about this. It seems that she must know 'that the assets [s]he received are traceable to a breach of fiduciary duty'[55] or that she knows the property 'was trust property'[56] or 'was transferred in breach of trust'.[57] This test will be satisfied where, e.g.: X receives money from T and knows the money represents the proceeds of fraud;[58] the court finds it highly probable that T explained to X that T was using money 'diverted without legitimate reason' from B to pay X;[59] X knows that the source of funds used by her husband, T to buy property for her was money 'entrusted by [B] to [T] and not lent to him';[60] or X did not have actual knowledge of the fraud or that the property was stolen but was 'actually aware that there was a possibility that [T] did not have title to, or authority to sell' the property.[61] Conversely, it will not be satisfied where: X was not 'at any time conscious of the fact that he was not entitled to receive the [trust assets] and deal with them as beneficial owner';[62] nor where X received a payment from BCCI in respect of the sale of shares at a time when 'no one outside BCCI had reason to doubt the integrity of its management' and X 'had no knowledge of the underlying frauds within the BCCI group' but saw the payment simply 'as an arm's length business transaction'.[63]

All the examples referred to above suggest that the key to X's personal liability is knowledge that, at the time T transferred the property to her, someone other

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[55] *El Ajou v Dollar Land Holdings Plc* (n 46) 478 (Hoffmann LJ); applied by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (n 51) 448.
[56] *Re Montagu's Settlement Trusts* (n 11) 276 (Megarry VC).
[57] *Arthur v Attorney General of Turks and Caicos* (n 54) [31] (Etherton LJ).
[58] *El Ajou v Dollar Land Holdings Plc* (n 46) 472 (Nourse LJ).
[59] *Relfo v Varsani* (n 50) [81], [82] (Sales J).
[60] *Ali v Al-Basri* (n 54) [194] (Tugendhat J).
[61] *Armstrong DLW GmbH v Winnington Networks Ltd* (n 37) [278] (Stephen Norris QC).
[62] *Re Montagu's Settlement Trusts* (n 11) 275 (Megarry VC).
[63] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (n 51) 456-7 (Nourse LJ).

than T was entitled to enjoy the benefit of it and the transfer was made without that other person's authority. This tells us something about the reason or ground for X's obligation to make good the value of the property to B. It suggests that X should not retain for her own benefit property to which someone else is entitled. However, there may be different reasons why X should not retain the property and these are explored in a little more detail below.

***Conscience and the Moral Principles Underpinning Knowing Receipt***

The language of unconscionability tells us that it would be morally unacceptable for X to keep the property but it does not tell us why. The fact that X must know that someone other than T (i.e. B) was entitled to enjoy the benefit of the property and the transfer was made without B's authority suggests she ought not to retain property to which she knows B is entitled, but there may be different reasons for this. We might say the fact that B did not consent to its transfer to T means that it would be morally unacceptable for T to keep it. Equally, we might say that T ought not to interfere with other people's property rights and if she does, it is morally unacceptable for her to keep the property. Finally, we might say that it is morally unacceptable for X to keep the property because once she receives it with knowledge that someone else has an interest in it, she comes under an immediate obligation to return it *in specie* to B and preserve it pending its return.

These three possibilities are reflected in the arguments about the true rationale of the doctrine of knowing receipt.[64] At one point it was suggested that X's personal obligation arose to reverse B's unjust enrichment and therefore the need for B to prove fault should be abolished, leaving X to rely on the change of position defence[65] ('the unjust enrichment rationale'). Subsequently, this

[64] R. Havelock, 'The Transformation of Knowing Receipt' (2014) 22 RLR 1, 2-4.

[65] Birks, 'Misdirected Funds: Restitution from the Recipient' (n 41); P. Birks, 'Persistent Problems in Misdirected Money: a Quintet' [1993] LMCLQ 218, 225; Millett, 'Proprietary Restitution' (n 2) 311-2; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch), 716 (Millett J); *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, 194, [105] (Lord Millett); *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, 1848, [4] (Lord Nicholls, Lord Walker concurring).

argument changed and it was contended that B should be entitled to assert a strict liability unjust enrichment claim against X in addition to the claim in knowing receipt, which should be subsumed within the wrong-based participatory liability of knowing assistance.[66] The suggestion that it is time for such a change has not been universally accepted.[67] There are at least two good reasons for this. First, equitable rights are less extensive than and derive from legal property rights; their scope corresponds to the extent to which B is owed management obligations by T.[68] Second, equitable property interests are often less visible than legal property interests, such that it would be harsh to hold X strictly liable to give up the property or make good its loss in every case.[69]

It has also been suggested that once X acquires knowledge of B's entitlement to the property, equity treats X as subject to obligations which mirror the core obligations of T[70] ('the trustee rationale'). Indeed, it is argued that X really *is* a trustee because at the date of knowledge she comes under a trustee's custodial obligation to account for the property *in specie*. This means she must return it if she still has it (and preserve it pending restoration[71]), failing which she must restore its value to the trust.[72] In other words, X's 'authority to deal with the property is made subject to the same limits as [T's] authority' and X really is

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[66] Birks, 'Receipt' (n 53) 223-225; Birks, *Unjust Enrichment* (n 5) 156-8; D. Nicholls, 'Knowing Receipt: the Need for a New Landmark' in W. Cornish (ed), *Restitution: Past, Present and Future* (1998) 245; Walker, 'Fraud, Fault and Fiduciary Duty' (n 53); T. Akkouh and S. Worthington, '*Re Diplock*' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006) 297-301; J. Edelman, '*Marsh v Keating* (1834)' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006) 119; D. Hayton, P. Matthews and C. Mitchell, *Underhill & Hayton, Law of Trusts and Trustees* (17th edn, LexisNexis Butterworths 2006) 1198-9; J. Dietrich and P. Ridge, ''The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 MULR 47, 85-86; A. Burrows, *The Law of Restitution* (Oxford University Press 2010) 424-431.

[67] D. Sheehan, 'Disentangling Equitable Personal Liability' (2008) 16 RLR 41; K. Low, 'Recipient Liability in Equity: Resisting the Siren's Lure' (2008) 16 RLR 96; C. Mitchell and S. Watterson, 'Remedies for Knowing Receipt' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 136-7.

[68] S. Worthington, *Equity* (2nd edn, Oxford University Press 2006) 186.

[69] L. Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 430-441.

[70] Harpum (n 41), 267; M. Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Thomson 2005) 330-333.

[71] *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75.

[72] Mitchell and Watterson (n 67) 135-6, 138-140.

subject to the custodial duties of a trustee.[73] This analysis has judicial support.[74] In *Arthur v Attorney General of the Turks and Caicos Islands*[75] the Privy Council accepted the argument that X's personal liability as a knowing recipient 'means the recipient is subject to custodial duties which are the same as those voluntarily assumed by express trustees … The recipient's core duty is to restore the misapplied trust property.'[76]

A third view is that knowing receipt is a species of equitable wrongdoing[77] and it has been described as 'equity's analogue to the common law's claim in conversion'[78] ('the wrongdoing rationale'). This analysis seems to have found favour with the Supreme Court in the recent case of *Williams v Central Bank of Nigeria.*[79] The question arose whether a claim for knowing receipt was subject to the usual six-year limitation period or - on the basis that a knowing recipient was in fact a constructive trustee who had been a privy to fraud - no limitation period at all. The Supreme Court rejected the argument that a knowing recipient is in fact a trustee and held that the six-year limitation period applied. According to Lord Sumption JSC, X never holds property as a trustee as she only becomes accountable for it when she parts with it.[80] Furthermore, in his view:

> The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive

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[73] C. Mitchell, 'Stewardship of Property and Liability to Account' [2014] Conv 215, 221.
[74] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* (n 9) [82] (Patten LJ).
[75] *Arthur v Attorney General of Turks and Caicos* (n 54).
[76] Ibid [37] (Etherton LJ), citing Mitchell and Watterson, 'Remedies for Knowing Receipt' (n 67).
[77] M. Dixon, 'Knowing Receipt, Constructive Trusts and Registered Title' [2012] Conv 439, 442-443; N. Hopkins, 'Recipient Liability in the Privy Council: Arthur v Attorney General of the Turks and Caicos Islands' [2013] Conv 61, 67. Cf. M. Conaglen and A. Goymour, 'Knowing Receipt and Registered Land' in C. Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 174, 177 (who argue that the knowing receipt claim involves wrongdoing but is 'parasitic' upon the equitable proprietary claim); P. Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in D. Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell 1993) (arguing that knowing receipt and assistance should be unified under a doctrine of participation in a breach of trust); and W. Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399 (arguing that all constructive trusts are fictional).
[78] L. Smith, 'W(h)ither Knowing Receipt?' (1998) 114 LQR 394.
[79] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.
[80] Ibid 1206, [26] (Lord Sumption JSC), citing *Paragon Finance Plc v D.B. Thakerar & Co (A Firm)* [1998] EWCA Civ 1249, [1999] 1 All ER 400 (CA), 412 (Millett LJ).

> them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately.[81]

Lord Sumption accepted that a knowing recipient may be accountable for profits made[82] or losses avoided had the property remained with the original trustee, and a proprietary claim might be available in some circumstances, but in his view this was 'simply the measure of the remedy' and did not make the defendant a trustee.[83]

For a number of reasons, it seems preferable to conclude X is *in fact* a constructive trustee if she receives property to which B has equitable title and while she has it, acquires knowledge that someone other than T (i.e. B) was entitled to enjoy the benefit of it and the transfer was made without that other person's authority. First, the arguments in Chapter 2 suggest that in these circumstances X comes under an immediate moral obligation to return the property to B or hold it for her benefit, which equity will underwrite. This does not mean she is subject to the managerial and fiduciary[84] obligations of a trustee, but it is difficult to resist the conclusion that she is subject to the custodial obligations,[85] at least to the extent necessary to make sure the property – or its value if X disposes of it while she has knowledge – is returned intact to B. This approach is consistent with Lord Browne-Wilkinson's

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[81] *Williams v Central Bank of Nigeria* (n 79) 1208, [31] (Lord Sumption JSC); 1217, [90] (Lord Neuberger JSC).
[82] *Crown Dilmun v Sutton* [2004] EWHC 52, [2004] 1 BCLC 468; *Bank of China v Kwong Wa Po* [2005] HKCFI 422; *Charter plc v City Index Ltd* (n 54); A. Goymour, 'A Contribution to Knowing Receipt Liability' (2008) 16 RLR 113.
[83] *Williams v Central Bank of Nigeria* (n 79) 1208, [31] (Lord Sumption JSC).
[84] Views are divided as to whether a knowing recipient is a fiduciary: see *Bank of China v Kwong Wa Po* (n 82) [1587], [1588]; and Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life - Some Reflections on Accessory Liability and Knowing Receipt' (n 53) 202 (suggesting knowing recipients may well owe fiduciary duties). Cf. S. Worthington, 'The Proprietary Consequences of Rescission' (2002) 10 RLR 28, 62 (argues it is merely a personal duty to compensate). The better view may be that X's duties are primarily custodial: C. Webb and T. Akkouh, *Trusts Law* (3rd edn, Palgrave Macmillan 2013) 267; Mitchell, 'Stewardship of Property and Liability to Account' (n 73) 221; also *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] 2 WLR 526, 547, [68] (Longmore LJ).
[85] S. Watterson, 'Limitation of Actions, Dishonest Assistance and Knowing Receipt' (2014) 73 CLJ 253, 256.

approach in *Westdeutsche.*[86] The implication from his judgment is that if the local authority *had* had knowledge of the fact that the contract was void at a time when it still had the bank's money, a non-express trust would have arisen.[87] Secondly, Lord Sumption's suggestion that T may only be subject to trust obligations if trust has been reposed in her or she is subject to investment and management obligations tends to suggest that T may only be a trustee where there is an express trust. This cannot be right. As Watterson suggests, its effect would be to undermine 'the well-established categorisations of many trusts that are imposed by operation of law.'[88] Thirdly, the Supreme Court's analysis fails entirely to address the fact that X's liability is contingent on the extent to which she is already susceptible to B's equitable proprietary claim: the knowing receipt claim cannot arise if X received the property as a *bona fide* purchaser for value.[89] In any case, for the reasons given above, the language of unconscionability does not help us choose between the rationales and can be used consistently with all of them.

***Conscience and the Standard of Knowledge***

The idea of conscience itself does not dictate the standard of knowledge required before X will be obliged to restore the value of the property to B; however, it does remind us that in essence this is a moral question. As argued in Chapter 2, on Lord Browne-Wilkinson's analysis we might say that if the only reason X does not know what she ought (morally) to do with the property (i.e. give it back to B or hold it for her benefit) is that she carelessly failed to acquire knowledge which she ought to have acquired, it is not unreasonable to treat her as bound by that obligation. On the other hand, we might say that because these are onerous obligations, X must actually know the facts (or at least not deliberately or recklessly fail to discover them). For this reason it is

[86] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (n 6); also *Conyngham v Conyngham* (1750) 1 Ves Sen 522; 27 ER 1181 (express trust).
[87] B. McFarlane, 'Trusts and Knowledge: Lessons from Australia' in J. Glister and P. Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) 173.
[88] Watterson (n 85).
[89] McGhee QC, *Snell's Equity* (n 3) 795, [30-071].

not right to say, as has been suggested,[90] that the language of conscience mandates a standard of actual knowledge.

Originally, the courts were prepared to accept that X could be personally liable for knowing receipt if B could prove that her state of mind came within any of the five *Baden*[91] categories of knowledge. In *Selangor v Cradock*[92] Ungoed-Thomas J concluded that the knowledge required to hold a stranger liable as a constructive trustee[93] was 'knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on inquiry, which the stranger failed to make, whether it was being committed'.[94] A number of subsequent cases adopted the same approach.[95] Thus, it was held that where X receives the trust property 'with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against [B] unless he has some better equity. He becomes a constructive trustee for [B] of the misapplied funds.'[96] Broadly, the same approach is taken throughout the Commonwealth,[97] although in Australia it seems that liability turns on the first four *Baden* categories only.[98] On this analysis, X's

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[90] E.g. *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 (HCA), 410-11 (Stephen J); *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* [1993] 1 WLR 509 (Ch), 576 (Peter Gibson J); *Re Montagu's Settlement Trusts* (n 11) 285 (Megarry VC); Havelock (n 64) 15.

[91] *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* (n 90) 575-6 (Peter Gibson J).

[92] *Selangor United Rubber Estates Ltd v Cradock and Others (No. 3)* (n 44); applied, *Karak Rubber Co. Ltd v Burden (No. 2)* [1972] 1 WLR 602 (Ch), 633 (Brightman J).

[93] The case concerned allegations of knowing assistance and knowing receipt but at the time there was a unified test of liability for both claims.

[94] *Selangor United Rubber Estates Ltd v Cradock and Others (No. 3)* (n 44) 1590 (Ungoed-Thomas J).

[95] *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* (n 90) 582 (Peter Gibson J); *International Sales & Agencies Ltd v Marcus* [1982] 3 All ER 551 (QB) 558 (Lawson J); *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 (CA), 298 (Slade LJ), 307 (Browne-Wilkinson LJ); *Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA), 567 (Fox LJ); *Eagle Trust Plc v S.B.C. Securities Ltd* (n 33) (Vinelott J) (probably *Baden* categories (i)-(iv) only); *El Ajou v Dollar Land Holdings plc* (n 65) 739 (Millett J).

[96] *Belmont Finance Corporation v Williams Furniture Limited (No. 2)* [1979] Ch 250 (CA), 405 (Buckley LJ).

[97] *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805 (SCC), [48] (La Forest J); *Gold v Rosenberg* [1997] 3 SCR 767 (SCC), [46] (Iacobucci J); *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41, 52-3 (Richardson J); *Equiticorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700 (NZHC); *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 317 (NZHC), 324-6 (Tipping J) (obiter); *Springfield Acres Ltd (In Liquidation) v Abacus (Hong Kong) Ltd* [1994] 3 NZLR 502 (NZHC), 510 (Henry J).

[98] Dietrich and Ridge (n 66) 61.

conscience may be affected if she knows *or has reason to know* that the property was traceable to a breach of trust. This test seems similar to the test for notice for the purposes of the *bona fide* purchase defence.[99]

Recent authority supports the view that all five *Baden* categories can render the receipt of trust property unconscionable,[100] but the preponderance of higher-level authority[101] now seems to favour a test based on the first three categories only. In *Arthur v Attorney General of Turks and Caicos*[102] Etherton LJ emphasised the difference between notice of equitable interests and knowledge for the purposes of knowing receipt because it 'reflects the difference between a proprietary remedy and the imposition of personal duties as a constructive trustee.'[103] He held that knowing receipt is 'not merely absence of notice but unconscionable conduct amounting to equitable fraud. It is a classical example of lack of *bona fides*'.[104] In his view it constituted equitable fraud, 'that is to say somewhere between mere notice (including constructive and imputed notice), on the one hand, and dishonesty, on the other hand.'[105] In light of the above, we can say that in the eyes of equity, X's conscience will be affected for the purposes of knowing receipt if she is consciously aware that someone

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[99] It has been argued that category 5 is not the same as constructive notice: *Agip (Africa) Ltd v Jackson* (n 10) 293 (Millett J); *Cowan de Groot Properties Ltd v Eagle Trust plc* [1991] BCLC 1045 (Ch), 1112 (Knox J); *Eagle Trust Plc v S.B.C. Securities Ltd* (n 33), 492 (Vinelott J); Gardner (n 38) 57-58; R. Bigwood, *Exploitative Contracts* (Oxford University Press 2003) 253; P. Creighton and E. Bant, 'Recipient Liability in Western Australia' (2000) 29 UWAL Rev 205, 208. This interpretation reflects a perceived difference between inferred and imputed knowledge, as described by J. Chan, 'Dishonesty and Knowledge' (2001) 31 HKLJ 283, 288, 289. However, the two seem very similar: *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* (n 90) 582-3, 587 (Peter Gibson J). In *El Ajou v Dollar Land Holdings plc* (n 65) 717 Millett J acknowledged that there was room for a doctrine analogous to constructive notice in the strict conveyancing sense to operate 'in a situation in which any honest and reasonable man would have made inquiry.'

[100] *The Law Society of England and Wales v Habitable Concepts Ltd* (n 54); *Armstrong DLW GmbH v Winnington Networks Ltd* (n 37). The remarks of Lloyd LJ in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* (n 9) [76], [81] also tend to support this view.

[101] *AG v Corporation of Leicester* (1844) 7 Beav 176; 49 ER 1031 (actual knowledge on the facts and boundaries of knowing receipt and assistance blurred); *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 1 Ch 276 (CA); *Competitive Insurance Co. Ltd v Davies Investments* [1975] 1 WLR 1240 (Ch); *Re Montagu's Settlement Trusts* (n 11); *Cowan de Groot Properties Ltd v Eagle Trust plc* (n 99); *Polly Peck International Plc v Nadir* (n 33); *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (n 51) 452, 455 (Nourse LJ); *Ali v Al-Basri* (n 54); *Crown Dilmun v Sutton* (n 82); *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch).

[102] *Arthur v Attorney General of Turks and Caicos* (n 54).

[103] Ibid [36] (Etherton LJ).

[104] Ibid [40].

[105] Ibid [41].

other than T was entitled to the property at the time it was transferred to her and it was transferred to her without that person's authority, or she has deliberately or recklessly avoided acquiring that knowledge.

***Conscience – Doctrinal Function***

The explanatory force of conscience within the doctrine of knowing receipt depends upon the doctrine's rationale. On the unjust enrichment rationale, B's lack of consent or intention to benefit X is the reason for relief. Any unconscionability arises *ex post*.[106] It tells us nothing about why relief is granted and has no explanatory force at all. The position is different in relation to the wrongdoing and the trustee rationales: here, arguably, the language of conscience does have some limited explanatory force. On the wrongdoing rationale, relief depends on the breach by X of a pre-existing obligation not to interfere with B's equitable proprietary rights. On the trustee rationale, relief depends on X being subject to the core custodial obligation of a trustee to account for the property *in specie*, which requires her to restore its value if she cannot restore the property itself. In both cases the language of conscience can remind us that in granting relief equity is underwriting and enforcing moral obligations. We know it is unreasonable to treat X as subject to the relevant obligation unless she has knowledge of the relevant facts because only then will she be able to determine, through the process of moral reasoning, what she *ought* to do in the circumstances. Therefore, the language of conscience tells us that X's factual knowledge is relevant not simply for its own sake but because it facilitates the process of moral reasoning, absent which the obligation will not be recognised or enforced.

In light of the above, it seems right that the knowledge threshold for knowing receipt should be higher than the standard of notice applied in the equitable proprietary claim, irrespective of whether the wrongdoing or the trustee rationale applies. If B's equitable title survives the transfer, X comes under a liability to return the property to her if required. This liability does not depend

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[106] P. Birks and N. Chin, 'On the Nature of Undue Influence' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995) 60.

on a pre-existing moral obligation owed by X to B, so there is no sense in which X is being required to take steps to comply with certain moral standards. The position is very different in the case of knowing receipt. By ordering X to put her hand in her pocket to make good the value of the property, equity is compelling X to comply with a pre-existing moral obligation. Therefore, a standard of actual knowledge seems justified.[107] Ultimately, however, the language of conscience plays a very limited function in knowing receipt. Beyond reminding us that equity is underwriting moral obligations (and hence why X's knowledge is important), it tells us nothing at all.

## CONSCIENCE AND DISHONEST ASSISTANCE

The courts use the language of dishonesty rather than unconscionability to explain X's liability for assisting in a breach of trust. However, as a label, dishonesty seems to face the same problems as unconscionability. In addition, the requisite mental element for the purposes of dishonesty seems to be the same as that which renders the retention of the property 'unconscionable' for the purposes of knowing receipt, so the labels appear to be interchangeable.[108] Moreover, it cannot be said that the idea of conscience is irrelevant to dishonest assistance. To the extent that dishonest assistance constitutes an equitable wrong, equity may be said to be underwriting a pre-existing moral obligation to which X is subject, i.e. not to interfere with a fiduciary relationship.[109] The language of conscience reminds us that it is unreasonable to expect X to comply with such an obligation in the absence of factual knowledge because only then can X, through the process of moral reasoning, determine what she ought or ought not to do in the circumstances.

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[107] Cf. Havelock (n 64) 15.
[108] Cf. Lord Neuberger JSC's reference to 'dishonest' receipt in *Williams v Central Bank of Nigeria* (n 79) 1215, [64].
[109] P. Ridge, 'Justifying the Remedies for Dishonest Assistance ' (2008) 124 LQR 445, 450.

***Dishonesty and the Test for Liability***

If X assists T in committing a breach of trust, she is liable to account for any loss caused to the trust fund[110] and must disgorge any profits which she herself has made as a result of her participation in the breach of duty.[111] For the purposes of establishing assistance, all that is required is that X's actions or omissions must have been of more than minimal importance to T and must not have hampered T in the breach of her duty.[112] X may be found to have assisted T (and may be liable to account for profits she makes from the breach[113]) even if she does not receive any misapplied trust property.[114] Therefore, the subject matter of T's breach of duty is irrelevant[115] and the measure of X's liability need not duplicate that of T.[116]

Originally, X's liability for (what was then) knowing assistance depended on whether she knew or had reason to know (in the sense of *Baden* categories 1-5) that she was assisting in a breach of trust.[117] If X knew all the circumstances 'from which the honest and reasonable man would have knowledge of the facts' then it was 'little short of common sense' that she should be treated as

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[110] *Royal Brunei Airlines Sdn. Bhd. v Tan* [1994] UKPC 4, [1995] 2 AC 378 (PC); *Twinsectra Ltd v Yardley* (n 65); *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] Bus LR 220.

[111] *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643, 672 (Toulson J); *Bank of China v Kwong Wa Po* (n 82) [1589]-[1601] (Lewison J); *OJSC Oil Company Yugraneft v Abramovic* [2008] EWHC 2613 (Comm), [382] (Christopher Clarke J); *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm), [62]-[67] (Andrew Smith J); *Novoship (UK) Ltd v Mikhaylyuk* (n 84), [87]-[93] (Longmore LJ).

[112] *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* (n 90) 574-5 (Peter Gibson J); C. Mitchell, 'Assistance' in P. Birks and A. Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 172.

[113] *Novoship (UK) Ltd v Mikhaylyuk* (n 84).

[114] *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840; *Barnes v Addy* (1874) LR Ch App 244 (CA); *Midgley v Midgley* [1893] 3 Ch 282 (CA); *Warman v Dwyer* [1995] HCA 18, (1995) 182 CLR 544; *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110), 382 (Lord Nicholls); *Houghton v Fayers* [2000] 1 BCLC 511 (CA), 517 (Nourse LJ); *Goose v Wilson & Sandford (a Firm)* [2000] EWCA Civ 73, [86]-[88] (Morritt LJ). Also: Harpum (n 41) 142; S. Elliott and C. Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16, 21.

[115] *Fyffes Group Ltd v Templeman* (n 111); *JD Wetherspoon PLC v Van de Berg* [2009] EWHC 239 (Ch), [511]-[520] (Peter Smith J); *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] 1 P & CR DG17; *Fiona Trust & Holding Corporation v Privalov* (n 111) [61] (Andrew Smith J); *Novoship (UK) Ltd v Mikhaylyuk* (n 84).

[116] Ridge (n 109). Cf. Elliott and Mitchell (n 114). Different rules of causation apply to profits made by X from those applicable to T: *Novoship (UK) Ltd v Mikhaylyuk* (n 84). It also seems unlikely that X should be liable for T's profits, although she is liable to compensate B for all losses: *Bank of China v Kwong Wa Po* (n 82) [1598]-[1600] (Lewison J).

[117] *Selangor United Rubber Estates Ltd v Cradock and Others (No. 3)* (n 44); *Karak Rubber Co. Ltd v Burden (No. 2)* (n 92).

having knowledge of the facts.[118] Occasionally, the courts used the language of conscience in assistance cases, e.g. to describe the fact that 'equity is concerned with [X]'s knowledge of equitable interests because it is concerned with fastening upon the conscience of the person with that knowledge'[119] or that X's conduct in assisting a breach of trust was 'unconscionable'.[120] Thus, it was held that a constructive trust was imposed for knowing assistance on a stranger who becomes 'bound in good faith and in conscience by the trust in consequence of his conduct and behaviour'.[121] Subsequently, the courts increased the knowledge threshold to conscious, deliberately or recklessly avoided knowledge (*Baden* categories 1-3) on the basis that dishonesty or lack of probity was key.[122]

In *Royal Brunei Airlines Sdn. Bhd v Tan*,[123] Lord Nicholls expressly chose dishonesty[124] as the touchstone for X's liability and re-named the doctrine 'dishonest assistance'. He held that B was entitled to expect 'that third parties

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[118] *Baden v Société Générale Pour Favouriser Le Développement Du Commerce Et De L'Industrie En France S.A.* (n 90) 582 (Peter Gibson J).
[119] *Selangor United Rubber Estates Ltd v Cradock and Others (No. 3)* (n 44) 1583 (Ungoed-Thomas J).
[120] *Karak Rubber Co. Ltd v Burden (No. 2)* (n 92) 633 (Brightman J). Also *Powell v Thompson* [1991] NZLR 597 (NZHC), 613 (Thomas J), noted K. McDonald, 'Case Note, Powell v Thompson' (1988-1991) [6] Auckland U L Rev 615; *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218.
[121] *Consul Development Pty Ltd v DPC Estates Pty Ltd* (n 90) 409 (Stephen J).
[122] *Belmont Finance Corporation v Williams Furniture Limited (No. 2)* (n 96) 405-406 (Buckley LJ), 407 (Goff LJ); *Agip (Africa) Ltd v Jackson* (n 10) 292 (Millett J). The Court of Appeal in *Agip* (n 95) 567 (Fox LJ), held that all five *Baden* categories of knowledge were relevant in principle to liability for knowing assistance. However, Millett J's approach was adopted in *Cowan de Groot Properties Ltd v Eagle Trust plc* (n 99) 1103 (Vinelott J); *Eagle Trust Plc v S.B.C. Securities Ltd* (n 33) 496 (Vinelott J); *Polly Peck International Plc v Nadir* (n 33) 203-204 (Scott LJ). The Commonwealth authorities also broadly support this view: see e.g. *Gold v Rosenberg* (n 97) [33] (Iacobucci J); *Citadel General Assurance Co v Lloyds Bank Canada* (n 97), [21]-[22], (La Forest J); *Consul Development Pty Ltd v DPC Estates Pty Ltd* (n 90), [33] (Stephen J). The law in New Zealand on this point has been described as unsettled: *Springfield Acres Ltd (In Liquidation) v Abacus (Hong Kong) Ltd* (n 97) 510 (Henry J).
[123] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110).
[124] The dishonesty test has been subsequently applied at all levels: *HR v JAPT* [1997] EWHC Ch 371, [1997] OPLR 123; *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [1999] EWCA Civ 2018, [1999] Lloyd's Rep Bank 511; *Al-Sabah v Grupo Torras SA* [2000] EWCA Civ 273, [2001] CLC 221; *Twinsectra Ltd v Yardley* (n 65); *Bank of China v Kwong Wa Po* (n 82); *Barlow Clowes International Ltd v Eurotrust Ltd* [2005] UKPC 37, [2006] 1 WLR 1476; *Abou-Rahmah v Abacha* (n 110); *AG Zambia v Meer Care & Desai (a firm)* [2007] EWHC 952 (Ch). On the need for a high standard for liability: W. Blair, 'Secondary Liability of Financial Institutions for the Fraud of Third Parties' (2000) 30 HKLJ 74, 84; and P. Birks, 'The Burden on the Bank' in F. Rose (ed), *Restitution and Banking Law* (Mansfield Press 1998) 90.

will refrain from intentionally intruding in the trustee-beneficiary relationship'.[125] He concluded that if X were strictly liable for unknowingly interfering, everyday business would be impossible. He jettisoned the term 'knowing assistance' because in his view determining fault by reference to the *Baden* categories of knowledge was difficult.[126] He also expressly rejected unconscionability as too uncertain a standard for liability:

> It must be recognised … that unconscionable is not a word in everyday use by non-lawyers. If it is to be used in this context, and if it is to be the touchstone for liability as an accessory, it is essential to be clear on what, *in this context*, unconscionable *means*. If unconscionable means no more than dishonesty, then dishonesty is the preferable label. If unconscionable means something different, it must be said that it is not clear what that something different is. Either way, therefore, the term is better avoided in this context.[127]

According to Lord Nicholls, dishonest conduct (like unconscionable conduct) has 'a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.'[128] His Lordship went on to emphasise that dishonesty 'is an objective standard … The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual … The individual is expected to attain the standard, which would be observed by an honest person placed in those circumstances'.[129]

***Unconscionability and Dishonesty Compared***

The explanatory force of dishonesty seems to be limited in the same way that the explanatory force of unconscionability is limited. Of itself, it does not tell us *what* X must know in order to be liable for dishonest assistance nor does it tell us what moral principles underpin the doctrine. The authorities suggest that X need not know specifically that she is assisting in a breach of trust or

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[125] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110) 387 (Lord Nicholls).
[126] Ibid 391.
[127] Ibid 392.
[128] Ibid 389.
[129] Ibid 389, 390.

even what a trust is. Rather, X needs to know that T does not have the right to do what she is doing. For example, if T misappropriates trust property and invests it for herself, X need only know that T did not have the authority to do so.[130] In other words, she must know that the assets are not at T's free disposal and that she is helping T to deal with the assets in an unauthorised fashion.[131] Similarly, it is dishonest for X to continue to enter into transactions with T in circumstances where X knew she was the beneficiary of the corrupt payment of bribes by T in breach of T's duty to her principal.[132] This suggests more broadly that X must know that she is helping T to breach some sort of duty or obligation, which T owes to another.

The fact that T must know that she is helping T to breach some duty or obligation owed to another suggests that the relevant moral principle is that we should respect and not interfere with obligations owed *by* others *to* others. It has been argued that the rationale for the doctrine is based on the need to deter third parties from helping trustees and fiduciaries to exploit the vulnerability of B[133] and compensating B for any harm done,[134] thus limiting fiduciaries' ability to do wrong[135] and safeguarding the trust relationship.[136] However, arguably the broader moral principle at stake is that referred to above. This view finds support in judicial assertions that X's liability in dishonest assistance is the equitable counterpart of the economic tort of inducing breach of contract.[137] In order to be liable for inducing breach of contract, X would have to know[138] that she was inducing T to breach her contract with B and nevertheless intend to

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[130] *Barlow Clowes International Ltd v Eurotrust Ltd* (n 124) 1483-1484, [28] (Lord Hoffmann).
[131] *Twinsectra Ltd v Yardley* (n 65) 202, [135]-[137] (Lord Millett).
[132] *Novoship (UK) Ltd v Mikhaylyuk* (n 84) 544-5, [57]-[59] (Longmore LJ).
[133] The vulnerability of the principal in a fiduciary relationship is emphasized by H. Dagan, 'Restitution and Relationships' Tel Aviv University Law Faculty Papers, 2011, Working Paper 127, 3.
[134] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110), 386-387 (Lord Nicholls).
[135] Ridge (n 109) 446, 467.
[136] M. Clapton, 'Gain-Based Remedies for Knowing Assistance: Ensuring Assistants do not Profit from their Wrongs' (2008) 45 Alta L Rev 989.
[137] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110) 387 (Lord Nicholls); *Twinsectra Ltd v Yardley* (n 65) 200-1, [127], [131] (Lord Millett).
[138] Actual knowledge or deliberately or consciously avoided knowledge is required: *British Industrial Plastics v Ferguson* [1940] 1 All ER 479 (HL); *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 701 (CA), 701 (Lord Denning MR); *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244, 275, [114] (Arden LJ).

bring about the breach.[139] Even though the remedies and defences differ[140] and the economic tort focuses on 'procurement and targeted harm', whereas 'the keys to liability [in dishonest assistance] are facilitation and dishonesty',[141] the aim of both doctrines is to prevent X from interfering in the relationship between B and T[142] and making herself party to a breach of duty owed by T to B.[143] Therefore, it seems right to say that X 'has committed an equitable wrong'[144] by breaching a pre-existing obligation or duty not to interfere in the relationship between T and B.

Furthermore, the language of dishonesty has caused some confusion as to whether X must simply have factual knowledge in order to be liable as a dishonest assistant or whether she must also understand that by reference to the objective standard of morality, her conduct is dishonest. According to Lord Nicholls, actual knowledge of the relevant facts is required.[145] However, in *Twinsectra Ltd v Yardley*[146] the majority seemed to require proof that X also understood her behaviour was dishonest. X, a solicitor had released money to his client, T knowing that: (i) T had allowed another solicitor acting on his behalf to give an undertaking to B that the money be used only for a specific purpose; and (ii) that T was going to use it for another purpose. The majority held that T's agreement with B that the money be used only for a specific purpose gave rise to a *Quistclose* trust, so that the use of the money for another purpose constituted a breach of trust by T. However, despite X's knowledge

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[139] *Glamorgan Coal Company Ltd v South West Miners' Federation* [1903] 2 KB 556 (CA); *OBG Limited v Allan, Douglas v Hello! Limited* [2007] UKHL 21, [2008] 1 AC 1, 20, [8], 30, [43] (Lord Hoffmann).
[140] R. Stevens, *Torts and Rights* (OUP 2007) 275-77 and N. McBride and R. Bagshaw, *Tort Law* (3rd edn, Pearson Education Ltd 2008) 418-9.
[141] H. Carty, *An Analysis of the Economic Torts* (2nd edn, Oxford University Press 2010) 317; P. Ridge, 'Participatory Liability for Breach of Trust or Fiduciary Duty' in J. Glister and P. Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) (on the need to distinguish between inducement and participation for the purposes of dishonest assistance).
[142] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110) 387 (Lord Nicholls).
[143] P. Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 CLJ 491, 503-4, 513; L. Hoffmann, 'The Redundancy of Knowing Assistance' in P. Birks (ed), *The Frontiers of Liability*, vol 1 (Oxford University Press 1994) 28; D. Stilitz and P. Sales, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 LQR 411, 433; H. Carty, 'Joint Tortfeasance and Assistance Liability' (1999) 19 LS 489, 514; P. Davies, 'Accessory Liability for Assisting Torts' (2011) 70 CLJ 353, 369.
[144] *Novoship (UK) Ltd v Mikhaylyuk* (n 84) 558, [107] (Longmore LJ).
[145] *Royal Brunei Airlines Sdn. Bhd. v Tan* (n 110) 389 (Lord Nicholls).
[146] *Twinsectra Ltd v Yardley* (n 65).

of the facts, he was not held liable for dishonest assistance. Lord Hoffmann held that the idea of dishonesty outlined by Lord Nicholls in *Tan* required 'a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour.'[147] According to Lord Hutton, in order to find X dishonest, 'it must be established that [his] conduct was dishonest by the ordinary standards of reasonable and dishonest people and that he himself realised that by those standards his conduct was dishonest.'[148] Therefore, on the analysis of the majority, the idea of dishonesty required X to know that T was breaching the undertaking *and* understand that ordinary people would view her conduct in assisting T to do this as dishonest. Lord Millett dissented on the basis that it was dishonest for X consciously to release the money to T in the knowledge that it would be used inconsistently with the undertaking without there being any need for him to appreciate that he was thereby acting dishonestly. He held that to introduce a requirement of 'subjective' dishonesty would introduce an unnecessary and unjustified distinction between dishonest assistance and inducing breach of contract.[149]

In *Barlow Clowes International Ltd v Eurotrust Ltd*[150] the Privy Council reinterpreted the majority decision in *Twinsectra* as imposing an objective standard of dishonesty. X had strongly suspected that monies going through his hands into T's personal accounts were monies received from T's clients who thought they were giving him money to invest on their behalf in a gilt-edged securities investment scheme. Lord Hoffmann, giving the judgment of the court, held that X consciously decided not to make enquiries because he preferred not to run the risk of discovering the truth and found that by ordinary standards such a state of mind was dishonest. It did not matter that A saw nothing wrong in what he was doing because he held an exaggerated notion of the need to provide dutiful service to his clients, nor would it have mattered if A was unaware that by ordinary standards his conduct would be regarded as dishonest.

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[147] Ibid 170, [20] (Lord Hoffmann).
[148] Ibid 171-2, [27]-[28], 173, [31], 174, [34]-[35], 175, [36] (Lord Hutton).
[149] Ibid 200-1, [126]-[132] ( Lord Millett).
[150] *Barlow Clowes International Ltd v Eurotrust Ltd* (n 124).

Lord Hoffmann re-characterised Lord Hutton's judgment in *Twinsectra* as meaning 'only that [X]'s knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were'.[151] Of his own judgment in *Twinsectra*, he held that it was intended to require only 'consciousness of those elements in the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require [X] to have thought about what those standards were.'[152] Despite Lord Hoffmann's avowedly objective approach to dishonesty the language in his judgment indicated a readiness to infer moral understanding from factual knowledge. For example he adopted the trial judge's finding that a dishonest state of mind on the part of X 'may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge.'[153] This has the potential to cause confusion insofar as it might suggest that moral understanding must be proved in addition to factual knowledge.

Although *Barlow Clowes* has been interpreted as mandating an objective test for dishonesty,[154] there still seems to be a residue of doubt as to the relevance of X's moral understanding. For example, in *Abou-Rahmah v Abacha*[155] Pill LJ held that the question whether subjective dishonesty was necessary had no bearing on the outcome of the appeal but went on to remark that if viewed objectively, X's conduct fell below normally acceptable standards 'it can readily be inferred that he knew it did, so that his conduct would have

[151] Ibid 1481, [16] (Lord Hoffmann).
[152] Ibid.
[153] Ibid 1480-1, [10].
[154] *Abou-Rahmah v Abacha* (n 110) 237-8 (Arden LJ), noted, N. Kiri, 'Dishonest Assistance: The Latest Perspective from the Court of Appeal' (2007) 22 JIBLR 305; *AG Zambia v Meer Care & Desai (a firm)* (n 124); A. Clarke, 'Claims Against Professionals: Negligence, Dishonesty and Fraud' [2006] PN 70, 74.
[155] *Abou-Rahmah v Abacha* (n 110).

amounted to dishonest assistance.'[156] Rix LJ analysed the elements of dishonest assistance as requiring proof of knowledge on X's part, the fact that given that knowledge, X breaches generally acceptable standards of honest conduct *and* 'possibly, that [X] must in some sense be dishonest himself (a subjective test of dishonesty which might, on analysis, add little or nothing to knowledge of the facts which, objectively, would make his conduct dishonest).'[157]

Subsequently in *Starglade Properties Ltd v Nash*[158] the Court of Appeal referred to the fact that X's conduct in removing assets from an insolvent company of which he was a director to frustrate the claim of a particular creditor was at variance with the ordinary standards of commercial behaviour *and* a person in X's position could not have thought otherwise.[159] In light of the above, it may be better to take up Lord Millett's suggestion that we re-adopt the label of 'knowing' assistance, assuming that, in accordance with *Barlow Clowes*, only factual knowledge is required.[160] In any event, as the law stands, the mental element required to prove dishonesty seems to be very similar to that required to establish knowing receipt (actual knowledge in the sense required in *Baden* categories 1-3), which suggests that the labels of dishonesty and unconscionbability are interchangeable. Moreover, for the reasons given above, they are of equally limited explanatory value.

Finally, if it is right to say that dishonest assistance is an equitable wrong, then the language of conscience *does* in fact have a limited role to play in the context of dishonest assistance. It reminds us that relief turns on the breach of a pre-existing moral obligation by X. In order for it to be reasonable to require X not to interfere with the fiduciary relationship between T and B, X must know that T's authority to do what she is doing is in some way limited by reference to a relationship with another. If she knows this, then through the

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[156] Ibid 247, [90] (Pill LJ).
[157] Ibid 224, [16] (Rix LJ).
[158] *Starglade Properties Ltd v Nash* (n 115).
[159] Ibid [39] (Morritt C), [44] (Leveson LJ).
[160] Cf. Webb and Akkouh (n 84) 364, who suggest that if it is thought necessary to excuse from liability those who assist a trustee in a justifiable breach of trust, then the test for liability could be reframed in terms of intention.

operation of her conscience, she can determine what she ought to do, i.e. not take steps to assist T to exceed the limits of that authority.

## CONCLUSION

The language of conscience tells us little if anything about why B's equitable title survives the transfer of the property to X. If X is a volunteer, from the date she receives the property she is liable to return it *in specie* if B demands it, but she comes under no obligations in respect of it absent knowledge. If X is a purchaser, she is in the same position unless she can prove that she received the property without notice of B's interest. Notice is relevant not because it triggers an immediate moral obligation on X's part to return the property to B but rather because it makes it fair to displace X's interest as a purchaser in security of receipt and subject her to the same liability as a volunteer. Again, it is only when X acquires knowledge of B's entitlement that she becomes obliged to restore the property *in specie* or, failing that, account to B for its value. By contrast, the language of conscience does tell us something about X's obligations towards B, whether they relate to the property itself or the relationship between B and T. However, even then, its function is very limited. It simply reminds us that it is unreasonable to treat X as subject to any obligation before she acquires knowledge of the relevant facts. This is because equitable obligations are rooted in moral obligations and X can only identify and comply with what morality requires of her through the process of moral reasoning; for this she requires factual knowledge. Beyond this, it tells us nothing.

The invocation of unconscionability as a standard in knowing receipt, without due regard to the explanatory limits of the language of conscience, is problematic. It cannot help us to identify the doctrine's rationale and in fact may be used consistently with several different rationales. Similarly, it may point to the moral nature of the obligations owed by the defendant, but it cannot give content to them. It may help us to understand why the defendant's knowledge is relevant but it cannot tell us what or how much she must know. Worse still, not only does it fail to help us answer these important questions, it

can often obscure the fact that they need answering in the first place. Arguably, the invocation of dishonesty as the standard for relief for assisting a breach of trust faces similar problems.

# CHAPTER 5: CONSCIENCE, MISTAKE AND MISREPRESENTATION

## INTRODUCTION

This chapter analyses the meaning and function of conscience in the contractual doctrines of common and unilateral mistake[1] and misrepresentation. Historically, claims for relief for mistake were first heard in equity and it was said to be 'against conscience for a man to take advantage of the plain mistake of another, or, at least, that a court of Equity will not assist him in doing so.'[2] The courts were concerned with the 'morality of founding an agreement upon mistake'.[3] Over time, a parallel doctrine of mistake developed at common law,[4] which was based on the idea of consensus rather than conscience and this is now dominant: if the mistake was sufficient to destroy consensus, the contract is void.[5] Nevertheless, the courts continued to use the language of conscience and unconscionability when explaining why equity would rescind a contract for common mistake or rescind or rectify a contract for unilateral mistake. Recently, in *The Great Peace,*[6] the Court of Appeal held that there was no room for overlapping doctrines of contractual mistake at common law and in equity. This has been taken to mean that

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[1] Mistake as to identity is not considered, as the leading judicial explanations of this doctrine do not make reference to conscience: *Cundy v Lindsay* (1878) 3 App Cas 459 (HL); *Shogun Finance Limited v Hudson* [2003] UKHL 62, [2004] 1 AC 919; C. Macmillan, 'Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law' (2005) 64 CLJ 711. Similarly, the refusal of specific performance for unilateral mistake is not considered because although there are early examples of the use of the language of unconscionability (e.g. *Manser v Back* (1848) 6 Hare 443; 67 ER 1239, [448]/1241 (Wigram VC); *Burrow v Scammell* (1881) 19 Ch D 175, 182 (Bacon VC), it was superseded by the language of hardship and unreasonableness: *Tamplin v James* (1880) 15 Ch D 215, 221 (James LJ); *Preston v Luck* (1884) 27 Ch D 497, 506 (Cotton LJ); *Stewart v Kennedy* (1890) 15 App Cas 75, 105 (Lord Macnaghten).

[2] *Manser v Back* (n 1) [448]/1241(Wigram VC); C. Macmillan, *Mistakes in Contract Law* (Hart 2010) 38.

[3] Macmillan, *Mistakes in Contract Law* (n 2) 45.

[4] Ibid 133, 179.

[5] *Smith v Hughes* (1870-71) LR 6 QB 597, 607 (Blackburn J); *Bell v Lever Brothers Ltd* [1932] AC 161 (HL), 217 (Lord Atkin); C. Macmillan, 'How Temptation Led to Mistake: An Explanation of Bell v Lever Bros Ltd' (2003) 119 LQR 625; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255, 264, 268 (Steyn J).

[6] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679.

equitable rescission for common and unilateral mistake is no longer available in equity.[7] Nevertheless, these doctrines are considered here for two reasons. First, the use of the language of conscience within them tells us something about its role in rescission more generally. Secondly, *The Great Peace* has been the subject of academic criticism and, although it seems likely that the common law and equitable doctrines cover the same ground so as to render the equitable doctrine superfluous, the Supreme Court has not yet had the opportunity to consider and rule on the question definitively.

The chapter argues that where the language of conscience and unconscionability has been used in the context of mistake, it bears its ordinary meaning: the courts are making judgments about whether the defendant's behaviour or particular outcomes are or would be morally acceptable. The chapter argues further that although the language of conscience and unconscionability alerts us to the fact that the principle underpinning rescission or rectification is a moral one, of itself the idea of conscience cannot identify that principle. Moreover, in principle, the language of conscience and unconscionability has no real explanatory role where the claimant seeks to rescind a contract for mistake. In such cases, the defendant's knowledge of the mistake is relevant but, crucially, only for the purpose of telling us whether it is fair to disable her from enforcing the contract. This does not depend on the breach of a pre-existing moral obligation[8] and therefore the language of conscience does not add anything to our understanding of why the contract may be rescinded. By contrast, where the claimant seeks to *rectify* the contract, the language of conscience does have an explanatory function. As in the case of trustee obligations and knowing receipt, it reminds us that it is unreasonable to treat the defendant as coming under an obligation (to abide by the claimant's interpretation of the contract) unless she knows that she has a (moral) reason to do so. Finally, the chapter explains that there are good reasons why the language of conscience is largely absent from the doctrine of misrepresentation.

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[7] E.g. J. McGhee QC (ed) *Snell's Equity* (33rd edn, Sweet & Maxwell 2014), 407, [15-006].
[8] Cf. S. Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Law and Jurisprudence 157, 179.

## CONSCIENCE AND COMMON MISTAKE

The courts have used the language of unconscientiousness to describe the fact that in the eyes of equity it is morally unacceptable for one party to seek to enforce a contract based on a common (i.e. shared) mistake, once that mistake has come to light. However, beyond this, the idea of conscience has no explanatory function in equitable rescission for common mistake.

### *Conscience - Meaning*

In *Solle v Butcher*[9] Denning LJ invoked the language of conscience to explain the basis on which a contract would be rescinded in equity for common mistake. The defendant landlord sought to resist a claim for overpaid rent and counterclaimed to rescind a lease entered into under a common mistake that the rent control legislation did not apply to it. Both parties had mistakenly believed that 'the rent [the landlord] could charge was not tied down to a controlled rent'.[10] The Court of Appeal therefore rejected the claim for the overpaid rent but was prepared to grant rescission on terms that the claimant was allowed to continue in occupation of the property at the controlled rent. Denning LJ cited authority to the effect that the court 'had power to set aside the contract whenever it was of opinion that it was "unconscientious" for the other party to avail himself of the legal advantage which he had obtained: *Torrance v Bolton* per James LJ.'[11] In his view, rescission was available for common mistake 'if the parties were under a common misapprehension either as to facts or as to their respective or relative rights, provided that the misapprehension was fundamental and the party seeking to set it aside was not himself at fault'.[12]

Because common mistake depends on *both* parties being mistaken, the language of unconscientiousness cannot be taken to refer to any shabby conduct by the defendant at the time the contract was formed. Thus, in *Solle*,

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[9] *Solle v Butcher* [1950] 1 KB 671 (CA).
[10] Ibid 691-2 (Denning LJ)
[11] Ibid 692.
[12] Ibid 693.

although Denning LJ referred to the fact that the tenant had been responsible for the mistake, the Court held there was no misrepresentation on the facts[13] and Denning LJ found it unnecessary to decide the point[14] because the shared mistake was enough. *Spooner v British Telecommunications plc*[15] also supports this view. BT and the members of its pension scheme both mistakenly assumed that the offer by BT of new pension benefits to the members would improve their pension rights. On the basis of this mistaken assumption the members elected to move to the new scheme. Jonathan Parker J held that there was no impropriety or bad faith on the part of BT or the trustees of the pension scheme. However, the circumstances were such 'as to render it unconscionable for BT or the trustees to insist that the elections in question should stand'.[16] The members were therefore entitled to rescind their elections and continue to participate in the original scheme. Therefore, in common mistake cases the language of unconscientiousness only really points to the fact that the court considers it (morally) unacceptable for the defendant to enforce and retain the benefit of the contract[17] once the mistake has come to light.

***Conscience – Function***

The idea of conscience plays no explanatory role in the doctrine of common mistake. Here, it is useful to distinguish between the ideas of unconscientiousness *ex ante* or 'unconscientiousness in acquisition'[18] and 'unconscientiousness *ex post'*.[19] The idea of unconscientiousness *ex ante* points to unconscionable conduct by the defendant at the time the contract was entered into and therefore may potentially tell us something about the cause of action. The idea of unconscientiousness *ex post* captures references to it being

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[13] Ibid 687 (Bucknill LJ), 703 (Jenkins LJ).
[14] Ibid 695 (Denning LJ).
[15] *Spooner v British Telecommunications Plc* 1999 WL 1953275 (ChD).
[16] Ibid [9.3.10] (Parker J).
[17] *Torrance v Bolton* (1872) LR 8 Ch 118, 124 (James LJ); *Nocton v Lord Ashburton* [1914] AC 932 (HL), 955 (Viscount Haldane LC).
[18] N. Chin, 'Relieving against Forfeiture: Windfalls and Conscience' (1995) 25 Western Australia Law Review 110, 111.
[19] P. Birks and N. Chin, 'On the Nature of Undue Influence' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995) 60.

unconscionable for the defendant to enforce the contract once the cause of action has been established; it is 'no more than an inference from the plaintiff's right to recover'.[20] It is clear from cases such as *Solle* and *Spooner* that any unconscientiousness in common mistake cases arises *ex post* and has no explanatory force beyond indicating that the court regards it as morally unacceptable for the defendant to enforce the contract.

Of themselves, the ideas of conscience and unconscientiousness cannot tell us *why* it would be morally unacceptable for the defendant to enforce the contract: to understand this, we need to interrogate the principles that underpin relief for common mistake, and the key seems to be a lack of consensus or the fact that the consensus the parties have reached does not cover the facts as they are. In *Solle* itself the Court of Appeal focused on the seriousness of the mistake. Had the lease been upheld, the landlord would have had to let the flat at a substantial undervalue for the remaining four years of a seven year term, something he would never have agreed to do had he not been mistaken. Later authorities also focused on the fundamentality of the mistake.[21] It has therefore been suggested that any perceived unconscientiousness in *Solle* was 'rooted only in the consequences of the bargain',[22] i.e. because it would have had a harsh impact on the landlord. '[O]nce the other party knows of the mistake and its effect, for him to seek to enforce the bargain with its resulting disparity of values would be unconscionable.'[23] Arguably, the seriousness of the mistake and its impact on the claimant provide evidence which goes to the issue of consensus: the graver the mistake, the easier it is to infer that the parties' agreement did not factor in this eventuality. Thus, for example, in *Magee v Pennine Insurance Co Ltd*[24] Lord Denning MR that held an agreement to settle an insurance claim ought to be set aside because it would not be fair to hold the insurance company to an agreement 'they would not have dreamt of making if

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[20] Ibid.
[21] *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016 (CA) 1042 (Evans LJ); *West Sussex Properties Ltd v Chichester District Council* [2000] All ER (D) 887 (CA).
[22] J. Cartwright, 'Solle v Butcher and the Doctrine of Mistake in Contract' (1987) 103 LQR 594, 621.
[23] H. Fuller, 'Mistake and Error in the Law of Contracts' (1984) 33 Emory LJ 41, 78.
[24] *Magee v Pennine Insurance Co. Ltd* [1969] 2 QB 507 (CA).

they had not been under a mistake' that Mr Magee had a valid insurance policy.[25]

The authorities on rectification for common mistake[26] also support the view that consensus is the key issue: the contract will be rectified where the contractual instrument does not accurately reflect the parties' true agreement.[27] The origins of the remedy of rectification are said to 'lie in conscience and fair dealing'[28] but all the idea of conscience signifies is that it is wrong for the defendant to seek to uphold the contract despite the absence of true agreement. Thus, it has been held that 'the type of unconscientiousness that is prevented by the availability of the equity to rectify a written contract is that which would occur if a party to the contract sought the benefit of those legal rights he would have if the document contained the agreement that the parties had made, when the doctrine does not accurately state the common intention that the parties had'.[29] A common mistake renders a contract void at common law for the same reason.[30] On this analysis, the objective standard requires both parties to honour their agreement, as long as it is the product of consensus. However, if both parties are so badly mistaken that their consensus does not cover the facts as they are, then the law will not enforce those obligations. The idea of conscience adds nothing to this conclusion other than to remind us that it

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[25] Ibid 515 (Lord Denning MR), 518 (Fenton-Atkinson LJ).

[26] Originally rectification was granted only for common mistake: *Bradford v Romney* (1862) 30 Beav 431; 54 ER 956, [438]/ 959; *Sells v Sells* (1860) 1 Dr & Sm 42; 62 ER 294, [45-46]/ 295 (Kindersley VC); *Fowler v Fowler* (1859) 4 De G & J 250; 45 ER 97.

[27] *Joscelyne v Nissen* [1970] 2 QB 86 (CA); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, noted, D. McLauchlan, 'Chartbrook Ltd v Persimmon Homes Ltd - Commonsense Principles of Interpretation and Rectification' (2010) 126 LQR 8; applied, *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153. On the debate as to whether the test should be based on the parties' intentions, subjectively or objectively interpreted: M. Smith, 'Rectification of Contracts for Common Mistake, Joscelyne v Nissen, and Subjective States of Mind' (2007) 123 LQR 116 (arguing for the objective approach). Cf. D. McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608; McGhee QC, *Snell's Equity* (n 7) 425-6, [16-015]; P. Davies, 'Rectifying the Course of Rectification' (2012) 75 MLR 412, 420-1; C. Nugee QC, 'Rectification after Chartbrook v Persimmon: Where Are We Now?' (2012) 26 TLI 76 (preferring the subjective approach).

[28] *Daventry District Council v Daventry & District Housing Ltd* (n 27) 1380, [194] (Lord Neuberger MR).

[29] *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65, [310] (Campbell JA); McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (n 27) 609; Nugee QC (n 27) 79.

[30] *Bell v Lever Brothers Ltd* (n 5) 217 (Lord Atkin); *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* (n 5) 264, 268 (Steyn J).

would be morally unacceptable if the defendant were to be allowed to enforce the contract[31] despite the problem with the consensus.

In any case, appeals to conscience for the purposes of common mistake are likely to be much rarer after *The Great Peace.*[32] The Court of Appeal held that *Solle* was inconsistent with earlier authority,[33] which established that a sufficiently serious common mistake destroys the parties' consensus so as to render a contract *void* at common law[34] rather than voidable. Relief at common law and in equity depended on the seriousness of the mistake, so the doctrines overlapped completely and the fact that the contract was void at common law meant that the equitable doctrine was otiose.[35] According to Lord Phillips MR, 'it is axiomatic that there is no room for rescission in equity of a contract which is void.'[36]

The decision in *The Great Peace* has been criticised for taking a very restrictive view of the circumstances in which the mistake will be serious enough to render the contract void, and instead Capper has argued for a new test for common mistake based on the idea of unconscionability. According to the Court of Appeal it is only where the parties' mistaken common assumption is so fundamental that 'performance of the contractual adventure' is impossible[37] and the basis for their consensus is effectively destroyed, so as to render the contract void. This reflects the view that the common law prefers to hold parties to what they have agreed if they have agreed terms and the

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[31] If the contract is void, the claimant may recover any benefits received by the defendant through the law of unjust enrichment: A. Burrows, *The Law of Restitution* (Oxford University Press 2010) 387-8.
[32] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (n 6) 725, [157], 726, [160] (Lord Phillips MR). Noted, J. Cartwright, 'Common Mistake in Common Law and Equity' (2002) 118 LQR 196.
[33] *Bell v Lever Brothers Ltd* (n 5) 218 (Lord Atkin); applied, *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* (n 5), 268 (Steyn J).
[34] As had been suggested by P. Atiyah and F. Bennison, 'Mistake in the Construction of Contracts' (1961) 24 MLR 241, 442.
[35] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (n 6) 709, [96] (Lord Phillips MR).
[36] Ibid.
[37] Ibid 703, [76].

bargaining process itself has been fair.[38] However, this test has been widely criticised,[39] particularly because of its remedial inflexibility.[40] Capper argues that a common mistake may undermine the parties' shared assumption of mutual gain under the contract in such a serious way that 'it would be unconscionable to uphold the contract'.[41] He suggests that '[T]o this extent unconscionability can be seen as the grounding principle of relief against all contracts vitiated at inception.'[42] 'The way forward … is to focus less on the fundamentality of the mistake and more on the unconscionability of the advantage gained by the party seeking to uphold the contract and on the allocation of risk between the parties.'[43] According to Capper's test, a contract would be voidable rather than void for common mistake. Relief would depend on whether the risk of the mistake had been allocated by the contract,[44] the mistake was 'fundamental or really serious'[45] and 'enforcing the contract would be unconscionable, and in this regard the inequality of the exchange is particularly important'.[46]

The suitability of the idea of unconscionability as the basis of an alternative test for common mistake is doubtful. The idea of unconscionability is neither

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[38] *Bell v Lever Brothers Ltd* (n 5), 226 (Lord Atkin); cited with approval in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* 2001 WL 1251948; High Court of Justice Queens Bench Division, 9 November 2001, [115], [122] (Toulson J); S. Worthington, *Equity* (2nd edn, Oxford University Press 2006) 207; M. Eisenberg, 'The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake and Nonperformance' (2009) 107 MichLRev 1412, 1415-1416.

[39] S. Midwinter, 'The Great Peace and Precedent' (2003) 119 LQR 180 questions the correctness of the departure from *Solle* as a matter of precedent. As to the doubtful weight of *Bell v Lever Bros* as authority for the doctrine of common mistake: Macmillan, 'How Temptation Led to Mistake: An Explanation of Bell v Lever Bros Ltd' (n 5) 658; Macmillan, *Mistakes in Contract Law* (n 2) 259-378, 315.

[40] A. Phang, 'Controversy in Common Mistake' [2003] Conv 247, 252, 253; A. Chandler, J. Devenney and J. Poole, 'Common Mistake, Theoretical Justification and Remedial Inflexibility' [2004] JBL 34, 35, 56, 57. Cf. C. Hare, 'Inequitable Mistake' (2003) 62 CLJ 29, in which it is argued that greater remedial flexibility could be provided through legislative reform. As to the flexibility of the equitable doctrine: C. Grunfeld, 'A Study in the Relationship Between Common Law and Equity in Contractual Mistake' (1952) 15 MLR 296, 319; R. Blackburn, 'The Equitable Approach to Mistake in Contract' (1955) 7 Res Jud 43, 50-51; A. Phang, 'Common Mistake in English Law: The Proposed Merger of Common Law and Equity' (1989) 9 LS 291, 303; D. Capper, 'Reconfiguring Mistakes in Contract Formation' in M. Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish 2007) 129.

[41] Capper (n 40) 120.

[42] Ibid.

[43] Ibid 136.

[44] Ibid 143.

[45] Ibid 142.

[46] Ibid 143.

a principle nor a standard in its own right. All it can do is denote the fact that in the eyes of equity it would be contrary to the objective standard of morality were the defendant to be allowed to enforce the contract; of itself, it cannot tell us why or, as importantly, when this is the case. Therefore, it cannot help us to choose between the approach of the Court of Appeal in *The Great Peace* and Capper's alternative; it is capable of describing either approach as an embodiment of the objective standard. If the courts are to be persuaded to adopt a different approach from that set out in *The Great Peace*, then direct argument is required as to what principles the law on common mistake should embody. The idea of unconscionability itself cannot provide answers to these questions and an appeal to it is no substitute for the hard analysis required.

## CONSCIENCE AND UNILATERAL MISTAKE

The courts use the language of conscience and unconscionability in unilateral mistake in two ways. First, they use it to describe the fact that if at the time the contract is being formed the defendant knows the claimant is mistaken, she ought not accept her consent to the contract. Secondly, they use it to indicate that in light of the claimant's mistaken consent, the defendant ought not seek to enforce the contract against her at a later stage. The language of conscience does not add anything to our understanding of the reasons why a contract may be rescinded for unilateral mistake. By contrast, in the case of rectification the language of conscience has a positive (albeit limited) explanatory function in that it reminds us that the defendant comes under an obligation to adhere to the claimant's interpretation of the contract if she knows she has moral reason to do so.

### *Conscience – Meaning*

#### *Rescission*

Equity will not rescind a contract for unilateral mistake simply because the claimant was mistaken. Even though the claimant's consent may have been impaired by the mistake, the defendant will only be disabled from enforcing the contract if at the time it was formed she had knowledge of the mistake.

The courts sometimes couch this requirement in the language of conscience. In *Riverlate Properties Ltd v Paul*[47] a landlord mistakenly believed that a term had been included in the lease that would have made the tenant liable for half the costs of repairs. He sought to rectify the lease for unilateral mistake, alternatively an order that the tenant should elect between rectification or rescission. The Court of Appeal refused to rectify the lease or rescind it on terms. Russell LJ considered whether the lease could be rescinded on the mere ground of a serious mistake when the tenant neither shared the mistake, nor knew that the lease did not give effect to the landlord's intention and had not caused the mistake. He held that rescission was unavailable in those circumstances. He went on to explain his conclusion in terms of conscience and expressly linked the idea of conscience to the objective standard of morality, as interpreted and applied by equity.

> If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or some other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or other mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing upon the field of moral philosophy in which it would soon be in difficulties.'[48]

In *OT Africa Line Ltd v Vickers plc*[49] the parties were negotiating a litigation settlement and the claimant made a mistake as to the currency in which the settlement offer was made. Mance J held that 'rescission may be available where it is simply inequitable for one party to seek to hold the other to a bargain objectively made'.[50] Rescission was refused because the defendant was 'not aware of, or in a position where they shut their eyes to, or responsible

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[47] *Riverlate Properties Ltd v Paul* [1975] Ch 133 (CA).
[48] Ibid 141 (Russell LJ).
[49] *OT Africa Line Ltd v Vickers plc* [1996] CLC 722.
[50] Ibid 727 (Mance J).

for or at fault in respect of any mistake.'[51] Subsequently, it has been held that implicit in Mance J's remarks was the idea that had the defendant known or had reason to know of the mistake, it would have been under 'a duty to speak rather than remain silent'.[52] When such a duty to speak will arise depends very much on the context. As a matter of English law, it will arise very rarely in the context of litigation settlement negotiations.[53]

The language used by the courts in some cases tends to suggest that it would be morally unacceptable for the defendant to be allowed to enforce the contract in light of her knowledge of the mistake at the time the contract was formed. Some cases go further and suggest that the courts regard the defendant as being under some sort of moral duty not to allow the claimant to enter into the contract without first correcting the mistake. For example, in *Huyton v DIPASA*[54] Andrew Smith J had to consider whether to grant rescission, where the claimant's mistake related to the facts underlying the contract rather than a term of the contract itself. In principle, he was prepared to recognise that rescission would be available for such a mistake. For reasons later discussed, this conclusion seems doubtful,[55] but Andrew Smith J's judgment tells us something about how the language of unconscionability is used. He held that one of the factors relevant to the grant of relief was whether it would be unconscionable for the defendant to enforce the contract 'in light of any responsibility for bringing about the mistake or for allowing the other party to enter into the contract under a mistake.'[56] He held the mistake was not 'of such importance … that it would be unconscionable to enforce' the contract.[57] Moreover, the defendants were not guilty of any misrepresentation, and they were neither aware of nor did they suspect the claimant was mistaken at the

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[51] Ibid 728.
[52] *Thames Trains Ltd v Adams* [2006] EWHC 3291, [46] (Nelson J).
[53] Relief was refused in *Thames Trains* and in *Thompson v Arnold* [2007] EWHC 1875 (QB); [2008] PIQR P1, [104], [105] (Langstaff J). Cf. *Deputy Commissioner of Taxation (NSW) v Chamberlain* (1990) 26 FCR 221 (ACT District Registry). Also, A. Kronman, 'Mistake, Disclosure, Information and the Law of Contracts' (1978) 7 JLS 1.
[54] *Huyton SA v DIPASA* [2003] EWHC 2088 (Comm).
[55] Text to n 147 - 150.
[56] *Huyton SA v DIPASA* (n 54) [455] (Andrew Smith J). The issue of unilateral mistake did not arise for decision on appeal: *Huyton SA v DIPASA* [2003] EWCA Civ 1104.
[57] *Huyton SA v DIPASA* (n 54) [461].

time the contract was formed; at most, they created the opportunity for the mistake. Thus, they were not guilty 'of the sort of unconscionable behaviour that should prevent them from enforcing' the contract.[58] He did not elaborate on what *would* constitute unconscionable conduct, but cited an authority on rectification[59] that suggests that it involves a failure to alert the claimant to or an attempt to distract her from discovering the mistake.

The High Court of Australia took a similar approach to unconscionability in *Taylor v Johnson.*[60] A vendor granted the purchaser an option to purchase two pieces of land for $15,000. He exercised the option and the parties entered into a contract for sale in those terms. Subsequently, the vendor sought to set aside the contract on the basis that when she executed it she had made a mistake as to a term of the contract because she believed she was agreeing to a price of $15,000 per acre. The High Court of Australia held that 'special circumstances will ordinarily need to be shown before it would be unconscientious for one party to a written contract to enforce it against another party who was under a mistake as to its terms or subject matter.'[61] The court cited authority (including *Solle* and *Riverlate*) to the effect that such special circumstances would include those where the defendant caused the mistake, e.g. by misrepresentation, or despite her awareness of the mistake, went ahead with the contract without correcting it. It granted rescission because at the time the option was exercised the purchaser suspected the vendor was mistaken and, rather than drawing this to her attention, he avoided mentioning the price and wrongly stated that he did not have a copy of the option agreement when asked for it. It would have been 'unfair' for the defendant to hold the claimant to the written contract, where she knew of the mistake or deliberately avoided acquiring such knowledge.[62]

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[58] Ibid [464].
[59] *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (CA); text to n 77 – 80.
[60] *Taylor v Johnson* (1982-1983) 151 CLR 422 (HCA).
[61] Ibid 431.
[62] Ibid 433.

The Singapore Court of Appeal cited *Solle*, *Riverlate* and *Taylor* and took a similar approach in *Chwee Kin Keong v Digilandmall.com Pte Ltd.*[63] The claimants sold computer equipment online and one of their employees made a pricing error, so that a laser printer was advertised on the claimants' website at a massive undervalue. The defendants did not have actual knowledge of the claimants' pricing error but they suspected it and acted very quickly to take advantage of it by placing large numbers of online orders for the printer without first checking with the claimants whether the price was in fact accurate. The claimants subsequently sought to rescind the sales contracts, which had been formed at the time the orders were placed. The court held that actual knowledge was required before the contracts would be void at common law. However, it held that equitable rescission was available for a unilateral mistake as to terms when it was 'unconscionable for the non-mistaken party to insist that the contract be performed.'[64] In its view 'a conscious omission to disabuse a mistaken party is itself sufficient to constitute unconscionable conduct'.[65] Constructive knowledge alone would not suffice. 'There must be an additional element of impropriety. The conduct of deliberately not bringing the suspicion of a possible mistake to the attention of the mistaken party could constitute such impropriety.'[66] This was established on the facts.

*Rectification*

It is said that rectification for unilateral mistake was originally limited to cases of equitable fraud.[67] Authority suggests this was not always the case,[68] but by the early twentieth century the idea seems to have been well established,[69] and

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[63] *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 (SCA). Noted, T. Yeo, 'Unilateral Mistake: Five Degrees of Fusion of Common Law and Equity' [2004] Sing JLS 227; T. Yeo, 'Great Peace: a Distant Disturbance' (2005) 121 LQR 293; P. Lee, 'Unilateral Mistake in Law and Equity - Solle v Butcher Reinstated' (2006) 22 JCL 81.
[64] *Chwee Kin Keong v Digilandmall.com Pte Ltd* (n 63) [80].
[65] Ibid [73].
[66] Ibid [80].
[67] McGhee QC, *Snell's Equity* (n 7) 428, [16-018]; H. Beale, *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) 558, [5-122].
[68] Rectification was granted in the absence of fraud in *Simpson v Vaughan* (1739) 2 Atk 31; 26 ER 415 and *Ball v Storie* (1823) 1 Sim & St 210; 57 ER 84.
[69] *May v Platt* [1900] 1 Ch 616 (Ch); *Hoblyn v Hoblyn* (1889) 41 Ch D 200 (Ch), 207 (Kekewich J); *Blay v Pollard & Morris* [1930] 1 KB 628 (CA); *McCausland v Young* [1949] NI 49.

nowadays the remedy is said to depend, at least in part,[70] on unconscionable conduct by the defendant at the time the contract was formed.[71] In *Riverlate* Russell LJ held that rectification could be ordered if the tenant had knowledge of the mistake at the time the contract was executed.[72] He remarked further, 'Basically it appears to us that it must be such as to involve the lessee in a degree of sharp practice.'[73] In *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd*[74] Buckley LJ cited *Riverlate* but preferred to focus on 'the equity of the position' rather than the idea of sharp practice. In his view, 'the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document … [The] conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake.'[75] This would be the case where the non-mistaken party was aware that due to a mistake by the other party, the contract did not contain a term that the mistaken party thought it contained, and she failed to draw this to the mistaken party's attention in circumstances where she stood to benefit from the mistake. In those circumstances 'the court may regard it as inequitable to allow [the non-mistaken party] to resist rectification to give effect to [her] intention.'[76]

In *CNT v Cooper*[77] Stuart Smith LJ held that the court would rectify a contract for unilateral mistake not simply because the claimant was mistaken but 'if there are "additional circumstances that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms".'[78] It would be unconscionable for the defendant to rely on the apparent contract if she dishonestly represented the position to the claimant,

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[70] D. Hodge, *Rectification* (Sweet & Maxwell 2010) 386, [4.66].
[71] A. Burrows, 'Construction and Rectification' in A. Burrows and E. Peel (eds), *Contract Terms* (Oxford University Press 2007) 88.
[72] Applying *A. Roberts & Co. Ltd v Leicestershire County Council* [1961] Ch 555, 570 (Pennycuick J).
[73] *Riverlate Properties Ltd v Paul* (n 47) 140 (Russell LJ).
[74] *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA).
[75] Ibid 515 (Buckley LJ).
[76] Ibid 516.
[77] *Commission for the New Towns v Cooper (Great Britain) Ltd* (n 59). Noted, Mossop, 'Rectification for Unilateral Mistake' (1996) 10 JCL 259.
[78] *Commission for the New Towns v Cooper (Great Britain) Ltd* (n 59) 277 (Stuart Smith LJ), citing Spry, *Equitable Remedies,* 4th ed (1990) 599.

had actual knowledge of the mistake or wilfully shut her eyes to the mistake or failed to make the enquiries an honest and reasonable person would have made as to whether the claimant was mistaken, i.e. knowledge of the type referred to in *Baden* categories 1-3.[79] On the facts the Court of Appeal found that such knowledge had been established. Alternatively, Stuart Smith LJ was prepared to hold that where the defendant did not know but merely suspected the claimant to be mistaken and, intending the claimant to make the mistake, had deliberately made misleading statements so as to prevent the claimant from discovering it but an actionable misrepresentation could not be proved, her conduct would be 'unconscionable' and she would be precluded from insisting on performance of the contract. In those circumstances, he held that 'it may also not be unjust or inequitable to insist that the contract be performed according to [the claimant's] understanding.'[80]

The courts often expressly characterize the defendant's decision to proceed with the contract despite her knowledge of the mistake as a moral failure. Thus, in *CNT v Cooper* Evans LJ remarked that the defendant's disingenuous conduct in trying to engineer the claimant's mistaken inclusion of a put option in a settlement agreement went 'beyond the boundaries of fair dealing even in an arm's length commercial negotiation'.[81] In *Thor Navigation v Ingosstrakh Insurance Co Ltd*[82] Gloster J held that rectification could be granted where the defendant had actual knowledge of the mistake (in the sense identified in *Baden* categories 1-3) at the time the contract was formed. In those circumstances, 'The defendant's knowledge of the claimant's mistake can be stigmatized as dishonest. The implication is that his decision to proceed with the contract when he knew of the claimant's mistake is below generally accepted standards of commercial behaviour.'[83]

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[79] Ibid 281 (Stuart Smith LJ), 292 (Evans LJ).
[80] Ibid 280 (Stuart Smith LJ).
[81] Ibid 292 (Evans LJ); *Traditional Structures Ltd v HW Construction Ltd* [2010] EWHC 1530 (TCC) [60] (HHJ Grant).
[82] *Thor Navigation Inc v Ingosstrakh Insurance Co Ltd* [2005] EWHC 19 (Comm), [2005] 1 CLC 12.
[83] Ibid 33, [57] (Gloster J), citing *Royal Brunei Airlines Sdn. Bhd. v Tan* [1994] UKPC 4, [1995] 2 AC 378 (PC), 390 (Lord Nicholls).

In *George Wimpey UK Ltd v VI Construction Ltd,*[84] the claimant alleged that as a result of its error, a price formula in a building contract did not reflect the fact that the price was to take account of certain enhancements to the property units, and that the defendant unconscionably decided to take advantage of the error by failing to alert the claimant to the mistake. The claim failed because the Court of Appeal found that there was no convincing evidence that the defendant had knowledge of the mistake in the sense described in *Baden* category 3, i.e. as a result of a wilful or reckless failure to make the enquiries an honest and reasonable person would have made in the circumstances. According to Sedley LJ:

> The phrase 'honest and reasonable' is not a term of art. It is a judicial attempt to sketch a line beyond which conduct may be regarded as unconscionable or inequitable. Its duality, however, is a recognition that honesty alone is too pure a standard for business dealings because it omits legitimate self-interest; while reasonableness alone is capable of legitimizing Machiavellian tactics.
> Mistake is a concept which sits awkwardly in this space. Absent a prior accord which has simply not been carried into effect, absent also a dishonest inducement to contract, one is looking for a mistake on the claimant's own part which the defendant was honour-bound, despite his own legitimate business interests, to point out to him.[85]

Subsequently, in *Chartbrook Ltd v Persimmon Homes Ltd* Briggs J remarked that in rectification cases, 'It is the unconscionable conduct involved in staying silent when aware of the claimant's mistake that makes it just to impose a different contract upon him from that by which he intended to be bound.' [86] More recently, in another rectification case it was held that the defendant was 'bound in conscience'[87] to alert the claimant to her mistake.

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[84] *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77.
[85] Ibid [60]-[61] (Sedley LJ); *Witney Golf Club Ltd v Parker* [2006] All ER (D) 174 (CA), [60] (Peter Leaver QC).
[86] *Chartbrook Ltd v Persimmon Homes Ltd* [2007] EWHC 409, [136], [137] (Briggs J). Reversed on appeal: *Chartbrook Ltd v Persimmon Homes Ltd* (n 27) but the Court of Appeal made no adverse finding as to Briggs J's interpretation of unconscionability.
[87] *Clayton v Candiva Enterprises Ltd* County Court (Newcastle upon Tyne), 17 January 2013.

*Conclusion*

In light of the above, it is clear that the courts use the language of conscience in unilateral mistake cases consistently with its ordinary meaning. A finding that the defendant's conscience is affected by knowledge of the mistake simply means that the defendant has knowledge of the mistake; it need not imply nothing as to what she ought to do. The courts use the language of unconscionability to signal that the defendant's behaviour in going ahead with the contract despite her knowledge of the mistake was morally unacceptable. Often the courts seem to hint that the defendant's knowledge of the mistake triggers some sort of moral obligation to correct it before entering into the contract. They also use the language of unconscionability to describe the fact that ultimately, it would be morally unacceptable for the defendant to be allowed to enforce the contract despite the mistake.

***Conscience and the Principle Underlying Unilateral Mistake***

Of itself, the idea of conscience cannot tell us why the claimant is entitled to rescind or rectify a contract for unilateral mistake; to answer this question we need to interrogate the moral principles that underpin the doctrine of unilateral mistake. The key concern seems to be to protect each party's entitlement to rely on the appearance of the other's consent, as long as such reliance is reasonable. We saw in Chapter 2 that the claimant's entitlement to recover a mistaken payment does not depend on proof that the defendant knew of the mistake at the time the payment was made: the concern for the claimant's autonomy embodied in the requirement that her consent be free and unimpaired is sufficient to justify relief.[88] By contrast, where the claimant's mistake is as to the terms of a contract, no relief is available unless the defendant was aware of the mistake at the time the contract was formed. Common law authority suggests that the reason for this is to do with the fact that English law seeks to protect the reasonable expectations of parties to

[88] Chapter 3, p 82, text to n 18.

contracts[89] by interpreting the idea of consent in a predominantly objective manner.[90]

If the parties have not reached a genuine, subjectively formed consensus as to terms, the question is whether a reasonable person would believe that consensus had been reached.[91] In other words, if the claimant *appears* to have consented, the defendant is entitled to rely on the appearance of consent and enjoys security of receipt unless she knows that the claimant intended something different.[92] Conversely, if the defendant does know about the mistake when the contract is formed, it is not open to her to say that she reasonably believed that the appearance of consensus embodied in the contract reflected the claimant's true intentions.[93] The contract is treated as void at common law or it may even be said 'that there was never a contract at all'.[94] Importantly, however, the common law does not treat the contract as void where the mistake relates only to the subject matter of the contract or the underlying facts or circumstances because if there is nevertheless agreement as to terms, it is said that there is consensus.[95] This distinction has been criticised as difficult to understand[96] and to 'square with morality',[97] particularly where the defendant knows the claimant to be mistaken about a material fact. Nonetheless, others suggest it is consistent with primary aim of contract law as

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[89] J. Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet and Maxwell 2012) 590, [12-14], 608, [13-11]; Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 LQR 274, 282.
[90] French law adopts a subjective approach: H. Beale, *Mistake and Non-Disclosure of Facts, Models for English Contract Law* (Oxford University Press 2012), 42. Australian law adopts a wholly objective approach: *Taylor v Johnson* (n 60) 428-429; D. McLauchlan, 'Objectivity in Contract' (2005) 24 UQLJ 479, 484; and D. McLauchlan, 'The Contract That Neither Party Intends' (2012) 29 JCL 26.
[91] *Smith v Hughes* (n 5) 607 (Blackburn J); Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (n 89) 602, [13-07]; McLauchlan, 'Objectivity in Contract' (n 90), 479; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577, 582.
[92] McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (n 27) 610.
[93] *Hartog v Colin & Shields* [1939] 3 All ER 566, 568 (Singleton J); *Smith v Hughes* (n 5), 607 (Blackburn LJ); *McMaster University v Wilchar Construction Ltd* [1971] 3 OR 801 (Ontario HCJ); *Shogun Finance Limited v Hudson* (n 1), 964, [123] (Lord Phillips); R. Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in A. Burrows and E. Peel (eds), *Contract Terms* (Oxford University Press 2007) 104; McLauchlan, 'The Contract That Neither Party Intends' (n 90) 33; McLauchlan, 'Objectivity in Contract' (n 90) 484.
[94] *Statoil A.S.A. v Louis Dreyfus Energy Services LP* [2008] 2 Lloyd's Rep 685 (QB), [87] (Aikens J).
[95] *Smith v Hughes* (n 5); *Statoil A.S.A. v Louis Dreyfus Energy Services LP* (n 94).
[96] E. Peel, *Treitel, The Law of Contract* (12th edn, Sweet & Maxwell 2011) 340, [8-044].
[97] Beale, *Mistake and Non-Disclosure of Facts, Models for English Contract Law* (n 90) 30.

being to promote the parties' autonomy, rather than fairness of exchange.[98] If the contract is void, the claimant may recover any benefits transferred to the defendant under the contract through an unjust enrichment action based on mistake of fact or failure of consideration.[99]

The fact that the defendant's knowledge of the mistake is a necessary prerequisite for relief for unilateral mistake has led some to characterize the mischief to which the common law and equity are responding as a form of passive exploitation[100] or unacceptable advantage-taking.[101] As Posner puts it, 'It is one thing to say that you can exploit your superior knowledge of the market … It is another thing to say that you can take deliberate advantage of an oversight by your contract partner concerning his rights under the contract. Such taking advantage is not the exploitation of superior knowledge or the avoidance of unbargained-for expense; it is sharp dealing.'[102] The use of the language of unconscionability tends to reinforce this perception. Of itself, this is not a problem, as long as we do not allow the language of unconscionability to distract us from the fact that the moral principle justifying relief flows from the need to protect each party's reliance on the appearance of consensus, where that reliance is reasonable. Arguably, sharp practice is unnecessary because it adds nothing to the reliance rationale, which is sufficient to justify the need to avoid the contract independently of the defendant's motives.

***Conscience and What the Defendant Must Know***

The language of conscience cannot explain what the defendant must know before the contract will be rescinded or rectified. Because these remedies have different effects, there are good arguments for saying that the answer to this question differs according to which remedy is in issue.

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[98] Ibid 77; Stevens (n 93) 104.
[99] Burrows, *The Law of Restitution* (n 31) 386, 387-8. The defendant's ability to rely on the change of position defence is likely to be compromised where she had knowledge of the mistake at the time the contract was formed.
[100] R. Bigwood, 'Undue Influence: Impaired Consent or Wicked Exploitation' (1996) 16 OJLS 503, 507.
[101] Lee (n 63) 84; Eisenberg (n 38) 1425.
[102] *Market Street Associates Ltd Partnership v Frey* 941 F 2d 588 (7th Cir 1991), 594 (Judge Posner).

*Rescission*

For the purposes of rescission, it seems to be sufficient if the defendant knows the claimant was mistaken.[103] This seems right,[104] as the effect of rescission is merely to disable[105] the defendant from enforcing the contract, and knowledge of the problem with the claimant's consent is all that is necessary to make it unreasonable for the defendant to rely on the appearance of consensus.

*Rectification*

By contrast with rescission, the effect of rectification is to correct the contract to accord with the claimant's true intentions, on the basis that they reflect the basis of the consensus reached.[106] In other words, the question is no longer merely whether the defendant is empowered to enforce (and the claimant obliged to perform) the contract according to his terms. Rather, it is whether the defendant is obliged to perform the contract according to the *claimant's* terms. Because we are no longer concerned simply with a disability but with an obligation, the question is whether the defendant can reasonably be held to this obligation. Therefore, we might well say it would only be reasonable to require her to comply with it if she knew not only that the claimant was mistaken but also what the claimant's terms were.[107] If at the time the contract was formed the defendant had this factual knowledge it would have enabled her to determine that she ought to correct the claimant's misapprehension. Failing that, it would not be unreasonable to take her silence as agreement to - and therefore to hold her to – the claimant's interpretation of the contract.

The cases in which rectification has been granted suggest that generally, the defendant does have knowledge not only of the mistake but also of the claimant's true intentions. Thus, rectification has been granted where, e.g.: a

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[103] *Taylor v Johnson* (n 60) 432.
[104] McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (n 27) 619, 625.
[105] Yeo, 'Unilateral Mistake: Five Degrees of Fusion of Common Law and Equity'(n 63) 231, n34.
[106] McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' 609, 613.
[107] Ibid 619.

developer was fully aware that a builder mistakenly believed their contract contained an 18-month completion period and was working to that timeframe but failed to alert him to the fact that the period in the contract was 30 months;[108] a tenant failed to alert a landlord to the fact that the lease as drafted mistakenly failed to record an agreed arbitration provision;[109] it was clear that before both parties signed a lease they shared the common intention to make the defendants liable for standard business rates, but the defendants noticed that the lease as drafted placed the burden of the rates on the claimant and said nothing;[110] the parties to a contract of sale had agreed that the conveyance would include a house but not the yard attached to it, but the purchaser deliberately waited until after the conveyance had been completed before pointing out to the vendor that the conveyance had in fact included the yard;[111] a tenant's solicitor knew that the lease was meant to contain a clause that made the *tenant's* right to break the lease conditional upon its observation of leasehold covenants (a standard boilerplate clause) and spotted that due to a drafting error the clause made the *landlord's* right to break the lease conditional upon the tenant's performance of the covenants.[112]

However, occasionally the courts fail to appreciate the fact that it is difficult to justify rectification in circumstances where the defendant does not know the claimant's true intentions. For example, in *Traditional Structures Ltd v HW Construction Ltd*[113] the defendant knew that a faxed version of the claimant's tender document for a construction project, which it had received, omitted some prices relating to cladding. The court held that its failure to alert the claimant to this omission was 'unconscionable' and 'went beyond the boundaries of fair dealing'.[114] It rectified the contract to include the claimant's prices even though the defendant had no knowledge of what prices the claimant would have charged and might not have agreed to them. This decision is difficult to justify. Absent knowledge of the claimant's true

[108] *A. Roberts & Co. Ltd v Leicestershire County Council* (n 72).
[109] *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* (n 74).
[110] *JJ Huber (Investments) Ltd v Private DIY Co Ltd* (1995) 70 P & CR D33.
[111] *Clayton v Candiva Enterprises Ltd* (n 87).
[112] *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1519; [2006] 2 P & CR 2.
[113] *Traditional Structures Ltd v HW Construction Ltd* (n 81).
[114] Ibid [60] (HHJ Grant).

intentions as to price, it is difficult to see how the defendant came under a moral obligation to do anything other than pay a fair market price for the cladding work. *Traditional Structures* is an example of a case where the unreflective invocation of unconscionability[115] caused the court to omit an important step in its reasoning. By focusing only on whether the defendant ought to have alerted the claimant to the mistake, it ignored the important question of what the defendant needed to know before it would be reasonable to hold her to the claimant's interpretation of the contract.

***Conscience and How Much the Defendant Must Know***

The courts tend to associate unconscionability with the defendant's actual knowledge of the mistake (in the sense described in *Baden* categories 1-3). Properly understood the idea of unconscionability does not mandate any particular level of knowledge as a prerequisite for rescission or rectification, albeit that, as indicated in earlier chapters, a high level of knowledge may be justified where the question is whether the defendant should be made subject to an obligation.

*Rescission*

As a matter of English law, it is not entirely clear how much the defendant must know for rescission to be granted for unilateral mistake. As mentioned above, in *OT Africa*[116] Mance J refused relief because the non-mistaken party was 'not aware of, or in a position where they shut their eyes to, or responsible for or at fault in respect of any mistake.'[117] Mance J's language is ambiguous. His reference to the shutting of eyes suggests that actual or consciously avoided knowledge (*Baden* categories, 1-3) may be required. Equally, however, the reference to fault could support the view that it would suffice if the defendant had reason to know of the mistake but did not take steps to

[115] Something McLauchlan deprecates: McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (n 27) 621, 640.
[116] *OT Africa Line Ltd v Vickers plc* (n 49).
[117] Ibid 728 (Mance J).

correct it. The judgment of the High Court of Australia in *Taylor v Johnson*[118] is also ambiguous. The court cited with approval US and Canadian authority, which supported the view that enforcement of the contract would be unconscionable 'when one party knows or ought to know that the other party is mistaken',[119] thus seemingly indicating that knowledge in the sense identified in *Baden* categories 1-5 should suffice. However, on the facts the defendant had wilfully avoided acquiring knowledge of the mistake (i.e. in the sense of *Baden* category 2). Thus, the court held that for the purposes of disposing of the case before it, the relevant principle was that a party under a serious mistake about a fundamental term of the contract could rescind the contract if 'the other party 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 the 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.'[120]

In the *Chwee* case[121] the Singapore Court of Appeal explicitly equated unconscionability with actual or consciously avoided knowledge. In its view, 'unconscionability cannot be imputed based on what a reasonable person would have know …. One cannot act unconscionably if one does not know of the facts which could render an act so.'[122] Therefore the idea of unconscionability could only refer to either 'a conscious omission to disabuse a mistaken party'[123] or constructive knowledge plus 'an additional element of impropriety', such as 'the conduct of deliberately not bringing the suspicion of a possible mistake to the attention of the mistaken party'.[124] In the court's view constructive knowledge alone would not suffice to justify rescission for unilateral mistake because 'parties to a contract do not owe a duty of care to

[118] *Taylor v Johnson* (n 60).
[119] Ibid 432.
[120] Ibid 432, 433; *Deputy Commissioner of Taxation (NSW) v Chamberlain* (n 53) 229 (Wilcox J).
[121] *Chwee Kin Keong v Digilandmall.com Pte Ltd* (n 63).
[122] Ibid [78].
[123] Ibid [73].
[124] Ibid [80].

each other'.[125] On the facts, the additional element of impropriety had been established and rescission was granted. The suggestion that the label of unconscionability is synonymous with a particular level of knowledge should be treated with caution. As was argued in relation to trusts, the selection of the appropriate level of knowledge is itself a moral question for the courts and the answer should be informed by the rationale and purpose of the moral principles underpinning the relevant legal doctrine. It cannot be answered simply by reference to the idea of conscience or unconscionability *per se*.

The choice of a high knowledge threshold in *Chwee* is not inevitable. It reflects the view that where the parties are dealing at arm's length in contractual negotiations, their bargain should not be set aside simply because the defendant *could* have discovered the mistake. However, it would be perfectly possible for the courts to take the view that it is reasonable to disable the defendant from enforcing the contract if at the time it was formed she knew *or* had reason to know of the mistake. The courts take this approach at common law. In *OT Africa*[126] Mance J held that a contract may be void for unilateral mistake as to terms where the defendant knew or 'ought reasonably to have known that there had been a mistake'.[127] He added the caveat that where the mistake was made in the context of litigation settlement negotiations 'there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he said'.[128]

In *Chwee* the court held that only actual knowledge could displace the objective principle at common law, but this conclusion is doubtful. The court's interpretation of Mance J's words in *OT Africa* as a 'reasoning process to

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[125] Ibid [77].
[126] *OT Africa Line Ltd v Vickers plc* (n 49).
[127] Ibid 726 (Mance J) citing *Centrovincial Estates Plc v Merchant Investors Assurance Company Ltd* [1983] Com LR 158 (CA); also *McMaster University v Wilchar Construction Ltd* (n 93) 9 (*obiter*).
[128] *OT Africa Line Ltd v Vickers plc* (n 49) 726 (Mance J).

determine actual knowledge'[129] is strained. His judgment clearly suggests that it will suffice if the defendant knows or ought to know about the mistake and the caveat was directed to litigation settlement negotiations. Moreover, *Chwee* itself fell squarely within the classic common law rule on unilateral mistake as to terms, where it is enough if it is obvious that a mistake has been made and the defendant snaps up the offer in a way that was unacceptable.[130] Therefore, the better view is that actual knowledge is unnecessary at common law. This is consistent with the objective approach to consensus: where the defendant ought to have known about the mistake, a reasonable person in her position would not have believed that the claimant was agreeing to the terms of the contract as she understood them, and so she cannot bind the claimant.[131] Arguably, this logic also applies to rescission for unilateral mistake in equity: there is nothing unfair in granting rescission when the only reason the defendant did not know the claimant had not properly consented to the contract was because she did not bother to ask the right questions.[132]

*Rectification*

Similarly, the idea of unconscionability *per se* cannot tell us what the knowledge threshold for rectification for unilateral mistake should be. Originally, it was thought that the defendant had to have actual knowledge of the mistake or have closed her eyes to it or deliberately or recklessly failed to make enquiries (*Baden* categories, 1-3) before a contract could be rectified for unilateral mistake.[133] Since the Court of Appeal's decision in *Commissioner for The New Towns v Cooper (GB) Ltd*,[134] it is also clear that where the defendant suspects the claimant to be mistaken and deliberately misleads the claimant so as to bring about the mistake in the apparent contract, this will also justify rectification. Given that *Baden* categories, 4-5 relate to a failure to

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[129] *Chwee Kin Keong v Digilandmall.com Pte Ltd* (n 63) [52], [53].
[130] *Statoil A.S.A. v Louis Dreyfus Energy Services LP* (n 94) [95] (Aikens J).
[131] Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (n 89) 616-7, [13-21]-[13-22]; Stevens (n 93) 104.
[132] Eisenberg (n 38) 1426. Cf. Yeo, 'Unilateral Mistake: Five Degrees of Fusion of Common Law and Equity' (n 63) 231; Lee (n 63) 81, 84.
[133] *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and Nai Superba)* [1984] 1 Lloyd's Rep 353 (CA), 361-2 (Slade LJ).
[134] *Commission for the New Towns v Cooper (Great Britain) Ltd* (n 59).

make reasonable enquiries (i.e. a negligence standard) and the conduct referred to in *Cooper* is premised on the defendant's suspicion that the claimant is mistaken, arguably it falls within *Baden* categories 1-3 anyway.

The English courts' insistence on a high threshold of knowledge before rectification will be granted seems to be rooted in the concern that because rectification binds the defendant to the claimant's interpretation of the contract in circumstances where she may never have intended to agree to it,[135] the remedy has a 'drastic' effect.[136] As McLauchlan points out, rectification is not a drastic remedy as its purpose can only ever be to ensure that the contract accords with the consensus reached between the parties, rather than to penalize the defendant for wrongdoing.[137] Nevertheless, the argument in favour of a higher knowledge threshold for rectification than for rescission is difficult to refute. Rectification has the effect of obliging the defendant to honour the claimant's interpretation of the contract. Equity treats the defendant's silence in the face of her knowledge of the claimant's true intentions not simply as precluding her from relying on the apparent agreement, but as precluding her from denying that she has agreed to the claimant's version of events. Arguably, for it to be reasonable to treat the defendant's silence as having this effect, she must remain silent in the face of actual knowledge, rather than mere suspicion, as to: (i) what the claimant's true intentions really were; *and* (ii) that the claimant mistakenly believed they were incorporated into the contract. If despite this knowledge, the defendant remains silent, then she may be taken to have acquiesced to the claimant's interpretation of the contract in such a way as to oblige her to abide by it.

McLauchlan has argued that too great a focus on the appropriate knowledge threshold and/or unconscionable behaviour at the time the contract is formed distracts unhelpfully from the core purpose of rectification, which is to ensure

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[135] *Fowler v Fowler* (n 26) 265 (Lord Chelmsford LC).
[136] *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and Nai Superba)* (n 133) 365 (Slade LJ); *Commission for the New Towns v Cooper (Great Britain) Ltd* (n 59) 137-8; *George Wimpey UK Ltd v VI Construction Ltd* (n 84) [75] (Blackburne J).
[137] McLauchlan, 'The 'Drastic' Remedy of Rectification for Unilateral Mistake' (n 27) 609.

the contract reflects consensus.[138] In his view, therefore, the courts should grant rectification only where there is evidence that the parties had a prior common intention that by mistake was not reflected in the draft agreement, or that the non-mistaken party misled the mistaken party to believe her interpretation was contained in the draft contract.[139] Mere awareness of the mistake on the defendant's part should not suffice.[140] McLauchlan is right to suggest that it is important to ensure that the idea of unconscionability does not distract from the underlying principle relating to consensus.[141] However, as Hodge points out, the cases make it clear that the test for rectification *is* knowledge-based. In his view, rectification is available only where the defendant could reasonably be expected to alert the claimant to the mistake, and this will be the case only where the defendant knows of the mistake.[142] Rather than changing the test for rectification as McLauchlan suggests, arguably it would suffice if the courts were more explicit as to the explanatory limits of the ideas of conscience and unconscionability. It is important to recognise that, contrary to Hodge's assertion,[143] unconscionability is not a separate, freestanding element of the cause of action for rectification for unilateral mistake. Properly understood, the ideas of conscience and unconscionability simply emphasize that equity will not treat the defendant as coming under a moral obligation to abide by the claimant's interpretation of the contract, absent sufficient knowledge of the relevant facts.

***Conscience and Doctrinal Function***

The language of conscience and unconscionability has no real explanatory role to play in cases of rescission for unilateral mistake for a number of reasons. First, although the courts' use of the language of conscience sometimes

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[138] Ibid 621, 640.
[139] Ibid 620.
[140] Ibid.
[141] For example, the outcome in *Hurst Stores and Interiors Ltd v ML Europe Property Ltd* [2004] EWCA Civ 490 is very difficult to explain in a commercial context, when there was no direct proof of knowledge or suspicion on the claimant's part. Arguably, the case should have been decided along the same lines as *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and Nai Superba)* (n 133).
[142] Hodge (n 70) 341-2, [4-22].
[143] Ibid 386, [4-66], 401, [4-79], 403, [4-81].

suggests that the defendant's knowledge of the mistake triggers a moral duty or obligation to correct the mistake, the better view is that there is no such duty. Rather, the impairment of the claimant's consent has the effect of excusing her from performing her obligations under the contract, and, correspondingly, the defendant is disabled[144] from enforcing them. Her knowledge of the mistake is relevant because it makes it unreasonable for her to rely on the appearance of consensus and therefore fair to displace her interest in security of receipt. There is no need to extrapolate from the knowledge requirement a moral obligation to speak, the breach of which constitutes unconscionable behaviour at the time the contract is formed. Therefore, we can explain rescission for unilateral mistake without reference to the language of conscience at all. Secondly, even if there *is* such a duty, the language of conscience has no real explanatory force beyond reminding us that it may be morally dubious for the defendant not to point out the mistake. There is no sense in which equity *requires* the defendant to take steps to comply with a particular moral standard. Thus, the language of conscience does not have the same explanatory force that it has in cases where the defendant's knowledge is a precondition to the enforcement of a moral obligation. In such cases the reference to conscience makes clear that it is reasonable to treat the defendant as subject to such an obligation only when she knows the facts, so as to be able – through moral reasoning – to discern and comply with what is required of her in the particular circumstances. Thirdly, any references to it being unconscionable for the contract to be enforced despite the defendant's knowledge of the mistake are simply examples of unconscientiousness *ex post*. As in the case of common mistake, this tells us nothing about why the claimant should be excused from performing her obligations. All it tells us is that in light of the mistake and the defendant's knowledge of it, it would be morally unacceptable to allow her to enforce it.

[144] Yeo, 'Unilateral Mistake: Five Degrees of Fusion of Common Law and Equity' (n 63) 321, n 34.

In any case, in light of Lord Phillips MR's remarks in *The Great Peace*,[145] if and insofar as the equitable doctrine of unilateral mistake overlaps with the common law doctrine, it is likely to be otiose. There appears to be a complete overlap in relation to mistakes as to terms unless, as the Singapore Court of Appeal suggested in *Chwee*, it is right that the knowledge thresholds at common law and in equity are different. However, for the reasons given above[146] this seems doubtful. Moreover, there is conflicting first instance authority in English law as to whether equitable rescission is available for mistakes as to subject-matter and/or underlying facts, which would give it greater scope than the common law doctrine. As previously mentioned, *Huyton v DIPASA*[147] offers some support for the conclusion that equitable rescission *is* available for mistakes as to underlying facts. However, in *Statoil ASA v Louis Dreyfus Energy Services LP,*[148] Aikens J directly rejected Andrew Smith J's conclusions in *Huyton*.[149] In his view, once there is consensus as to terms, the contract is enforceable at law: lack of consensus as to an underlying fact does not affect this conclusion.[150] It may therefore be said that the existence and scope of a doctrine of equitable rescission for mistake in English law is uncertain.

By contrast, where a contract is rectified for unilateral mistake, the idea of conscience does appear to play a positive explanatory role. Here, the question is whether it is reasonable to treat the defendant as coming under a positive obligation to abide by the claimant's interpretation of the contract. If at the time the contract is formed, the defendant knows what the claimant truly intends to agree to *and* the contract does not accurately reflect the claimant's intention, then her conscience is affected in such a way as to enable her to discern what she ought (morally) to do, i.e. alert the claimant to the mistake or, failing that, accept the claimant's interpretation of the agreement. In other words, here, as in the law of trusts, equity will only treat the defendant as

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[145] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (n 6) 709, [96] (Lord Phillips MR).
[146] Text to n 129 - 132.
[147] *Huyton SA v DIPASA* (n 54).
[148] *Statoil A.S.A. v Louis Dreyfus Energy Services LP* (n 94).
[149] Ibid [98]-[105] (Aikens J).
[150] Ibid [87], [88]; S. Smith, *Contract Theory* (OUP 2004) 369.

coming under an enforceable obligation if she knows she has reason to comply with it, and for these purposes, moral understanding and factual knowledge are required. At least in this setting (unlike elsewhere) the reference to conscience is an application of the notion of conscience as a director of what one ought to do (and hence it depends on knowledge of one's circumstances). More generally, however, it is worth noting that the importance of the remedy of rectification may recede, as the courts take a more relaxed approach to the admission of evidence of pre-contractual intention when interpreting contracts.[151]

## CONSCIENCE AND MISREPRESENTATION

We saw in the previous section that the courts frequently use the language of conscience in the doctrine of mistake. By contrast, the courts rarely, if ever, use the language of conscience to explain the basis on which relief is granted for misrepresentation. The reasons for this are considered below.

### *Conscience and Non-Fraudulent Misrepresentation*

Historically, the courts used the ideas of conscience and constructive fraud to describe the basis on which they would grant rescission for non-fraudulent misrepresentation. A claimant may rescind a contract for non-fraudulent misrepresentation[152] where one party makes a representation of fact that is untrue and induces the other party to enter into the contract (or another transaction) in reliance upon it.[153] If these requirements are met, then subject to the court's discretion to order damages in lieu of rescission,[154] the representee may rescind the contract in equity and, if the misrepresentation was negligent, she may recover damages at common law.[155] The fact that

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[151] Burrows, 'Construction and Rectification' (n 71) 90-99.
[152] *Redgrave v Hurd* (1881) 20 Ch D 1; *Newbigging v Adam* (1887) 34 Ch D 582 (CA), 588 (Cotton LJ); *Derry v Peek* (1889) 14 App Cas 337 (HL), 359 (Lord Herschell). For the background to *Derry v Peek*, see M. Lobban, 'Nineteenth Century Frauds in Company Formation: Derry v Peek in Context' (1996) 112 LQR 287.
[153] *Brown v Raphael* [1958] Ch 636 (CA), 641 (Lord Evershed MR).
[154] Under s. 2 of the Misrepresentation Act 1967.
[155] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. A statutory right to damages for non-fraudulent misrepresentation was also conferred by the Misrepresentation Act 1967.

rescission is available for innocent misrepresentation demonstrates clearly that it is unnecessary that the defendant should know at the time the contract was formed that the statement was untrue or that it adversely affected the claimant's consent.

The courts have rarely used the language of conscience in the context of innocent misrepresentation. *Torrance v Bolton*[156] is an example of such a case. James LJ held that a sales contract could be rescinded for misrepresentation without proof of dishonesty because such contracts were not 'free from the ordinary jurisdiction of the Court to deal with them as it deals with any other instrument or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained.'[157] In *Redgrave v Hurd*[158] Jessel MR used the language of equitable fraud rather than unconscientiousness to describe the basis of relief for non-fraudulent misrepresentation, and gave two alternative explanations. His second explanation was very similar to James LJ's idea of unconscientiousness. He held that, 'Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.'[159] Such explanations simply indicate that it is morally unacceptable for the defendant to take the benefit of the contract once she becomes aware of the falsity of her statement.[160] This is an example of unconscientiousness *ex post*. It tells us nothing about why the claimant is entitled to set the contract aside or why the defendant is disabled from enforcing it. All it tells us is that once the cause of action has been established, it would be unacceptable to allow the defendant to rely on the legal rights she acquired under the contract.[161] Moreover, as will be

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[156] *Torrance v Bolton* (n 17).
[157] Ibid 124 (James LJ).
[158] *Redgrave v Hurd* (n 152).
[159] Ibid 12-13 (Jessel MR).
[160] The courts adopted a similar approach in *Mair v Rio Grande Rubber Estates Ltd* [1913] AC 853, 870 (Lord Shaw); and *Nocton v Lord Ashburton* (n 17) 955 (Viscount Haldane LC).
[161] *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 (HCA), 325 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

seen below the fact that the defendant made the statement and therefore was responsible for the problem with the claimant's consent is sufficient to disable her from enforcing the contract; there is no additional requirement of knowledge. To the extent that the use of the language of conscience in the manner described above suggests otherwise, it is misleading.

The basis on which the defendant is disabled from enforcing the contract is better described by reference to Jessel MR's first explanation. He held, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.'[162] This explanation rests on the idea that when the defendant makes a representation to the claimant, she assumes responsibility for the truth of it, so that it if it turns out to be untrue she cannot rely on her ignorance.[163] In other words, the defendant is disabled from enforcing the contract because she was directly responsible for causing a problem with the claimant's consent and it is therefore unreasonable for her to rely on the appearance of that consent. This makes it fair to displace her interest in security of receipt and disable her from enforcing the contract. Therefore, the idea of conscience plays no explanatory role in rescission for misrepresentation.

***Conscience and Fraudulent Misrepresentation***

If a misrepresentation is made fraudulently, the common law and equity exercise concurrent jurisdiction,[164] so the representee can recover damages for the tort of deceit[165] at common law and/or rescind the contract at law[166] or in

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[162] *Redgrave v Hurd* (n 152) 12-13 (Jessel MR).
[163] The courts adopted a similar approach in *Reese Silver River Mining Co v Smith* (1869-70) LR 4 HL 64, 79-80 (Lord Cairns); and *Hart v Swaine* (1877) 7 Ch D 42, 46 (Fry J).
[164] *Newbigging v Adam* (n 152) 592 (Bowen LJ); *Nocton v Lord Ashburton* (n 17) 951 (Viscount Haldane LC).
[165] Because the law regards dishonesty as immoral, damages for deceit are not limited by reference to foreseeability: *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA), 167 (Lord Denning MR); *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL), 280 (Lord Steyn).
[166] *Kennedy v The Panama, etc., Royal Mail Company Ltd* (1866-67) LR 2 QB 580 (CA).

equity[167] for what is known as actual fraud, or fraud 'in the more invidious sense'.[168] In order to establish actual fraud it must be proved that the representor[169] made a false statement of fact[170] to the representee,[171] without an honest belief in its truth,[172] intending it would be relied upon,[173] and the representee in fact relied upon it[174] by entering into the contract or taking some other step to her detriment. As far as the representor's state of mind is concerned, what is necessary is that 'a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'[175] The only thing that will save the statement from being fraudulent is 'an honest belief in its truth.'[176]

Despite the fact that actual fraud is sometimes referred to as an example of procedural unconscionability affecting the defendant's conscience,[177] there are good reasons why the language of conscience is hardly ever used in an attempt to explain fraudulent misrepresentation.[178] We know from unilateral mistake and non-fraudulent misrepresentation that for the defendant to be disabled from enforcing the contract, all that is necessary is that *either* she knew the claimant's consent was impaired *or* she was responsible for causing the problem with consent. We also know that in neither case does the idea of conscience play a necessary explanatory role. In cases of fraudulent misrepresentation, the defendant causes the problem with the claimant's

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[167] *Newbigging v Adam* (n 152) 592 (Bowen LJ).
[168] *Reese Silver River Mining Co v Smith* (n 163) 79-80 (Lord Cairns).
[169] *Karberg's Case* [1892] 3 Ch 1 (CA), 13 (Lindley LJ).
[170] *Bisset v Wilkinson* [1927] AC 177 (HL), 182 (Lord Merrivale).
[171] *Andrews v Mockford* [1896] 1 QB 372.
[172] *Derry v Peek* (n 152) 374 (Lord Herschell).
[173] *Peek v Gurney* (1873) LR 6 HL 377 (HL) (deliberate concealment of facts from the public).
[174] This is true of all types of misrepresentation: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, 542 (Lord Mustill).
[175] *Derry v Peek* (n 152) 374 (Lord Herschell). See also *Standard Chartered Bank v Pakistan National Shipping Corp (No. 2)* [1998] 1 Lloyd's Rep 685 (QB), 704 (Cresswell J); approved, *Niru Battery Manufacturing Company v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985.
[176] *Derry v Peek* (n 152) 374 (Lord Herschell).
[177] E.g. *Hart v O'Connor* [1985] AC 1000 (PC), 1024 (Lord Brightman); A. Leff, 'Unconscionability and the Code - the Emperor's New Clause' (1967) 115 U Phil L Rev 485, 487; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) 252.
[178] *Mair v Rio Grande Rubber Estates Ltd* (n 160) 873 (Lord Moulton) is a rare example, where it was held to be 'contrary to good conscience' to allow a company to hold a shareholder to a bargain induced by fraudulent misrepresentation.

consent and in principle this is sufficient for the purposes of rescission. In other words, the fact that the defendant was guilty of actual fraud at the time the contract was formed is irrelevant for the purposes of determining whether rescission should be granted.

The idea of conscience may have greater (albeit limited) explanatory force where the claimant seeks damage, in that it reminds us that relief depends on the defendant's breach of a pre-existing moral obligation of which she had reason to know.[179] However, the courts prefer to use the language of dishonesty in this context. Why might this be so? We saw in Chapter 1 that insofar as the idea of unconscionability denotes a breach of the objective standard of morality, it is wider than but includes dishonesty. In other words, unconscionability describes some breach of a moral standard but it does not enlighten us as to the type of breach or the level of moral fault required. The language of dishonesty may enable us to answer that question more precisely. Therefore, the language of dishonesty, rather than unconscionability, is more appropriate where the question is whether the defendant has lied or deliberately misled the claimant. This is all the more so given that if the defendant honestly believed her statement was true she will not be liable for fraudulent misrepresentation, even if her belief is unreasonable by reference to the standards of honest, reasonable people.[180] In other words, the defendant's behaviour may be unconscionable in the sense that it breaches the objective standard of morality but unless she herself did not believe in the truth of what she was saying, she will not be liable for damages. Moreover, equity has long recognised a distinction between passive suppression of the truth and active distortion of the truth.[181] The former is usually described in terms of unconscionability (e.g. knowing receipt and mistake), whereas the latter tends to be described in terms of dishonesty (e.g. dishonest assistance and misrepresentation). The difference in terminology may simply reflect an

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[179] Cf. Smith, 'A Duty to Make Restitution' (n 8) 174.
[180] *Angus v Clifford* [1891] 2 Ch 449, 472 (Bowen LJ); *Baron Uno Carl Samuel Akerhielm v Rolf De Mare* [1959] AC 789 (PC), 805 (Lord Jenkins); *Wee v Ng* [2013] SGCA 36, [37] (Leong JA).
[181] *Peek v Gurney* (1871) LR 13 Eq 79, 113 (Lord Romilly MR).

intuitive sense that active dishonesty is more morally reprehensible than a passive failure to point out the truth.

## CONCLUSION

This chapter has demonstrated that where the courts use the language of conscience in the context of mistake, they are concerned with moral questions and the ideas of conscience and unconscionability bear their ordinary meanings. It has also shown that the explanatory role of conscience in cases of mistake and misrepresentation is very limited. Where both parties are mistaken, any references to unconscientiousness arise *ex post* and have no explanatory force beyond reminding us that once the cause of action is established, it would be morally unacceptable or unfair for the defendant to be allowed to enforce the contract. Where only the claimant is mistaken, the defendant's knowledge of the mistake at the time the contract was formed is a necessary precondition of rescission. Here again the idea of conscience tells us very little. References to unconscionability either arise *ex post* or add nothing to our understanding of why the defendant is disabled from enforcing the contract. In any event, the continued existence of an equitable doctrine of rescission for mistake is uncertain. By contrast, the idea of conscience has more explanatory force in the context of rectification for unilateral mistake. Here, as in the case of trusts, it reminds us that equity is underwriting a moral obligation, which will not be enforced unless the defendant has reason to know that she ought to comply with it. She will only have reason to know this through the operation of her conscience, i.e. through the application of her moral understanding to her knowledge of the relevant facts. Finally, if the claimant wishes to rescind a contract for misrepresentation, it is sufficient if the defendant actively induced the claimant's misapprehension – there is no need to prove that at the time the contract was formed she knew her statement to be untrue or that the claimant was mistaken. Any references to unconscientiousness in the context of rescission for misrepresentation therefore arise *ex post* and have no role in explaining why the defendant is disabled from enforcing the contract. It is also unsurprising that the language of conscience does not tend to appear in fraudulent misrepresentation, as the concepts of

dishonesty and bad faith can more accurately explain the state of mind required to establish the cause of action.

# CHAPTER 6: CONSCIENCE AND UNCONSCIONABLE BARGAINS

## INTRODUCTION

This chapter considers the meaning and function of conscience and unconscionability in the doctrine of unconscionable bargains. The chapter argues that where the language of unconscionability appears in the doctrine of unconscionable bargains, it bears its ordinary meaning. The courts are judging whether the defendant's conduct and the terms of the transaction were morally unacceptable, i.e. 'whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.'[1] The chapter argues further that the explanatory force of the language of unconscionability within the doctrine is limited. Although it reminds us that the defendant's conduct and/or the terms of the transaction are morally unacceptable, of itself it cannot identify what counts as morally unacceptable, nor by reference to which moral principle this is judged. Early English and New Zealand authority suggests the defendant's conduct will be morally unacceptable if she goes ahead with the contract despite the fact that she knows or has reason to know that the claimant's consent is impaired by her special disadvantage. This approach is consistent with a moral concern to ensure the claimant is not bound by obligations to which she did not properly consent. More recent English and Australian authority indicates that morally unacceptable conduct requires an exploitative intention, which is consistent with a moral concern to prevent the defendant from benefiting from her own wrongdoing. The language of unconscionability is consistent with both the wrongdoing and the consent rationales and does not help us choose between them.

[1] *Harry v Kreutziger* (1978) CanLII 393 (BCCA); (1978) 95 DLR (3d) 231, [26] (Lambert JA).

Where the only relief sought is rescission, as a matter of principle and by analogy with unilateral mistake, the defendant's disability from enforcing the contract may be explained without reference to the language of conscience at all. Where the claimant seeks relief for wrongdoing, the language of unconscionability reminds us that relief depends on the breach by the defendant of a pre-existing moral duty or obligation, but beyond that it tells us very little. Nevertheless, in practice the English courts seem to insist on proof of exploitation even in cases where the only relief sought is rescission. This chapter suggests that the reasons for this may be partly historical and partly policy-driven and concludes that there are better ways of addressing the courts' policy concerns than through the invocation of unconscionability as a limitation on relief.

## CAUSE OF ACTION AND RATIONALE

Three factors will make a bargain unconscionable: the claimant suffering from a special disadvantage that affects her judgement, the transaction being substantively unfair and the defendant having taken advantage of her weakness.[2] If these factors are proved, the claimant may rescind the transaction (this is by far the most common remedy sought) and, it seems, claim equitable compensation from the defendant.[3] As far as the doctrine's rationale is concerned, two concerns are apparent. The current view in English and Australian law is that it rests on the need to prevent the defendant from exploiting or victimising the claimant.[4] The idea that the purpose of the doctrine is to prevent the defendant from engaging in the 'morally culpable exploitation of a superior bargaining position'[5] – or at least from failing to

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[2] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 (Ch), 94-5 (Peter Millett QC), approved *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 (CA); *Boustany v Pigott* (1993) 69 P & CR 298; *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 305, [30]; approved, *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47; [2008] 2 NZLR 735 (NZSC), [6] (Tipping J); *Harry v Kreutziger* (n 1) [14] (McIntyre JA); *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (HCA), 474, 480 (Deane J).

[3] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25.

[4] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2); *Hart v O'Connor* [1985] AC 1000 (PC); *Boustany v Pigott* (n 2); *Kakavas v Crown Melbourne Ltd* (n 3).

[5] M. Ogilvie, 'Wrongfulness, Rights and Economic Duress' (1984) 16 Ottawa L Rev 1, 11; A. Angelo and E. Ellinger, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States' (1992) 14 Loy LA Int'l & Comp LJ 455;

protect the claimant from the foreseeable risk of transactional harm[6] - has plenty of academic support. However, earlier English[7] and New Zealand[8] authority suggests an additional or alternative concern, namely to excuse the claimant from obligations to which she did not properly consent. There is also some academic support for this view.[9]

## SPECIAL DISADVANTAGE

The claimant must first prove that at the time of the contract she 'has been at a serious disadvantage to the [defendant], whether through poverty or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken ….'[10] The question of whether the claimant suffers from a special disadvantage is therefore a factual question relating to her state of mind, physical being or circumstances. The effect of it is said to be 'that the party is unable to judge for himself'.[11] Therefore, the disadvantage must be 'one which seriously affects the ability of the innocent party to make a judgement as to his own best interests.'[12] This disadvantage can take different forms, such as poverty, illiteracy and illness,[13] severe financial difficulties giving rise to a risk of bankruptcy,[14] drunkenness,[15] advanced age and lack of

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P. Birks and N. Chin, 'On the Nature of Undue Influence' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995) 59-60, 94-95; A. Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 Anglo-AmLR 1, 7; G Dal Pont, 'The Varying Shades of "Unconscionable Conduct" - Same Term, Different Meaning' (2000) 19 Aust Bar Rev 135, 138; R. Bigwood, *Exploitative Contracts* (Oxford University Press 2003), 227-78; P. Saprai, 'Unconscionable Enrichment?' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009).

[6] R. Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (2005) 25 OJLS 65; R. Bigwood, 'Still Curbing Unconscionability: *Kakavas in the High Court of Australia*' (2013-14) 37 MULR 463, 497 *et seq.*

[7] E.g. *Fry v Lane* (1888) 40 Ch D 312 (Ch); *Cresswell v Potter* [1978] 1 WLR 255.

[8] *Gustav & Co Ltd v Macfield Ltd* (NZCA) (n 2); *Gustav & Co Ltd v Macfield Ltd* (NZHC) (n 2).

[9] C. Rickett, 'Unconscionability and Commercial Law' (2005) 24 UQLJ 73, 79; see also J. Devenney and A. Chandler, 'Unconscionability and the Taxonomy of Undue Influence' [2007] JBL 541, 544-5.

[10] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2) 94 (Peter Millett QC).

[11] *Blomley v Ryan* [1956] HCA 81, (1956) 99 CLR 362, 393 (McTiernan J).

[12] *The Commercial Bank of Australia Ltd v Amadio* (n 2) 462 (Mason J); *Bridgewater v Leahy* (1998) HCA 66; (1998) 194 CLR 457, 470 (Gibbs CJ and Callinan J, dissenting); *Gustav & Co Ltd v Macfield Ltd* (n 2) [30]; approved, *Gustav & Co Ltd v Macfield Ltd* (n 2) [6] (Tipping J); *Chagos Islanders v The Attorney General* [2003] EWHC 2222 (QB), [559] (Ouseley J).

[13] *Clark v Malpas* (1862) 4 De G F & J 401; 45 ER 1238.

[14] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2).

education[16] or illness,[17] illness alone,[18] insanity,[19] an inability to speak and/or read English,[20] extreme emotional dependence[21] or a combination of such factors. Generally speaking, the claimant's commercial vulnerability[22] or an inequality of bargaining power[23] is insufficient. The requirement of special disadvantage is the key requirement of the cause of action: without it the claim will fail.

The courts interpret the relevance of special disadvantage in two ways. Some authorities support the view that special disadvantage is relevant because it goes to the claimant's ability to give consent. Thus, relief has been refused where there has been no special disadvantage because the claimant was 'a man perfectly free to enter into the contract, perfectly in possession of his faculties, according to the weight of the evidence, and he was dealt with perfectly fairly on the occasion';[24] or the claimant was 'fully capable of taking care of himself';[25] or there was nothing in the evidence 'to suggest this could even arguably be a case in which the question of capacity arose' or to support a finding that the claimant 'lacked capacity because she did not understand either the nature of the transactions or their potential effect.'[26] '[E]quity intervenes not necessarily because the complainant has been deprived of an independent judgement and voluntary will, but because that party has been unable to make an independent judgement as to what was in that party's best interests.'[27] It is also important to note that the claimant's special disadvantage is innate or arises from her particular circumstances.

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[15] *Blomley v Ryan* (n 11).
[16] *Baker v Monk* (1864) 4 De G J & S; 46 ER 968.
[17] *Boustany v Pigott* (n 2).
[18] *Liddle v Cree* [2011] EWHC 3294 (Ch).
[19] *Hart v O'Connor* (n 4).
[20] *The Commercial Bank of Australia Ltd v Amadio* (n 2); *Singla v Bashir* [2002] EWHC 883.
[21] *Louth v Diprose* (1992) 175 CLR 621 (HCA).
[22] *ACCC v Samton Holdings Pty Ltd* [2002] FCA 62, (2002) 117 FCR 301.
[23] *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (HCA). Cf. the Canadian courts' tendency to conflate inequality of bargaining power with special disadvantage: e.g. *Dusik v Newton* (1985) 62 BCLR 1 (BCCA); *Smyth v Szep* (1992) 63 BCLR (2d) 53 (BCCA).
[24] *Harrison v Guest* (1860) 8 HL Cas 481; 11 ER 517, [493]/522 (Lord Wensleydale).
[25] *Webster v Cook* (1866-67) LR 2 Ch App 542 (CA), 548 (Lord Chelmsford LC).
[26] *Fineland Investments Ltd v Pritchard* [2011] EWHC 113 (Ch), [79], [82], [83] (Alison Morris QC).
[27] *ACCC v CG Berbatis Holdings Pty Ltd* (n 23) 74 (Gummow and Hayne JJ).

Other authorities interpret special disadvantage as going to the claimant's vulnerability to exploitation. Thus, the presence of a special disadvantage on the claimant's part is sometimes said to indicate that the parties are not on equal terms[28] and it puts the claimant 'in the power of'[29] the defendant, such that the defendant may unconscientiously exploit her advantage.[30] It has also been said that the relevant question is how the claimant's intention to contract has been produced.[31] The question is whether 'circumstances existed of which unfair advantage could be taken.'[32] Although special disadvantage can be interpreted in this way, the risk of exploitation arises only *because* the special disadvantage has had the effect of impairing claimant's ability to exercise her independent judgement in respect of the transaction in question.[33] Finally, the claimant's access to independent advice is relevant, irrespective of which rationale is in play. Thus, it may be said to help the claimant 'overcome the disadvantage arising from a want of proper understanding' of the transaction[34] or to dispel a 'suspicion of nefarious dealing' by the defendant.[35]

## UNCONSCIONABILITY AND THE TERMS OF THE TRANSACTION

As a matter of English law, if the claimant wishes to set aside a transaction as an unconscionable bargain she must show that there is 'some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred form the latter in the absence of an innocent explanation) which in the traditional phrase "shocks the conscience of the court," and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.'[36] For the

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[28] *Baker v Monk* (n 16), [390]/969-70 (Knight Bruce LJ); *The Commercial Bank of Australia Ltd v Amadio* (n 2) 474 (Deane J); *Louth v Diprose* (n 21) 637 (Deane J).
[29] *Harry v Kreutziger* (n 1) [14] (McIntyre JA).
[30] *Louth v Diprose* (n 21) 626 (Brennan J); *Blomley v Ryan* (n 11) 406 (Fullagar J).
[31] *Bridgewater v Leahy* (n 12) 491 (Gaudron, Gummow and Kirby JJ).
[32] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2) 94-5 (Peter Millett QC).
[33] N. Chin, 'Unconscionable Contracts in Anglo-Australian Law' (1985-1986) 16 UWAL Rev 162, 167 suggests that where the parties are not economic equals, the contract does not reflect *real* agreement or consent.
[34] *ACCC v Samton Holdings Pty Ltd* (n 22).
[35] *Portman Building Society v Dusangh* [2000] EWCA Civ 142; [2000] 2 All ER (Comm) 221, 235 (Ward LJ).
[36] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2) 95 (Peter Millett QC); *Boustany v Pigott* (n 2) 303 (Lord Templeman).

terms of the transaction to shock the conscience of the court, the claimant needs to show that 'the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive.'[37] In other words, it must be 'oppressive and extortionate'[38] or 'at a considerable undervalue',[39] e.g. where the terms of the bargain involve, e.g. a loan at an interest rate of 60%[40] or the renewal by a landlord of a lease at an undervalue.[41]

The use of the term 'unconscionable' to describe the substantive unfairness of the transaction is entirely consistent with one of the senses in which we ordinarily understand that word, i.e. as meaning excessive or unreasonable. Although English law requires proof of both substantive unfairness and unconscionable conduct,[42] arguably the primary role of substantive unfairness is evidential.[43] On the one hand, it supports a finding that the claimant did not properly consent to the transaction: the more disadvantageous it is to her, the less likely it is that she properly intended it. On the other, if the defendant knows there is a problem with the claimant's consent *and* that the bargain is disadvantageous to her, a decision to proceed with it in any event evinces a deliberate intention to do wrong, e.g. by causing harm to the claimant's interests. Therefore, insofar as the courts describe the bargain as unconscionable, the description is largely rhetorical. The terminology simply emphasises the fact that the bargain is *so* excessive or unreasonable that it must be the product of defective consent or wrongdoing.

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[37] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2) 95 (Peter Millett QC).
[38] *Earl of Aylesford v Morris* (1872-73) 8 Ch App 484, 495 (Lord Selborne LC).
[39] *Fry v Lane* (n 7) 322 (Kay J); applied, *Cresswell v Potter* (n 7).
[40] *Earl of Aylesford v Morris* (n 38) 498 (Lord Selborne LC).
[41] *Boustany v Pigott* (n 2).
[42] *Chagos Islanders v The Attorney General* (n 12) [583] (Ouseley J); *Hart v O'Connor* (n 4) 1024 (Lord Brightman).
[43] D. Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479, 486. The Australian and New Zealand courts take this approach: *Blomley v Ryan* (n 11) 406 (Fullagar J); *The Commercial Bank of Australia Ltd v Amadio* (n 2) 475 (Deane J); *Gustav & Co Ltd v Macfield Ltd* (n 2) (NZCA) [30]; *Gustav & Co Ltd v Macfield Ltd* (n 2) (NZHC) [6] (Tipping J).

## UNCONSCIONABLE CONDUCT

### *Unconscionability - Meaning*

Where the language of unconscionability is used to describe the defendant's conduct, it bears its ordinary meaning. It is clear that the courts are concerned with the moral quality of the defendant's behaviour and whether it accords with what is 'right and reasonable',[44] i.e. whether it is morally acceptable. As a matter of English law, 'it must be shown that "one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience".'[45] The defendant's conduct 'must be characterised by some moral culpability or impropriety',[46] which is judged by reference to the objective standard of morality, rather than the defendant's individual sense of right and wrong.[47]

### *Unconscionability, Morally Unacceptable Conduct and the Principles by Which it is Judged*

Of itself, the language of unconscionability does not tell us what sort of conduct counts as morally unacceptable or by reference to which moral principle this question is determined. For this, we need direct argument about what principles do and/or should ground relief for unconscionable bargains. As will be seen below, some cases suggest the defendant's conduct is morally unacceptable if she accepts the claimant's consent in circumstances where she knows or has reason to know about the claimant's special disadvantage and the claimant has no independent advice. This approach is consistent with the courts' concern to ensure the claimant is able to exercise independent judgment for the purposes of consenting freely to the transaction. However, to the extent that the defendant has actual knowledge of the claimant's special disadvantage, it may also be consistent with an exploitative intention. Other

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[44] *ACCC v Samton Holdings Pty Ltd* (n 22) [44] (judgment of the court).
[45] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2) 94 (Peter Millett QC), citing *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 (HL), 110 (Browne-Wilkinson J).
[46] *Boustany v Pigott* (n 2) 303 (Lord Templeman).
[47] *Kakavas v Crown Melbourne Ltd* (n 3) [16] (judgment of the court); *Jones v Morgan* [2001] EWCA Civ 995, p 9 of transcript (Chadwick LJ).

cases, particularly recent English and Australian authorities, seem to require positive proof of an exploitative intention before the defendant's conduct will be treated as morally unacceptable, which is consistent with a concern to prevent wrongdoing.

*The Early English Authorities*

Initially, English authority suggested that the defendant's behaviour could be described as unconscientious if she entered into the transaction despite knowing of the claimant's special disadvantage, without first ensuring the claimant took independent advice. Even though the language of unfair advantage-taking appeared in these cases from time to time, it was unnecessary to prove an improper motive on the defendant's part. The focus was on the claimant's capabilities and the presence or absence of independent advice.[48] This approach suggests that the primary concern was that the claimant should not be bound by obligations to which she did not freely consent.

In *Evans v Llewellin*[49] the claimant was poor and ignorant and sold his reversionary interest to the defendant at an undervalue in circumstances in which he had insufficient time to act with caution. Lord Kenyon MR held that 'if the party is in a situation, in which he is not a *free agent*, and is not *equal to protecting himself,* this Court will protect him … I am of opinion, in this case, the party was not competent to protect himself, and therefore this Court is bound to afford him such protection'.[50] The defendant's solicitor had told the claimant what the estate was worth and what he was being offered for his share and suggested he take independent advice. However, this was not enough. The defendant 'ought to have gone further' and 'should not have permitted the man to make the bargain without consulting his friends …'[51] Although there was no fraud, 'it is something like fraud, for an undue advantage was taken of

[48] Devenney and Chandler (n 9) 544-5; I. Hardingham, 'Unconscionable Dealing' in P. Finn (ed), *Essays in Equity* (LawBook Co 1985) 18 points out that this is similar to the approach taken in some early undue influence cases.
[49] *Evans v Llewellin* (1787) 1 Cox 333; 29 ER 1191.
[50] Ibid [340]-[341]/1194 (Lord Kenyon MR); *Gwynne v Heaton* (1778) 1 Bro CC 1; 28 ER 949, [9]/953 (Lord Thurlow LC).
[51] *Evans v Llewellin* (n 49) [340]/1194 (Lord Kenyon MR).

his situation.'[52] Ultimately, Lord Kenyon MR concluded that if the claimant *had* consulted his friends, the court would not have granted rescission.[53] The language used by Lord Kenyon MR suggests that in the court's eyes the defendant ought not to have accepted the claimant's consent without first ensuring she had received independent advice.

The Court of Appeal expressed similar sentiments in *Clark v Malpas*.[54] A poor, illiterate and ill man conveyed all his property to his neighbour at an undervalue and without taking security for what he was getting in return. Knight Bruce LJ emphasised that the claimant was poor, lacking in education and 'unable of himself to judge of the precautions to be taken in selling, or of the mode of sale, or of the mode of securing the price which was not at once paid down. He was helpless in the matter, without protection.'[55] In his view, there was completion at an undervalue, 'under circumstances of gross imprudence, on terms on which the seller ought not to have been allowed to complete.'[56] Because of his age, the fact that he was unwell, could only write his name and read with difficulty, 'such a transaction could not be enforced or sustained without proof that he was properly advised.'[57] Turner LJ agreed. In his view, 'this deed was obtained by advantage being taken of the vendor's position and circumstances, and was executed without due deliberation and without sufficient advice.'[58] Again, the emphasis was on the claimant's inability to give proper consent and what the defendant ought to have done to counteract that, i.e. not allow him to complete without independent advice.

In *Baker v Monk*[59] the Court of Appeal went further and characterised the need to ensure the claimant took independent advice in terms of a duty or obligation. A poor, elderly and uneducated woman sold her land to a local businessman at an undervalue in return for an annuity. She subsequently succeeded in setting

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[52] Ibid.
[53] Ibid [341]/1194 (Kenyon MR).
[54] *Clark v Malpas* (n 13).
[55] Ibid [404]/1240 (Knight Bruce LJ).
[56] Ibid [404]/1240.
[57] Ibid [405]/1240.
[58] Ibid [405]/1240 (Turner LJ).
[59] *Baker v Monk* (n 16).

the transaction aside. Turner LJ cited Lord Kenyon MR's remarks in *Evans v Llewellin* and rested his decision on that principle. He remarked that the claimant was elderly, unadvised and unassisted and 'could know no more about what the pecuniary value of that annuity was than any person whom you might meet walking along the streets at the time.'[60] He held further that the difference in station between the parties 'rendered it incumbent on [the defendant] to throw further protection around this lady before he made the bargain with her.'[61] Ultimately, he concluded that he did not wish to enter into the question of the defendant's conduct and he was 'content to believe that in this case there has been no actual moral fraud'[62], but nevertheless it was the defendant's 'duty' to say to the claimant, "You had better not sell it to me without consulting someone else".'[63]

In *Earl of Aylesford v Morris*[64] Lord Selborne LC held that a combination of special disadvantage, substantive unfairness and lack of independent advice gave rise to a presumption of the unconscientious use of power by the defendant, which could only be rebutted if the defendant could show the transaction was 'in point of fact fair, just and reasonable.'[65] A moneylender charged an expectant heir interest on loans at a rate of 60% and, when the moneylender sued on the loans, the heir successfully argued that the interest rate should be reduced to 5%. A presumption of unconscientiousness arose on the facts because of the heir's special disadvantage (*qua* expectant heir), the extortionate interest rate and the fact that he had not received any independent advice. The moneylender was unable to rebut the presumption because he had wilfully avoided acquiring knowledge of the heir's circumstances (and hence the special disadvantage), knew he had no independent advice and made no attempt to show that the loan terms were fair.[66] Therefore, although Lord Selborne LC spoke of fraud and exploitation, the moneylender's

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[60] Ibid [393]/970 (Turner LJ).
[61] Ibid [393]/970.
[62] Ibid [393]-[394]/971.
[63] Ibid [394]/971; *O'Rorke v Bolingbroke* (1877) 2 App Cas 814 (HL), 830 (Lord Hatherley, dissenting).
[64] *Earl of Aylesford v Morris* (n 38)
[65] Ibid 491 (Lord Selborne LC).
[66] Ibid 495-7.

unconscientiousness consisted simply in going ahead with the transaction in circumstances where he knew of the heir's special disadvantage and no independent advice had been received. In other words, wrongdoing was not required.[67]

*Aylesford* was applied in two later cases, *Fry v Lane*[68] and *Cresswell v Potter*,[69] both of which are consistent with the consent rationale. In *Fry*, the defendant alleged that he had acted in good faith in purchasing a reversion from the claimant and Kay J accepted that 'no moral fraud ha[d] been proved'.[70] However, the price was 'considerably below the real value',[71] the claimants were poor and ignorant and the solicitor acting on the transaction 'did not properly protect the vendors, but gave a great advantage to the purchasers, who had been former clients, and for whom he was then acting.'[72] Kay J reviewed the earlier authorities (including those referred to above) and held that the rule was that 'a poor, ignorant man, selling an interest of this kind, should have independent advice, and that a purchase from him at an undervalue should be set aside, if he has not.'[73] He concluded that the transactions amounted to 'unfair dealing, which equity considers a fraud'.[74] In *Cresswell* the claimant sold her share of the family home to her ex-husband in exchange only for a release from future mortgage liabilities. She had no solicitor and neither the defendant nor his solicitor suggested she should take independent advice. Megarry J accepted that no oppression had been alleged but held that the defendant could not uphold what was for him a very advantageous conveyancing transaction without first bringing to the claimant's attention 'the true nature of the transaction and the need for advice.'[75] At the very least, the defendant's solicitor ought to have sent the claimant a short covering letter

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[67] S. Waddams, 'Protection of Weaker Parties in English Law' in M. Kenny, J. Devenney and L. Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press 2010) 37-8.
[68] *Fry v Lane* (n 7) 321 (Kay J).
[69] *Cresswell v Potter* (n 7).
[70] *Fry v Lane* (n 7) 324 (Kay J).
[71] Ibid 322.
[72] Ibid 323.
[73] Ibid.
[74] Ibid 324.
[75] *Cresswell v Potter* (n 7) 259 (Megarry J).

explaining that by giving up her half share in the family home to the defendant, she would receive nothing other than a release from him from the responsibility to contribute to future mortgage repayments, and suggesting that she ought to get independent advice. He did not view the requirement of independent advice as absolute but the fact that 'there was no attempt whatever to comply with the requirement' meant the transaction could not stand.[76]

In light of the above, the courts' references to advantage-taking seem to have mean no more than that the defendant entered into and sought to enforce the contract despite knowing of the claimant's disability. It involved no further allegation that the defendant was guided by any bad faith or improper motive in doing so. The approach of the early English cases is therefore similar to that of the courts to mistake in the last chapter. We might say that it is sharp practice to snap up an offer one knows to be mistaken or to 'take advantage' of the claimant's special disadvantage. Nevertheless, the reason for not upholding the contract is that the claimant has not properly consented to it, and thus the references to the defendant's bad behaviour are superfluous.

*The Later English Authorities*

Later English authorities suggest that it is necessary for the claimant to prove some sort of bad faith or improper motive on the part of the defendant before her conduct will be characterised as unconscionable. In other words, the courts now take a much more restrictive approach to what unconscionable conduct entails.[77] This suggests a shift in rationale, away from a concern for the claimant's autonomy and towards a concern to prevent wrongdoing. For the defendant's conduct to be unconscionable, it now seems that it may not always be enough for her to go ahead with the transaction with knowledge of the claimant's special disadvantage and without ensuring she take independent

[76] Ibid 260.
[77] D. Capper, 'Protection of the Vulnerable in Financial Transactions - What the Common Law Vitiating Factors can do for You' in M. Kenny, J. Devenney and L. Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge University Press 2010) 181; D. Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 LQR 403, 408.

advice. Something else may be required, possibly in the form of an improper motive or exploitative intention.

In *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*[78] Peter Millett QC restated the law on unconscionable bargains and held that 'the court is concerned, not with the reality of the weaker party's consent, but with the conduct of the stronger.'[79] The claimants sought to rescind an arrangement whereby they had leased their garage premises to the defendant in exchange for a cash premium and a leaseback, the terms of which included a long petrol tie. Peter Millett QC held that the claimants were under a special disadvantage because they were in extreme financial difficulties. It was clear that the defendants were well aware of this. Nevertheless, their claim failed because the transaction was fair and the defendants had not behaved unconscionably. He held further that in order to establish unconscionable conduct, it was necessary to show the 'weakness of the [claimant] has been exploited by the [defendant] in some morally culpable manner', i.e. that there is some 'impropriety' in the defendant's conduct that '"shocks the conscience of the court," and makes it against equity and good conscience' for the defendant to retain the benefit of the transaction.[80] It is true that 'exploit' does not sound too different from 'taking advantage', but the rest of Peter Millett QC's judgment makes it clear that some more is required.

There seem to have been three reasons for the finding that the defendant had not behaved unconscionably. First, the claimants had independent legal and financial advisors and the defendants had no reason to think they had not taken advice. Secondly, the defendants did not rush the claimants. Thirdly, they had no reason to believe nor did they believe that they were getting a bargain.[81] However, he gave no indication of what *would* have constituted unconscionable conduct if the transaction had been oppressive and the claimant had not received independent advice. His judgment was upheld on

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[78] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2).
[79] Ibid 94 (Peter Millett QC).
[80] Ibid 95.
[81] Ibid.

appeal. Dillon LJ emphasised that the focus was on 'extortion, or undue advantage [being] taken of weakness, an unconscientious use of the power arising out of the inequality of the parties' circumstances',[82] but did not indicate precisely what that would entail.

In *Hart v O'Connor*,[83] Lord Brightman also emphasised the idea that the doctrine of unconscionable bargains exists to prevent constructive fraud or victimisation, which may comprise either 'the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.'[84] The claimant, who was of unsound mind, agreed to sell his land to the defendant at a significant undervalue. However, because the defendant was entirely unaware that the claimant suffered from a special disadvantage and he neither knew nor had reason to suspect that the claimant was not acting in accordance with the advice of his solicitor, he was not guilty of any unconscionable conduct. 'There was no equitable fraud, no victimisation, no taking advantage, no overreaching or other description of unconscionable doings which might have justified the intervention of equity'.[85] The decision suggests that for the defendant's conduct to be unconscionable, at a minimum he would have needed to know about the claimant's special disadvantage. However, Lord Brightman does not indicate this in terms, nor what level of knowledge would have been sufficient.[86] Therefore, the decisions in *Alec Lobb* and *Hart* do not identify what conduct is sufficiently 'morally reprehensible' (using Peter Millett QC's language in *Alec Lobb*) to count as unconscionable conduct for the purposes of the doctrine.

More recent English authority has failed to delineate clearly the scope and content of 'morally reprehensible' conduct for the purpose of the doctrine. It seems clear that if the defendant actively induces the claimant to enter into the bargain in circumstances where she knows it is substantively unfair and the

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[82] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* (n 2) 182 (Dillon LJ).
[83] *Hart v O'Connor* (n 4).
[84] Ibid 1024 (Lord Brightman).
[85] Ibid 1028 (Lord Brightman).
[86] Some argue it supports a requirement of actual knowledge: J. Getzler, 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 Mon LR 283, 296; A. Duggan, 'Till Debt Do Us Part' (1997) 19 Syd LR 220, 228; Mason (n 5) 11.

claimant suffers from a special disadvantage, her conduct will be unconscionable. Beyond that the position is unclear. These authorities are discussed below. A number of cases suggest that in the absence of active inducement, the defendant's conduct will not be unconscionable simply because she accepts the claimant's consent in the knowledge that she is operating under a special disadvantage. One or two others suggest that if the transaction is substantively unfair, the defendant's knowledge of this might be relevant to a finding of unconscionability. The difficulty with all these cases is that in none of them was the transaction substantively unfair, so as to make the issue of unconscionable conduct determinative and force the courts to delineate clearly what constitutes 'morally reprehensible' conduct.

In *Portman Building Society v Dusangh*[87] the claimant building society sought possession of the defendant's house when he fell into mortgage arrears. The defendant resisted possession on the basis that the bargain was unconscionable. The defendant clearly suffered from a special disadvantage: he was seventy two years old, could neither speak English very well nor read and write in English at all and did not have the income to support the borrowing. The transaction was improvident from his point of view: the mortgage had a twenty-five year term and the sum borrowed was £33,000, most of which went to the claimant's son, who used it to buy a supermarket. Although the son had guaranteed the mortgage and agreed with his father that he would repay it, there was never likely to be enough income from the business to support the borrowing. The same solicitor acted for all three parties in relation to the transaction and the claimant was only unaware of the defendant's true circumstances because of a failure of its internal procedures. However, the Court of Appeal upheld the possession order.

Ward LJ held that neither the son nor the building society had behaved unconscionably. As far as the son was concerned, he had believed the supermarket business would be profitable and persuaded his father to lend it

[87] *Portman Building Society v Dusangh* (n 35), noted L. McMurtry, 'Unconscionability and Undue Influence: An Interaction?' [2000] Conv 573.

without undue influence and misrepresentation. There was 'nothing, absolutely nothing, which comes close to morally reprehensible conduct or impropriety. No unconscientious advantage has been taken of the father's illiteracy, his lack of business acumen or his paternal generosity … There was no exploitation of father by son such as would prick the conscience and tell the son that in all honour it was morally wrong and reprehensible.'[88] As a matter of fact, the son would inevitably have been aware of the circumstances, which put his father at a special disadvantage. However, going ahead with the transaction despite this knowledge was insufficient to constitute unconscionable conduct. This suggests that something more in the form of an improper motive or exploitative intention was required.

The defendant argued that the building society ought to have been aware of the special disadvantage and this fact, coupled with its failure to insist on independent advice, was enough to render its actions in proceeding with the mortgage unconscionable. Ward LJ disagreed. In his view, this approach missed the fact that 'for the lending by the building society to be unconscionable, it must, as is implicit in the very word, be against the conscience of the lender – he must act with no conscience, with no sense that he is doing wrong.'[89] Assuming with the defendant that he suffered from a special disadvantage, the transaction was improvident and the building society was perhaps even lending irresponsibly, Ward LJ considered that the foregoing did not '[get] close to establishing morally reprehensible conduct' on the part of the building society. Although the bargain was foolish from the defendant's perspective, 'the moral conscience of the court has not been shocked.'[90] Two points arise from these conclusions. Ward LJ's use of the language of conscience tends to suggest that an individual's behaviour can only be unconscionable if she understands morally that she is transgressing the objective standard. In fact, as we know from Chapter 1, the term, 'unconscionable' does not necessarily imply consciously immoral conduct.[91]

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[88] *Portman Building Society v Dusangh* (n 35) 232 (Ward LJ).
[89] Ibid 235-6.
[90] Ibid 236.
[91] Chapter 1, pp 27-9, text to n 99-103.

Second, given Ward LJ's conclusions regarding the son, it is not certain that if the building society had *actually* known about the defendant's circumstances, a finding of unconscionable conduct would have followed.

There are some cases in which the defendant's knowledge of the substantive unfairness of the bargain appears to be relevant to a finding of unconscionability.[92] It is true that on the one hand, substantive unfairness may be relevant because it supports a finding that the claimant did not properly consent to the transaction. On the other hand, if the defendant knows the transaction is substantively unfair, arguably this may support a finding that she intended to harm the claimant's interests.[93] In *Mitchell v James*[94] Park J held the claimants could not show that the defendant had behaved unconscionably by 'knowingly [taking] advantage of them'[95] where they could not remember the discussions about the relevant transaction and the defendant's evidence was 'that he explained everything to them, and proposed to them a transaction which he thought was fair.'[96] In *Singla v Bashir*[97] Park J found that in the absence of evidence that the claimant could have got better terms for the same transaction elsewhere and the defendant 'knew that he could have done that', he was not prepared to set aside the transaction as an unconscionable bargain.[98] These findings echo the approach of Millett QC in *Alec Lobb*. However, in all three cases the transaction was substantively fair, so the issue of unconscionable conduct was not determinative and the courts did not have to address directly the relevance of this kind of knowledge.

The defendant's acts in trying to induce the claimant to enter into the contract, when she knew of the claimant's vulnerability and the substantive unfairness of the transaction *did* generate a finding of unconscionable conduct in *Boustany v Piggott*.[99] Miss Piggott was elderly and had been subsequently

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[92] *O'Rorke v Bolingbroke* (n 63) 835, 836 (Lord Blackburn) is an early example.
[93] Text to and following n 42 - 43.
[94] *Mitchell v James* [2001] All ER (D) 116 (Jul) (Ch ).
[95] Ibid [82] (Park J).
[96] Ibid.
[97] *Singla v Bashir* (n 20).
[98] Ibid [29] (Park J).
[99] *Boustany v Pigott* (n 2).

diagnosed with Parkinson's disease. She owned and let several properties and the Boustanys were her tenants. Because of her incapacity, Miss Piggott had appointed her cousin George to act as her agent in respect of all her properties. Mrs Boustany had conversations with George about a lease renewal, though terms were not agreed. While George was away, Mrs Boustany flattered and lavished attention and hospitality on Miss Piggott. Some days later she took Miss Piggott to a barrister (who had prepared the original lease for Miss Piggott) to execute a lease renewal at a low rent for a period of ten years, with an option for the Boustanys to renew the lease again for a further ten years at the same rent. The Privy Council held that the lease should be set aside.

Lord Templeman cited with approval the judgments of Millett QC in *Alec Lobb* and Lord Brightman in *Hart* on the need to demonstrate unconscionable conduct. He held it was necessary to show 'unconscientious advantage has been taken of [the claimant's] disabling condition or circumstances'.[100] This was clearly established on the facts. The reasons Miss Piggott gave the barrister for renewing the lease were absurd and she was plainly under a misapprehension of the facts at the time. He also found that the barrister 'forcibly pointed out not only to Miss Piggott but also to Mrs Boustany and her husband the disadvantages to Miss Piggott of the new lease but [they] gave no explanation and offered no concessions. They were content to allow Miss Piggott ostensibly to insist on the unjustifiable terms which they must have already persuaded her to accept.'[101] It followed that the trial judge was entitled to infer that the Boustanys had 'prevailed upon Miss Piggott to agree to grant a lease on terms which they knew they could not extract from [her cousin] or anyone else.'[102] When the unfairness of the lease was pointed out to them, they did not release Miss Piggott from the bargain. 'In short Mrs Boustany must have taken advantage of Miss Piggott before, during and after the interview with [the barrister] and with full knowledge before the … lease was settled that her conduct was unconscionable.'[103]

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[100] Ibid 303 (Lord Templeman), citing *The Commercial Bank of Australia Ltd v Amadio* (n 2).
[101] *Boustany v Pigott* (n 2) 304.
[102] Ibid.
[103] Ibid.

Since *Boustany* the courts have taken an inconsistent approach as to what constitutes morally reprehensible or unconscionable conduct in the absence of positive acts of inducement or exploitation. In *Chagos Islanders v The Attorney General*[104] the UK government sought to strike out a claim that a settlement agreement it had entered into with the claimants should be set aside as an unconscionable bargain. The claimants were very poor, illiterate and uneducated and Ouseley J held they had reasonable prospects of showing that the UK government knew this. He accepted it was arguable that the UK government's conduct in accepting the claimant's signatures to the agreement without ensuring they understood it 'involved the exploitation of [the claimants'] weaknesses in a morally culpable manner. They were asked to sign a legal form without explanation at the time as to its purpose or content by those who knew of their weakness.'[105] There was no evidence that the government had attempted to prevent the claimants from understanding it and therefore they had not engaged in any trickery; 'it is rather that no positive attempt to inform them was made at the time.'[106] Ultimately, the terms of the agreement were fair and so the claim was struck out. Ouseley J's judgment suggests that the defendant's conduct may be unconscionable because she accepts the claimant's consent with knowledge of her special disadvantage, but his characterisation of this conduct as exploitation suggests a concern to prevent the defendant benefiting from wrongdoing.

Three subsequent cases indicate that even where the defendant has knowledge of the special disadvantage, a finding of unconscionable conduct will *not* necessarily follow. In *Humphreys v Humphreys*[107] Rimer J doubted whether the transaction was oppressive and unreasonable and held that the facts supporting a finding of presumed undue influence were insufficient to justify a finding that the defendant 'had acted with sufficient moral culpability' to establish unconscionable conduct and that he had made no other findings

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[104] *Chagos Islanders v The Attorney General* (n 12).
[105] Ibid [580] (Ouseley J).
[106] Ibid.
[107] *Humphreys v Humphreys* [2004] EWHC 2201.

which would have justified it.[108] He did not discuss what would have sufficed to establish unconscionable conduct. However, in view of the fact that the defendant (the claimant's son) was – or must have been - aware of the facts that established her special disadvantage (she was deaf and poorly educated and he did not rate her powers of comprehension very highly[109]), his decision to proceed with knowledge of those facts was not unconscionable. In *Liddle v Cree*[110] the claimant sought to set aside a conveyance partitioning the parties' property. Between the date on which the transaction was substantially completed as between the parties and the date on which the conveyance was registered, the claimant's health deteriorated to the point where he could be said to have suffered from a special disadvantage. It was clear the defendant knew the claimant was very unwell. Briggs J found the transaction was not oppressive. He also found it was impossible to describe the defendant's conduct as 'taking unfair or unconscionable advantage of [the defendant] or … meeting the requirement that it should have been "morally reprehensible".'[111] In reaching this conclusion, Briggs J was clearly influenced by the fact that the parties had substantially completed the deal three months earlier when the claimant was not so unwell. From then on, the defendant kept the claimant informed about progress and at no time did she 'receive any inkling' from him that he was having second thoughts about the transaction because of his illness.[112] Thus, it seems the defendant's knowledge of the claimant's ill health was not enough to make it unconscionable for her to go ahead with the contract: some sort of improper motive or harmful intention would have been necessary.

Finally, in *Evans v Lloyd*[113] Wynne, a poor and uneducated farm worker, made a gift of all his property to the defendants, on whose farm he had lived and worked all his life. The parties treated each other as family. After his death, his heirs at law sought to set aside the gift on the grounds of undue influence

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[108] Ibid [106] (Rimer J).
[109] Ibid [46].
[110] *Liddle v Cree* (n 18).
[111] Ibid [92] (Briggs J).
[112] Ibid.
[113] *Evans v Lloyd* [2013] EWHC 1725 (Ch).

and unconscionable bargain. The court accepted that Wynne was at a special disadvantage, the gift *was* improvident and he had received no independent advice. The defendants' solicitor, who dealt with the transaction, said he regarded Wynne as his client. It was also clear that Wynne wanted the defendants to take the property because he wanted it to be used productively and had good reason to think that if he left it to his siblings, this would not happen. As far as the undue influence claim was concerned, HHJ Keyser QC held Wynne had clearly exercised an independent will and the gift could be explained by ordinary human motives (the desire to benefit people he regarded as family).[114] Therefore, the burden did not fall on the defendants to rebut an inference of undue influence. However, even if it had, he found that Wynne had made the gift on his own initiative 'without the suggestion or bidding of the defendants, who are decent people and made no attempt to influence or direct his will.'[115] In his view, the unconscionable bargain claim also failed. He held that 'no finding of fact that I have made could support a finding that the defendants acted with sufficient moral culpability to justify the grant of relief'.[116] In his view, the failure of the undue influence claim meant that the claimants could not 'conceivably' succeed on this ground.[117] He did not say why, nor did he identify what would have sufficed to establish unconscionable conduct in the circumstances. However, it was clear that the defendants' acceptance of the gift despite knowledge of the facts establishing Wynne's special disadvantage and the fact that he was giving them all his property in circumstances where he had not received independent advice was insufficient. This suggests a finding of unconscionable conduct would have required proof that the defendants had induced or persuaded Wynne to make the gift to them and/or harboured an improper or exploitative motive. Arguably, this conclusion may have been driven by the fact that although, technically, Wynne suffered from a special disadvantage, in fact his consent was not materially distorted by it. In light of the above, the meaning of 'morally reprehensible'

[114] Ibid [65] (HHJ Keyser QC).
[115] Ibid [72]; also [56], [60].
[116] Ibid [76].
[117] Ibid [76].

conduct in English law remains unclear but it does appear that active exploitation and/or an improper motive may be required.

*New Zealand Authority*

The use of the language of unconscionability by the New Zealand courts suggests that the defendant's conduct is morally unacceptable simply because she accepts the claimant's consent where she knows or has reason to know that it is defective. Their approach therefore appears to be consistent with the early English authorities and the focus appears to be on the quality of consent, even though they sometimes use the language of advantage-taking. In *Bowkett v Action Finance Ltd*[118] Tipping J held that a defendant takes advantage of a claimant's special disadvantage where there are 'circumstances which are either known or ought to be known to the stronger party in which he has an obligation to say to the weaker party: no, I cannot in all conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.'[119]

In *Gustav & Co Ltd v Macfield Ltd*[120] the New Zealand Court of Appeal cited with approval Tipping J's words in *Bowkett* and held that 'an unconscionable victimisation' of the claimant would occur in the circumstances identified by him above.[121] It held further that 'the essential question is whether it is unconscionable to permit the stronger party to take the benefit of the bargain.'[122] In its view, for a finding of unconscionability to be made, the defendant must know of the claimant's special disadvantage and take advantage of it. Actual or constructive knowledge will suffice for these purposes, and the absence of independent advice or the substantive unfairness of the bargain may suggest the defendant ought to have known about the special disadvantage. On appeal,[123] Tipping J approved the findings of the Court of Appeal. He held that 'Equity will intervene when one party in

[118] *Bowkett v Action Finance Ltd* [1992] 1 NZLR 499.
[119] Ibid 457 (Tipping J).
[120] *Gustav & Co Ltd v Macfield Ltd* (n 2) [30].
[121] Ibid.
[122] Ibid.
[123] *Gustav & Co Ltd v Macfield Ltd* (n 2).

entering into a transaction, unconscientiously takes advantage of the other. That will be so when the stronger party knows or ought to be aware, that the weaker party is unable adequately to look after his own interests and is acting to his detriment. Equity will not allow the stronger party to procure or accept a transaction in these circumstances.'[124] In *Gustav* the only question was whether the transaction could be rescinded and the court accepted that the contract could be rescinded if the defendant merely had reason to know of the claimant's special disadvantage: this does not suggest that wrongful conduct is required.

*Australian Authority*

Until recently the Australian courts were prepared to grant rescission not only in cases of active exploitation[125] but also where the defendant accepted the claimant's consent with actual or constructive knowledge of her special disadvantage. Thus, in *Commercial Bank of Australia Ltd v Amadio*[126] a bank accepted a mortgage from two elderly immigrants as guarantee for their son's company's debts, knowing they were not proficient in written English and had not received any independent advice about the transaction. This was sufficient to justify setting the transaction aside. Mason J characterised unconscionable bargains as concerned with the defendant's 'unconscientiously taking advantage' of the fact that the claimant was at a special disadvantage.[127] He held that if the defendant knows or ought to know of the claimant's special disadvantage adversely affecting the claimant's ability to judge what is in her own interests and 'takes advantage of [her] superior bargaining power or position by entering into that transaction, [her] conduct in doing so is unconscionable.'[128] In other words, the defendant's conduct may be unconscionable simply because she enters into the transaction despite her knowledge of the claimant's disability. This is consistent with the approach of the early English and New Zealand authorities.

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[124] Ibid [6] (Tipping J); also *Nicholls v Jessup* [1986] 1 NZLR 226 (NZCA), 235 (Cooke P).
[125] *Louth v Diprose* (n 21); *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [2007] NSWSC 12.
[126] *The Commercial Bank of Australia Ltd v Amadio* (n 2).
[127] Ibid 461 (Mason J).
[128] Ibid 467.

As in the early English cases, Deane J used the language of unfair advantage-taking, but not so as to require proof of an improper motive. In his view, the doctrine '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.'[129] He accepted that where the claimant's special disadvantage 'was sufficiently evident to [the defendant] to make it prima facie unfair or "unconscientious" that he procure, or accept, the [claimant's] consent to the impugned transaction in the circumstances in which he procured or accepted it … an onus is cast on the [defendant] to show that the transaction was fair, just and reasonable.'[130] He emphasised that there was no suggestion that anyone at the bank was 'guilty of dishonesty or moral obliquity' in their dealings with the elderly couple.[131] However, the evidence showed that it was apparent to the bank that Mr and Mrs Amadio required advice and assistance and it was therefore 'prima facie unfair and "unconscientious" of the bank to procure their signature on the guarantee/mortgage'[132] without having made sure they received such advice in circumstances where the transaction was manifestly unfair to them.[133]

A concern for the quality of the claimant's consent was also evident in *ACCC v Samton Holdings Pty Ltd.*[134] The court held that '[C]haracterisation of disadvantage as "special" involves the recognition that it would be unconscionable knowingly to deal with the person so affected without regard to his or her disability.'[135] Therefore 'conscientious dealing' may require that the defendant take steps (e.g. through the provision of independent advice), 'which will either enable [the claimant to have] a proper understanding of the transaction or overcome the disadvantage arising from a want of proper

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[129] Ibid 474 (Deane J).
[130] Ibid 474.
[131] Ibid 478. Also *Blomley v Ryan* (n 11) 429 (Kitto J, dissenting, but not on this point); *Louth v Diprose* (n 21) 637 (Deane J).
[132] *The Commercial Bank of Australia Ltd v Amadio* (n 2) 479 (Deane J), citing *Fry v Lane* (n 7).
[133] Ibid 466 (Mason J).
[134] *ACCC v Samton Holdings Pty Ltd* (n 22).
[135] Ibid [100] (judgment of court).

understanding.'[136] This is redolent of some of the early English and New Zealand cases and *Amadio*. It suggests that the defendant behaves unconscientiously by failing to comply with some sort of (moral) obligation to encourage the claimant to take independent advice. This duty has been variously characterised as a duty to ensure the claimant is in a position to make 'an independent and informed judgement'[137] and a duty to take reasonable steps to protect the claimant from foreseeable transactional harm.[138]

The recent decision of the High Court of Australia in *Kakavas v Crown Melbourne Ltd*[139] marked a change in direction. In its view, proof of a 'predatory' intention on the part of the defendant is required before a finding of unconscionable conduct will be made, at least where the claimant seeks compensation rather than rescission. The claimant was a pathological gambler who lost $20.5 million playing baccarat at the defendant's casino. He alleged that his gambling addiction meant that he was under a special disadvantage, the defendant knew about it and nevertheless actively induced him to gamble by offering rebates on losses and transport on its private jet. He sought damages under s.82 of the Trade Practices Act 1974, further or alternatively equitable compensation for his losses, which he said resulted from the defendant's unconscionable exploitation of his special disadvantage.[140] The availability of equitable compensation for unconscionable conduct does not seem to have been questioned at any stage of the proceedings. However, the claim failed. The court accepted that the claimant suffered from a special disadvantage in the form of a gambling addiction, which made him susceptible to exploitation. It went on to reject the argument that the defendant had behaved unconscionably, in circumstances where it did not have actual knowledge of the claimant's special disadvantage. It reinterpreted *Amadio* as consistent with a requirement of actual knowledge, because in that case it had been evident that the bank had wilfully ignored the fact that the Amadios

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[136] Ibid.
[137] Hardingham (n 48) 18.
[138] Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (n 6).
[139] *Kakavas v Crown Melbourne Ltd* (n 3).
[140] *Kakavas v Crown Melbourne Ltd* [2012] VSCA 95, [10]-[11] (Mandie JA).

needed advice. The court concluded that 'equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind'.[141] In its view, 'mere inadvertence, or even indifference' to the circumstances of the claimant in an arm's length commercial transaction 'falls short of the victimisation or exploitation with which the principle is concerned', but proof of actual knowledge would suffice.[142] The language used by the court suggests that it regarded proof of a predatory state of mind as a necessary element of unconscionable bargains generally, irrespective of the type of relief sought.

It is clear from the authorities discussed above that the courts have two concerns: to ensure the claimant is in a position to consent freely and independently to the transaction and to prevent wrongful conduct by the defendant. The authorities demonstrate that the language of unconscionability is consistent with both principles. On the one hand, we can say it is morally unacceptable for the defendant to accept or seek to uphold a contract she knows to be the product of defective consent. This suggests that unconscionable bargains are concerned with ensuring the claimant is not bound by a contract to which she did not properly consent. As in the case of unilateral mistake, the defendant's knowledge is relevant because it makes it unreasonable for her to rely on the appearance of consensus and thus it is not unfair to disable her from enforcing the contract. On the other hand, we can say it is morally unacceptable for the defendant to exploit the claimant's weakness. The use of the language of unconscionability in this way suggests that the doctrine is principally concerned with denying the defendant a wrongful gain, rather than protecting the claimant's autonomy. Here, the defendant's knowledge goes to the question of whether she is subject to a duty to the claimant and/or harbours an exploitative intention. The unreflective invocation of the language of unconscionability in the authorities is unhelpful

[141] *Kakavas v Crown Melbourne Ltd* (n 3) [161].
[142] Ibid.

because it tends to obscure the distinction between the two separate moral principles in play.

***Unconscionability – Doctrinal Function***

The explanatory force of the language of unconscionability within the doctrine of unconscionable bargains is very limited. Where the claimant seeks only to rescind the contract, then although the defendant may have harboured an exploitative intention towards her, it should be unnecessary to prove this in order to obtain relief. The claimant may be excused from performing an obligation to which she did not properly consent, irrespective of whether that obligation was also the product of a wrong committed by the defendant. By analogy with unilateral mistake, where the claimant's consent is impaired or distorted by her special disadvantage, this is sufficient to justify rescission, as long she can show that the defendant knew or ought to have known about her special disadvantage at the time the contract was formed. The only relevance of the defendant's knowledge is that it makes it unreasonable for her to rely on the appearance of consent and therefore displaces her interest in security of receipt,[143] so that it is not unfair to disable her from enforcing the contract. Some of the cases seem to suggest that the defendant's knowledge of the claimant's special disadvantage may trigger some sort of moral obligation to ensure she has the benefit of independent advice before proceeding with the transaction, the breach of which might be described as unconscionable. It is questionable whether such an obligation arises or if it does, whether it is a real obligation, as the effect of the defendant's failure to discharge it is merely disabling. In any event, even if it does arise, arguably it is unnecessary to justify rescission, as the defendant's knowledge is sufficient for this purpose. There is no sense in which equity is requiring the defendant to take steps to comply with a particular moral standard. Therefore, the language of conscience adds nothing to our understanding of why rescission is granted.

[143] Rickett (n 9) 78.

If the claimant seeks compensation or disgorgement of profits, such relief cannot be justified by reference to the claimant's lack of consent. Rather, she must show that the defendant has committed a wrong, i.e. a breach of a pre-existing duty.[144] Here again, the explanatory force of the language of conscience is limited. It can remind us that it is morally unacceptable to breach a duty or an obligation, but it cannot tell us what the content of the obligation/duty is[145] and thus what conduct will constitute a breach of it. To answer these questions we need direct argument as to the principles that justify the imposition of the duty in the first place. It is true that the language of conscience reminds us that the defendant will not come under any such duty absent knowledge of the facts. However, by contrast with e.g., trust obligations, the degree of knowledge that the defendant must have in order to come under a duty not to exploit the claimant's special disadvantage is very limited. All she needs to know is that the claimant suffers from such vulnerability. Therefore, we do not need to enquire into the state of the defendant's knowledge to the same extent, and so the idea of conscience plays a much less prominent role. The bigger and more important question is what sorts of conduct are morally unacceptable in this context and we cannot answer this question simply by invoking the notion of unconscionability.

## CONCLUSION

This chapter has sought to demonstrate that the role of unconscionability in unconscionable bargains is limited. In principle, it plays no positive explanatory role where the only question is whether rescission is justified. Where the relief sought depends on wrongdoing, its explanatory force is limited to reminding us that it is morally unacceptable to breach a pre-existing duty, but it does not tell us anything about the content of the duty or what sort of behaviour will constitute a breach of it. As English law stands, it is necessary to prove that the claimant's consent was produced 'by malign means of an intention to act'[146] even where the only remedy in question is rescission.

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[144] P. Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2005) 21; Rickett (n 9) 77.
[145] Rickett (n 9) 77-8.
[146] *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 (HCA), 325.

There may be at least two reasons why this is the case. First, it seems that the nineteenth century treatise writers did little to reinterpret this area of law consistently with will theory, so that the significance of the consent principle in unconscionable bargains has perhaps been underplayed.[147] Secondly, the English courts' approach may reflect the view that the defendant's interest in security of receipt should be afforded greater protection than the principled approach allows. If this concern is justified, arguably there are better ways to address it than through recourse to the language of unconscionability. For example, the courts could refine the special disadvantage requirement to ensure it involves a rigorous enquiry as to whether the claimant's consent was *in fact* impaired or distorted. If the claimant's consent *is* impaired, then in principle, if the defendant knows or has reason to know about it, this should displace her interest in security of receipt.

At the moment, even in the wake of *Kavakas*, any classification of unconscionable conduct as a wrong 'is flawed by the absence of reliable indicators of what constitutes a wrong for this purpose'.[148] Therefore, if the English courts are faced with a similar issue, it is imperative they consider questions relating to the content of the duty and what sorts of conduct are legitimate in these settings. The last question will require consideration of whether any such wrong is concerned only with the process of contract formation[149] and/or harm to the claimant's welfare interests, and whether it is to be of more general application in cases where the defendant knows the claimant's consent has been impaired (for whatever reason). Careful consideration would also need to be given to the impact the recognition of such a duty would have on transactions generally.[150]

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[147] W. Swain, 'Reshaping Contractual Unfairness in England 1670-1900' (2014) 35 J Legal Hist 120, 141.
[148] M. Bryan, 'Unconscionable Conduct as an Unjust Factor' in S. Degeling and J. Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson 2008) 303.
[149] This form of exploitation focuses on the processes by which the contract is formed rather than the infringement of the claimant's welfare rights: Bigwood, *Exploitative Contracts* (n 5) 249; R. Bigwood, 'Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing - Kiwi-Style' (2011) 42 Victoria U Wellington L Rev 83, 113; Bigwood, 'Still Curbing Unconscionability: *Kakavas in the High Court of Australia*' (n 6) 495.
[150] Rickett (n 9) 78.

# CHAPTER 7: CONSCIENCE, LAWFUL ACT DURESS AND UNDUE INFLUENCE

## INTRODUCTION

This chapter considers the meaning and function of conscience in the common law doctrine of lawful act duress and the equitable doctrine of undue influence, which offer relief where the claimant confers a benefit or enters into a contract as a result of pressure or influence applied by the defendant. Pressure takes many forms: for example, the defendant may threaten to harm the claimant physically unless she agrees to her demand[1] or she may simply threaten to harm the claimant's economic interests. In the latter case, the pressure is referred to as economic duress and this category of pressure is further sub-divided into threats to do something unlawful and threats to do something lawful (lawful act duress), such as a refusal by a shareholder to consent to a transfer of shares.[2] In a case of lawful act duress, relief will not be granted unless the court 'the pressure involved in the defendant's threatening to do that which it is clearly entitled to do, was in all the circumstances unconscionable'.[3] Influence may also be exercised in different ways: the defendant may actively dominate the claimant[4] (actual undue influence) or the influence may arise by virtue of their relationship, e.g. where the claimant relies entirely on the defendant to manage her financial affairs[5] (presumed undue influence). The courts frequently use the language of conscience and unconscionability in their efforts to distinguish between acceptable and unacceptable influence. Thus, it is said that '[i]t is only when [influence] becomes unconscionable that the court can and should interfere.'[6]

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[1] *Barton v Armstrong* [1976] AC 104.
[2] *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.
[3] *Alf Vaughan & Co Ltd (In Receivership) v Royscot Trust Plc* [1999] 1 All ER (Comm) 856 (Ch), 863 (Judge Rich QC).
[4] *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 (CA).
[5] *Pesticcio v Huet* [2004] EWCA Civ 372, noted N. Enonchong, 'Presumed Undue Influence: Continuing Misconceptions' (2005) 121 LQR 29.
[6] *Meredith v Lackschewitz-Martin* [2002] All ER (D) 20 (Jun) (Ch), [32] (David Mackie QC).

Where the courts use the language of conscience and unconscionability, it bears its ordinary meaning: they are making judgments about the moral quality of the defendant's behaviour and/or outcomes. Although the language of conscience reminds us that moral principles underpin both doctrines, beyond this its function is very limited. The language of unconscionability plays no necessary explanatory role in lawful act duress as a matter of principle. However, the courts invoke it in order to limit the circumstances in which coercive pressure will entitle the claimant to escape her obligations in a commercial context. As far as undue influence is concerned, the explanatory force of the language of conscience depends on the type of relief sought. Where the claimant seeks to rescind the transaction, the language of conscience adds nothing to our understanding of why relief is granted. However, if and insofar as the courts are prepared to treat undue influence as an equitable wrong, the language of conscience plays a discernible but limited explanatory role. It reminds us that relief depends on the defendant's breach of a pre-existing moral obligation of which she had reason to know through the operation of her conscience, i.e. as a result of the application of her innate moral understanding to her knowledge of the relevant facts.

## CONSCIENCE AND LAWFUL ACT DURESS

### *Cause of Action and Rationale*

Smith suggests there are two distinct, 'even if often factually overlapping'[7] moral principles that may explain relief where the defendant extracts a payment or a bargain through the exercise of pressure. He gives the example of a contract signed at gunpoint and argues that one reason for not enforcing it may be that 'the person seeking enforcement … is seeking to enforce an obligation obtained by his or her own wrongdoing. A second reason for not enforcing the agreement is that the person denying the contract's validity … did not consent to the contract.'[8] Consistently with this suggestion, duress may give rise to two distinct types of relief. First, the claimant may seek

[7] S. Smith, 'Contracting Under Pressure: A Theory of Duress' (1997) 56 CLJ 343, 344.
[8] Ibid.

restitution of a benefit conferred or to rescind a contract entered into as a result of duress. Secondly, she may have a right to recover damages if the defendant's conduct also constitutes a legal wrong, such as the tort of intimidation.[9]

As the law stands, the test for establishing economic duress is the same, irrespective of the nature of the threat and the type of relief sought by the claimant. It involves two questions: did the pressure exercised by the defendant have a coercive effect on the claimant and was it pressure of a kind that the law regards as illegitimate?[10] The first question is whether the pressure distorted her consent in such a way that it should not be treated as voluntary. Here 'voluntarily' does not simply mean 'willingly'.[11] Rather, the claimant's consent is involuntary if it was the product of 'unwarrantedly constrained or deflected volition'.[12] For the purposes of duress to the person, the courts ask only whether the pressure was a cause of the claimant's decision to enter into the contract.[13] The courts seem to lean towards a tougher causation test in cases of economic duress, asking whether the pressure was a significant or dominant cause.[14] Although the validity of the stricter test has been doubted,[15] it is clear that when working out whether *lawful* economic pressure is coercive, the courts usually have regard to whether its effect on the claimant in the context of her relationship with the defendant was to cut off her options in such a way that she had no practical alternative but to consent.[16]

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[9] E. McKendrick, 'The Further Travails of Duress' in A. Burrows and A. Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press 2006) 196; *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113, [2010] 1 CLC 256, 281, [119]-[120] (Christopher Clarke J). Cf. H. Carty, *An Analysis of the Economic Torts* (2nd edn, Oxford University Press 2010) 119-20.

[10] *Universe Tankships of Monrovia Inc v ITWF* [1983] AC 366 (HL), 400 (Lord Scarman); *R v Attorney General of England and Wales* [2003] UKPC 22, [15] (Lord Hoffmann).

[11] *Mason v New South Wales* (1959) HCA 5, [4] (Kitto J), [12] (Windeyer J).

[12] R. Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' (1996) 46 UTLJ 172, 207.

[13] *Barton v Armstrong* (n 1), 120 (Lord Cross), 121 (Lords Wilberforce and Simon).

[14] *Dimskal Shipping Co SA v ITWF* [1992] 2 AC 152 (HL), 166-7 (Lord Goff); *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620; [1999] CLC 230 (QB), 250 (Mance J).

[15] P. Birks, *An Introduction to the Law of Restitution* (revised edn, 1989), 180-1, 183; McKendrick (n 9) 186-7; A. Burrows, *The Law of Restitution* (Oxford University Press 2010) 270.

[16] *Universe Tankships of Monrovia Inc v ITWF* (n 10) 400; *Dimskal Shipping Co SA v ITWF* (n 14) 166 (Lord Goff); *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo Services ASA* [2000] BLR 530 (QB (TCC)), [131] (Dyson J); *Carillion Construction Ltd v*

The illegitimacy of the pressure is established by reference to the quality of the defendant's conduct at the time of the transaction. For the purposes of duress generally, where the defendant threatens to do something unlawful, i.e. commit a legal wrong in the form of a tort or a crime, the unlawfulness of the threat is usually sufficient to render the pressure illegitimate.[17] However, the courts treat economic pressure differently. Even though a threat to break a contract *is* a threat to do something unlawful,[18] the courts take the view that it does not automatically constitute illegitimate pressure. Broadly speaking, it seems to be accepted that the illegitimacy of the pressure is determined by reference to whether the threat was made because the defendant 'intended to exploit the plaintiff's weakness rather than to solve financial or other problems of the defendant.'[19] The pressure is not illegitimate if she acts in good faith in order to further her legitimate business interests.[20] For the pressure to be illegitimate, it seems that at the very least the defendant must know that 'it would be in breach of contract if the threat were implemented'[21] and in many of the cases where relief has been granted, the threat was made in bad faith.[22] This view seems to be based on the idea that parties should be free to exert commercial pressure to renegotiate bargains where necessary,[23] although the

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*Felix (UK) Ltd* [2000] BLR 1 (QB (TCC)), [24] (Dyson J); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* (n 9) 275, [92] (Christopher Clarke J); *Borrelli v Ting* (n 2), 1727-8 [31] (Lord Saville); *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm), [40] (Cooke J).

[17] *Universe Tankships of Monrovia Inc v ITWF* (n 10) 401 (Lord Scarman); *R v Attorney General of England and Wales* (n 10) [16] (Lord Hoffmann).

[18] Burrows (n 15) 277.

[19] Birks (n 15) 183; Burrows (n 15) 273-5. Similar explanations are put forward by M. Ogilvie, 'Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract' (1981) 26 McGill LJ 289; R. Halson, 'Opportunism, Economic Duress and Contractual Modifications' (1991) 107 LQR 649; Bigwood (n 12) 245; R. Bigwood, *Exploitative Contracts* (Oxford University Press 2003) 334-5.

[20] *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo Services ASA* (n 16), [65]-[66] (Dyson J).

[21] *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* (n 9) 275, [92] (Christopher Clarke J). Arguably, *North Ocean Shipping Co Ltd v Hyundai Construction Ltd* [1979] 1 QB 705 may be justified on this ground. It was clear the defendant knew there was no justification for its demand that the claimant pay more than the contractually agreed price: ibid 708.

[22] *D & C Builders Ltd v Rees* [1966] 2 QB 617, 625 (Lord Denning MR), 626 (Danckwerts LJ); *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 (CA), 426 (Griffiths LJ); *Carillion Construction Ltd v Felix (UK) Ltd* (n 16) [37], [39] (Dyson J); Burrows (n 15) 273-5.

[23] Burrows (n 15) 275.

appropriateness of the bad faith requirement has been doubted.[24] By definition, a threat to do something *lawful* is *not* a threat to commit a legal wrong and it does not automatically constitute illegitimate pressure either. When the courts are determining whether a threat to do something *lawful* is illegitimate, they apply a similar test to that adopted where the threat is to break a contract, but they use the language of unconscionability to describe it.

***Unconscionability – Meaning***

When the courts use the language of unconscionability in lawful act duress, it bears its ordinary meaning: the courts are judging the moral quality of the defendant's behaviour. Because the illegitimacy of the pressure does not depend on its legality, it has been held that 'the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable'[25] and 'as the law stands it is essential that the threat must, if not tortious in itself, at least be immoral or unconscionable' before it would be characterised as illegitimate pressure.[26] In other words, it is accepted that the courts are applying 'a standard of impropriety'.[27]

***Unconscionability, Morally Unacceptable Conduct and the Principles by Which it is Judged***

Of itself, the language of unconscionability does not tell us what sort of conduct counts as morally unacceptable or the moral principle by which this is judged. Enonchong has argued that the legitimacy of the pressure in lawful act duress cases depends on four factors: whether the threat constitutes an abuse of the legal process, whether the demand is made in bad faith and is unreasonable, and whether the threat is 'considered unconscionable in light of

[24] Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' (n 12) 251; Bigwood, *Exploitative Contracts* (n 19) 340 (on the basis that it suggest that contractual rights are less important than other rights); McKendrick (n 9) 188-9 (on the basis that we do not distinguish between good and bad faith breaches of contract).
[25] *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA), 719 (Steyn LJ).
[26] *Alf Vaughan & Co Ltd (In Receivership) v Royscot Trust Plc* (n 3 ) 863 (Judge Rich QC).
[27] Birks (n 15) 177.

all the circumstances.'[28] He accepts that these requirements can overlap but treats them separately for the purposes of analysis.[29] The position taken here is that unconscionability is not a separate requirement: unconscionable is simply a synonym for morally unacceptable. The cases suggest that the defendant's motive is crucial to a finding as to whether her conduct in exerting the pressure was unconscionable.[30] For example, if she makes the threat in good faith and in support of a reasonable demand, a finding of unconscionable conduct is highly unlikely. Conversely, if the defendant deliberately manoeuvres the claimant into a position where she has no option but to agree to a demand, which the defendant knows to be inimical to her interests,[31] her conduct is much more likely to be described as morally unacceptable.

Where the defendant threatens to do something lawful in support of a demand, which is reasonable within the context of the parties' relationship,[32] her conduct is not usually treated as morally unacceptable.[33] *CTN Cash and Carry Ltd v Gallaher Ltd*[34] also establishes that there will be no finding that the defendant's conduct is morally unacceptable even if the demand is *un*reasonable, as long as she acts in good faith, i.e. genuinely believing it to be reasonable. The defendants mistakenly but genuinely believed the claimants bore the risk of theft of a consignment of cigarettes and threatened to withdraw discretionary credit facilities unless the claimants reimbursed them for the

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[28] N. Enonchong, *Duress, Undue Influence and Unconscionability* (Sweet & Maxwell 2006) 25-6, [3-022].
[29] Ibid 26.
[30] *Huyton SA v Peter Cremer GmbH & Co* (n 14) 251 (Mance J), emphasising the importance of good or bad faith.
[31] E.g. *Re Blythe* (1881) 17 Ch D 480 (CA), 488 (James LJ), 490 (Brett LJ), 492 (Cotton LJ); and *Duke de Cadaval v Collins* (1836) 4 Ad & E 858; 111 ER 1006. These cases are often referred to as resting on the defendant's abuse of the legal process: N. Enonchong, *Duress, Undue Influence and Unconscionability* (2nd edn, Sweet & Maxwell 2012) 47-9, [3-028]-[3-029].
[32] *Alf Vaughan & Co Ltd (In Receivership) v Royscot Trust Plc* (n 3). Enonchong, *Duress, Undue Influence and Unconscionability* (n 31) 53, [3-033] explains the outcome of this case on this basis. Arguably it is also explicable on the basis that in reality the claimant did have a realistic alternative to submitting to the demand because it could and should have commenced a timely application for relief against forfeiture.
[33] *Parras Holdings Pty Ltd v Commonwealth Bank of Australia* [1999] FCA 391 (demand made in order to protect the defendant's legitimate interest in obtaining sufficient security for loans granted to the claimants; *R v Attorney General of England and Wales* (n 10) (demand made in order to protect the defendant's legitimate interest in preserving operational security).
[34] *CTN Cash & Carry Ltd v Gallaher Ltd* (n 25).

value of the consignment after it had been stolen. The court held that the circumstances in which lawful act duress would arise would be rare, the relevant question was whether the defendant's conduct was 'morally or socially unacceptable' and 'it might be particularly difficult to establish duress if the defendant *bona fide* considered that his demand was valid'.[35] The critical factor militating against a finding of lawful act duress seems to have been that 'the defendants *bona fide* thought that the goods were at the risk of the plaintiffs and that the plaintiffs owed the defendants the sum in question … The defendants' motive in threatening withdrawal of credit facilities was commercial self-interest in obtaining a sum that they considered due to them'.[36]

Three recent cases in which lawful act duress claims succeeded support the view that the defendant's conduct is morally unacceptable if she acts with an improper motive, i.e. by deliberately putting the claimant in a position where she has no realistic option but to agree to a bargain, which the defendant knows is inimical to the claimant's interests. The first case is *Tam Tak Chuen v Khairul bin Abdul Rahman.*[37] The parties were partners in a medical practice. Their relationship broke down because the defendant suspected the claimant of having an affair with a member of staff; the claimant denied it but the defendant obtained video footage which confirmed his suspicions. He threatened to use the footage as evidence in support of a petition for the compulsory winding up of the business unless the claimant agreed to sell him his shares at an undervalue. The claimant succeeded in setting aside the sale agreement on the basis of lawful act duress. The court accepted that the effect of the threat was to distort the claimant's consent.[38] The court held that three separate factors were relevant to whether the pressure was illegitimate: the reasonableness of the demand, whether it was made *bona fide* and whether the threat was unconscionable in all the circumstances.[39] The court found the demand was clearly unreasonable as it required sale of the claimant's shares at

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[35] Ibid 719 (Steyn LJ).
[36] Ibid.
[37] *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR 240 (SCA) .
[38] Ibid [71] (Prakash J).
[39] Ibid [50], citing Enonchong, *Duress, Undue Influence and Unconscionability* (n 28) 26, [3-022].

an undervalue. It held further that the defendant was 'acting with a collateral motive and the presence of that motive made the threat illegitimate'.[40] The demand was unreasonable because it was at an undervalue. The circumstances in which the demand was made were 'unconscionable' because the defendant sprang it on the claimant without any notice at a meeting late at night, which appeared to have been called for a different, anodyne purpose, 'in a way that was calculated to unnerve' him and making clear that the only option he was willing to accept that would not have resulted in publication of the footage was sale of the claimant's shares to him at an undervalue.[41] The defendant's conduct was described as unconscionable because he clearly acted with an improper motive. The invocation of unconscionability as a separate requirement distracts from the fact that it is merely a synonym for morally unacceptable conduct and is therefore unhelpful. The case supports the view that the defendant's conduct will be morally unacceptable *if* she acts with an improper motive, i.e. not to protect her own legitimate business interests but to extract a bargain, which she knows is inimical to the claimant's interests.

In *Borrelli v Ting*[42] Ting had been the CEO of A Ltd, which had collapsed with net liabilities of over HK $1 billion. The liquidators had been unable to investigate A Ltd's affairs properly because of a lack of funds and Ting's obstructive behaviour. They sought to transfer A Ltd's shares to another company in order to raise funds to continue the liquidation and sought the consent of A Ltd's shareholders, who included Ting and B Ltd and C Ltd (two companies which he controlled), for this purpose. Ting arranged for the relevant board resolutions to be forged, so that B Ltd and C Ltd opposed the scheme. He also got an employee to swear an affidavit to the effect that the signatures were genuine. The liquidators applied to the court to disallow the votes but opposition to the proceedings by Ting, B Ltd and C Ltd meant the liquidators' application would not be heard before the deadline for the scheme's approval. Ting, B Ltd and C Ltd then offered to discontinue their opposition to the scheme as long as the liquidators dropped all claims against

[40] *Tam Tak Chuen v Khairul bin Abdul Rahman* (n 37) [57] (Prakash J).
[41] Ibid [59].
[42] *Borrelli v Ting* (n 2).

him. The liquidators agreed and entered into the relevant settlement agreement but subsequently discovered evidence that suggested that Ting had misappropriated substantial funds from A Ltd.

The Privy Council held the settlement agreement was voidable for economic duress. Lord Saville found that Ting had the liquidators 'over a barrel' in that he had left them with no reasonable or practical alternative but to offer him the release because their only other option was to give up the scheme, which represented the only real prospect of obtaining something for the creditors of A Ltd.[43] He also held that the pressure exerted by Ting was illegitimate. Relevant to this finding was the fact that Ting's (lawful) opposition to the scheme was not made in good faith, but for an improper motive'[44] and 'for purely personal and selfish reasons'.[45] His 'failure to provide any assistance to the liquidators; his opposition to the scheme; and his resort to forgery and false evidence in order to further that opposition amount to unconscionable conduct on his part.'[46] Thus, the term 'unconscionable' applied to unlawful conduct *and* lawful conduct (the opposition to the scheme was not *per se* unlawful). When Ting agreed to withdraw opposition to the scheme, he did 'no more than he should have done from the outset, had he acted in good faith rather than in an attempt to avoid responsibility for his conduct of the affairs of [A Ltd].' For these reasons Lord Saville concluded that 'it would offend justice' to allow Ting to rely on the settlement agreement in order to defeat the liquidators' claims.[47] Here again, the key seems to have been the defendant's motives: he was not acting in order to protect his legitimate business interests, but rather to escape liability for his own misconduct. Therefore, he was deliberately manoeuvring the claimants into a position where they had no option but to consent to a demand, which he knew to be unreasonable and inimical to their interests.

[43] Ibid 1727-1728, [31].
[44] Ibid 1727, [28].
[45] Ibid 1728, [32], [35].
[46] Ibid 1728, [32].
[47] Ibid 1728, [33].

Finally, in *Progress Bulk Carriers Ltd v Tube City IMS*[48] the owners of a ship chartered it to the respondents to carry a cargo of scrap metal to China. In breach of the charter, the owners chartered the ship to a third party and told the respondents they would provide a substitute vessel and compensate them for any losses flowing from their failure to provide the contracted vessel on time. The respondents relied on these assurances, did not look for another vessel and renegotiated their delivery date, which required them to discount the price payable by the Chinese recipients of the scrap by $8 per ton. They sought to pass the discount onto the owners. The owners responded by threatening not to provide a substitute vessel unless the respondents agreed to drop all claims against them arising out of the breach of contract and accept compensation of $2 per ton in respect of the discount on the scrap metal price. The respondents entered into a compromise agreement on those terms, which they subsequently succeeded in rescinding at arbitration on the ground of economic duress.

On appeal, Cooke J rejected the owner's argument that if a threat to do something lawful were to constitute illegitimate pressure, this should only be the case where the threat 'provoked such a sense of moral outrage and appeared so unconscionable or so manifestly beyond the norms of ordinary commercial practice that it could be considered on a par with conduct that the law does expressly recognise as illegal or criminal.'[49] In his view, each case would turn on its facts, but 'the more serious the impropriety and the greater the moral obloquy which attaches to the conduct, the more likely the pressure is to be seen as illegitimate.'[50] He held the threat not to provide a substitute vessel did constitute illegitimate pressure. The previous breach of contract by the owners was 'the root cause of the problem'[51] and 'their continuing conduct after that was designed to put the Charterers in a position where they had no option but to settlement the agreement … and avoid further huge losses on the sale contract to the Chinese receivers.'[52] Although the arbitrators made no

[48] *Progress Bulk Carriers Ltd v Tube City IMS LLC* (n 16); noted, R. Ahdar, 'Contract Doctrine, Predictability and the Nebulous Exception' (2014) 73 CLJ 39.
[49] *Progress Bulk Carriers Ltd v Tube City IMS LLC* (n 16) [22] (Cooke J).
[50] Ibid [43].
[51] Ibid [39].
[52] Ibid [39].

express finding of bad faith, it was clear they held the view that the owners 'had manoeuvred the Charterers into the position they were in, following the breach, in order to drive a hard bargain.'[53] In light of these cases, it seems that the defendant's conduct will be unconscionable if she makes the threat in order to coerce the claimant into agreeing to a demand, which she knows to be substantively unfair or unreasonable. In other words, an improper motive or an intention to do harm seems to be required. The use of the language of unconscionability in this way suggests a concern to prevent wrongdoing rather than merely to ensure the claimant's consent is not distorted by pressure.

***Unconscionability – Doctrinal Function***

Arguably, in principle the language of unconscionability plays no necessary explanatory role in lawful act duress. Because no legal wrong has been committed, relief for wrongdoing is unavailable. Therefore, the only question is whether the claimant may rescind the transaction. The doctrines of mistake and misrepresentation demonstrate that the claimant may rescind a contract on the basis of defective consent, as long as the defendant either knew about or caused the problem with the claimant's consent, respectively. By analogy with misrepresentation, the fact that the threat caused the distortion or impairment of the claimant's consent is sufficient to make it unreasonable for the defendant to rely on the appearance of consensus. Therefore, it is not unfair to disable her from enforcing the contract. Although the defendant may also be acting in bad faith, strictly speaking this is unnecessary to justify relief: the consent principle alone can do the justificatory work.[54] Therefore, we do not need to have recourse to the language of unconscionability to explain rescission for lawful act duress. Nevertheless, the courts require proof of an improper motive before they will grant relief. The expectation seems to be that commercial actors must sometimes expect their consent to transactions to be 'legitimately' impaired.[55] Therefore, the invocation of the language of unconscionability reflects a policy choice to limit relief for lawful pressure by

[53] Ibid [40].
[54] Smith (n 7) 352-3, 362.
[55] *Barton v Armstrong* (n 1) 121 (Lords Wilberforce and Simon).

reference to the manner in which it was exercised rather than its impact on the claimant.

It remains to be seen whether the courts will ever treat the conduct required to establish lawful act duress as a wrong so as to give rise to claims for compensation or disgorgement. If so, the language of unconscionability would have a limited explanatory role to play insofar as it would remind us that – as in the case of trustee obligations and rectification for unilateral mistake - relief depends on a pre-existing moral obligation or duty,[56] about which the defendant has reason to know as a result of the operation of her conscience, e.g. through the application of her moral understanding to the facts as she knows them to be. The cases in which lawful act duress claims have been successful tend to suggest that the wrong would comprise the deliberate distortion of the claimant's consent in order to extract a bargain or benefit, which the defendant knew to be substantively unfair or unreasonable. It remains to note that the content of morally unacceptable conduct for the purposes of lawful act duress is very similar to that required for unconscionable bargains under English law. The Australian High Court has recently suggested that lawful act duress be merged into the unconscionable bargains doctrine[57] and, as we saw in the last chapter, seems to be prepared to treat such conduct as giving rise to a right to compensation.[58] As yet, the English courts show no signs of following this approach.

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[56] Cf. S. Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Law and Jurisprudence 157, 175.
[57] *ANZ Banking Group Ltd v Karam* [2005] NSWCA 344, [61], [66] (judgment of the court). This is controversial: compare K. Mason, 'Economic Duress' in S. Degeling and J. Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson 2008) 288 (welcomes the move) and R. Bigwood, 'Throwing the Baby out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales' (2008) 27 UQLJ 41, 82-84 (prefers to retain a separate category of duress to deal with cases of coercion and would deal with cases of necessity under the unconscionable bargains doctrine).
[58] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25.

## CONSCIENCE AND UNDUE INFLUENCE

### *Cause of Action and Rationale*

A claimant may rescind a gift or contract for undue influence if she can show her intention to make the gift or to transact was a product of the defendant's influence over her, rather than her own independent and unfettered powers of decision.[59] On occasion, compensation has also been awarded in response to undue influence.[60] The cause of action may be established in one of two ways. If the claimant can point to a relationship of trust and confidence and show that the transaction is one that calls for explanation, e.g. because it is not obviously explained by ordinary motives, such as friendship,[61] the burden shifts to the defendant to show that the transaction was unimpeachable, i.e. that the claimant entered into it free of her influence.[62] To this end, the defendant needs to show that the transaction 'was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will.'[63] She may do this by demonstrating the claimant was not under her influence at the time of the transaction[64] or, if she was, by liberating the claimant from her influence,[65] e.g. by insisting she take independent advice.[66]

Alternatively, the claimant may prove actual undue influence without the aid of the presumption if she can show that the defendant actively exercised influence over her, e.g. in the form of pressure[67] or dominance.[68] For these purposes she must show that the defendant had the capacity to influence her,

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[59] *Huguenin v Baseley* (1807) 14 Ves 273; 33 ER 526.
[60] *Jennings v Cairns* [2003] EWCA Civ 1935.
[61] *Allcard v Skinner* (1887) 35 Ch D 145 (CA), 185 (Lindley LJ); *Royal Bank of Scotland Plc v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773, 796, [13] (Lord Nicholls).
[62] *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL), 190 (Lord Browne-Wilkinson).
[63] *Allcard v Skinner* (n 61) 171 (Cotton LJ); Enonchong, *Duress, Undue Influence and Unconscionability* (n 31) 287, [12-003].
[64] *Davies v Dobson* 7 July 2000 (Chancery Division 7 July 2000 (Geoffrey Vos QC)).
[65] *Powell v Powell* [1900] 1 Ch 243, 245, 246 (Farwell J); *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 (PC), 134; *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 798, [20] (Lord Nicholls).
[66] *Inche Noriah v Shaik Allie Bin Omar* (n 65) 134, 135 (Lord Hailsham LC) or because there was a break in the chain of causation: Bigwood, *Exploitative Contracts* (n 19) 462-5.
[67] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 795, [8] (Lord Nicholls).
[68] *Dunbar Bank Plc v Nadeem* [1998] 3 All ER 876 (CA), 883 (Millett LJ).

exercised that influence, the influence was undue and its exercise brought about the transaction.[69] Sometimes, where the parties are in a relationship of trust and confidence *and* the defendant actively wields influence over the claimant,[70] actual and presumed undue influence may be pleaded as alternatives.[71] Where the parties are not in a relationship of trust and confidence, but the defendant actively exercises influence through acts of pressure or coercion,[72] there is an obvious overlap between actual undue influence and duress.[73]

There is a debate as to whether the doctrine of undue influence responds to the need to protect the claimant's autonomy, prevent the defendant's wrongdoing or both.[74] Broadly speaking, there are two lines of authority. The first suggests that the purpose of granting relief for undue influence (actual or presumed) is to prevent the defendant's wrongdoing.[75] Thus, it has been said

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[69] *Bank of Credit and Commerce International v Aboody* (n 4) 967 (Slade LJ).

[70] These cases are relational and therefore rightly form part of the law on undue influence: P. Birks and N. Chin, 'On the Nature of Undue Influence' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1995) 77, 95; M. Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' in A. Burrows and A. Rodger (eds), *Mapping the Law* (Oxford University Press 2006) 217.

[71] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 853-4, [219], 864-5, [281], 872, [315] (Lord Scott). Cf. earlier authority, which suggested they were antithetical: *Bank of Scotland v Bennett* (1999) 77 P & CR 447 (CA), 465 (Chadwick LJ); *R v Attorney General of England and Wales* (n 10) [24] (Lord Hoffmann).

[72] *Williams v Bayley* (1866) LR 1 HL 200 (HL), 211 (Lord Cranworth LC); *Mutual Finance Co Ltd v Wetton & Sons Ltd* [1937] 2 KB 389 (KB), 396 (Porter J); and *In Re Craig, Decd* [1971] 1 Ch 95 (ChD); W. Winder, 'Undue Influence and Coercion' (1939) 3 MLR 97; *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 872, [312] (Lord Scott) (blackmail).

[73] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 795, [8] (Lord Nicholls) (overlap in cases where the defendant exerts pressure). As to whether or not the pressure cases should be dealt with as part of the doctrine of duress, cf. Birks and Chin, 'On the Nature of Undue Influence' (n 70) 63, 64; Bigwood, *Exploitative Contracts* (n 19) 384-5; Chen-Wishart (n 70) 216, 217; M. Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' [2006] CLP 231 262-3.

[74] Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' (n 70); Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' (n 73) argues for a relational analysis incorporating both concerns and the need to prevent substantive unfairness.

[75] *Allcard v Skinner* (n 61) 183 (Lindley LJ); *Lancashire Loans Ltd v Black* [1934] 1 KB 380 (CA), 401-4 (Scrutton LJ); *Re Brocklehurst's Estate* [1978] Ch 14, 40 (Bridge LJ); *National Westminster Bank Plc v Morgan* [1985] AC 686 (HL), 705 (Lord Scarman); *Barclays Bank Plc v O'Brien* (n 62) 189-90 (Lord Browne-Wilkinson); *Cheese v Thomas* [1994] 1 WLR 129 (CA), 138 (Nicholls VC); *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 (CA), 153-4 (Millett LJ); *Dunbar Bank Plc v Nadeem* (n 68) 883 (Millett LJ); *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 795, [8]-[9], 800, [32]-[33] (Lord Nicholls); *National*

that in cases of undue influence 'the court is concerned with the conscience or behaviour of the party deriving the benefit rather than with any lack of consent on the part of the loser',[76] and equity 'sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable'.[77] In *RBS plc v Etridge*[78] the House of Lords endorsed the wrongdoing rationale. Lord Nicholls held that undue influence consisted of 'two forms of unacceptable conduct'.[79] In his view, actual undue influence 'comprises overt acts of improper pressure or coercion such as unlawful threats.'[80] Lord Hobhouse held it was 'an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other.'[81] Lord Nicholls held further that presumed undue influence involves the defendant taking 'unfair advantage' of her relationship with the claimant by preferring her own interests.[82] There is academic support for the wrongdoing rationale on the basis that undue influence involves either the defendant's exploitation of her relationship with the claimant[83] or, at the very least, her failure to take reasonable steps to protect the claimant from transactional harm.[84]

According to a second line of authority, whilst actual undue influence may involve wrongdoing, the courts intervene in cases of presumed undue influence on the grounds of public policy in order to protect those subject to influence in relationships of trust and confidence, and thus no proof of misconduct is

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*Commercial Bank (Jamaica) Ltd v Hew's Executors* [2003] UKPC 51, [28] (Lord Millett); *R v Attorney General of England and Wales* (n 10) [21]-[23] (Lord Hoffmann).

[76] *Dickinson v Lowery* Unreported, Auld J, 23 March 1990 (QB), p20 of transcript.

[77] *Dunbar Bank Plc v Nadeem* (n 68), 883 (Millett LJ); *Rosenfeld v Ransley* [2004] EWHC 2962 (Ch), [90] (Ferris J); *Hughes v Hughes* [2005] EWHC 469 (Ch), [93] (Ferris J); *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192, [26] (Patten LJ).

[78] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61).

[79] Ibid 795, [8] (Lord Nicholls).

[80] Ibid.

[81] Ibid 820, [103] (Lord Hobhouse); *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch); [2012] 2 P & CR 19, [10] (Norris J).

[82] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 795, [8]-[9] (Lord Nicholls).

[83] Bigwood, *Exploitative Contracts* (n 19) 420; R. Bigwood, 'Undue Influence: Impaired Consent or Wicked Exploitation' (1996) 16 OJLS 503, 512; R. Bigwood, 'Undue Influence in the House of Lords: Principles and Proof' (2002) 65 MLR 435, 440.

[84] R. Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (2005) 25 OJLS 65.

required.[85] Here, the focus is on the quality of the claimant's consent. Thus, the question is whether the transaction is 'the result of a free exercise of the [claimant's] will'[86] or 'the product of full free and independent volition or, which comes to the same thing … the free exercise of his independent will'.[87] The transaction may be rescinded if 'it was not the spontaneous act of the plaintiff acting in the requisite circumstances'.[88] There is also academic support for the view that the consent rationale underpins both types of undue influence.[89] On this analysis, relief is given 'because of the impairment of the integrity of the plaintiff's decision to transfer the benefit in question'[90] and it should be possible for a claimant to rescind a contract on the ground of undue influence, albeit that such influence might have been innocently acquired and exercised.[91]

The courts use the language of conscience and unconscionability in a number of different ways within the doctrine of undue influence, i.e. to describe the moral quality of the defendant's conduct and/or the terms of the transaction itself and to explain the circumstances in which a transaction may be set aside against a third party creditor for undue influence. Each of these three different usages is discussed below.

***Conscience, Unconscionability and the Defendant's Conduct - Meaning***

The courts use the language of conscience and unconscionability in undue influence to suggest that where the parties are in a relationship of trust and

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[85] *Allcard v Skinner* (n 61) 171 (Cotton LJ), 189-90 (Bowen LJ); *Morley v Loughnan* [1893] 1 Ch 736 (Ch), 756 (Wright J); *Powell v Powell* (n 65) 247 (Farwell J); *Lancashire Loans Ltd v Black* (n 75) 412 (Lawrence LJ); *Goldsworthy v Brickell* [1987] Ch 378 (CA), 402 (Nourse LJ); *Hammond v Osborn* [2002] EWCA Civ 885; [2002] WTLR 1125, [32] (Nourse LJ); *R v Attorney General of England and Wales* (n 10) [40]-[41] (Lord Scott); *Pesticcio v Huet* (n 5) [20] (Mummery LJ); *Macklin v Dowsett* [2004] EWCA Civ 904, [10] (Auld LJ); *Turkey v Awadh* [2005] EWCA Civ 382, [19] (Buxton LJ).
[86] *Allcard v Skinner* (n 61) 171 (Cotton LJ).
[87] *Hammond v Osborn* (n 85) [60] (Ward LJ).
[88] *Goldsworthy v Brickell* (n 85) 402 (Nourse LJ).
[89] Birks and Chin, 'On the Nature of Undue Influence' (n 70); A. Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 Anglo-AmLR 1, 7; C. Smith, 'Allcard v Skinner' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006).
[90] Birks and Chin, 'On the Nature of Undue Influence' (n 70) 61.
[91] P. Birks, 'Undue Influence as Wrongful Exploitation' (2004) 120 LQR 34, 36.

confidence for the purposes of presumed undue influence, the defendant is subject to moral obligations of some kind, and to express moral disapprobation for the defendant's behaviour. The cases are discussed in detail in the next section. Where the issue is one of obligation, it is clear the courts are concerned with whether the defendant is subject to a 'conscientious'[92] or moral obligation. Where the issue relates to the defendant's conduct, although the courts do not expressly use the language of morality, it is clear from their references to exploitation and unfair advantage-taking that they are concerned with the moral quality of the defendant's behaviour.

### *Conscience, Unconscionability and the Defendant's Conduct and the Principles by Which it is Judged*

Of itself, the language of conscience cannot help us to identify the obligations to which the defendant is subject or what counts as morally unacceptable conduct, nor by reference to which principles these determinations are made. The cases demonstrate that in cases of presumed undue influence the courts sometimes characterise the parties' relationship as giving rise to an obligation to ensure the claimant is in a position to consent freely to the transaction or possibly even to act in her best interests in some way. They also suggest that the defendant's conduct may be unconscionable simply because she fails to ensure the claimant takes independent advice or because she engages in some sort of wrongful or exploitative conduct towards the claimant. Thus, the language of conscience and unconscionability can be interpreted consistently with both the consent and the wrongdoing rationales.

#### *Conscience and a Moral 'Obligation' to Enable the Claimant to Consent Freely to the Transaction*

In the context of presumed undue influence the courts have used the language of conscience to signify that the defendant comes under some sort of moral 'obligation' to enable the claimant to consent freely to the transaction,

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[92] *Liddle v Cree* [2011] EWHC 3294 (Ch).

independently of her influence. For example, in *Allcard v Skinner*[93] the claimant joined an order of nuns, subject to the rules of which she owed absolute obedience to her mother superior and was obliged to give up all her property to her relatives or the poor or the order itself. After she joined the order she made a will bequeathing her property to the mother superior and transferred large sums of money and shares to her. Subsequently she left the sisterhood, revoked her will and sought to recover the property she had transferred on the basis that she had been acting under the presumed undue influence of the mother superior. The Court of Appeal accepted that the relationship was one in which influence could be presumed and that the transaction called for explanation.[94] The mother superior could not rebut the presumption of undue influence because the claimant had not received independent advice about the transaction. In principle, therefore, the claimant was entitled to rescind the transaction but the claim failed for *laches*.

In *Allcard* Bowen LJ held that it was important to keep separate 'the rights of the donor, and the duties of the donee and the obligations which are imposed on the conscience of the donee by the principles of this court.'[95] He found that the donor was not subject to duress nor was she incompetent or incapable. She was a free agent and had 'the absolute right to deal with her property as she chose'.[96] Nevertheless:

> Passing next to the duties of the donee … it is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shewn that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside – the means of considering his or her worldly position and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play.[97]

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[93] *Allcard v Skinner* (n 61).
[94] Ibid 185 (Lindley LJ).
[95] Ibid 189 (Bowen LJ).
[96] Ibid 190.
[97] Ibid; cited with approval in *Morley v Loughnan* (n 85) 756 (Wright J); *Powell v Powell* (n 85) 247 (Farwell J); *Hammond v Osborn* (n 85), [60] (Ward LJ).

Bowen LJ's use of the language of conscience in this way evinces concern for the claimant's autonomy. In his view, the question was whether the claimant was subject to 'an all-powerful religious influence which disturb[ed] [her] independent judgment … and subordinat[ed] for all worldly purposes'[98] her will to the will of the mother superior. It has been suggested in fact the claimant had capacity and clearly intended to make the gift to the order, so that her consent was not defective or lacking in a material respect.[99] However, arguably the better view is that the claimant's consent was *distorted* by the mother superior's influence over her, such that it ought not to have been taken as a legally valid expression of her free will and autonomy.[100] On this analysis, if the defendant fails to take steps to ensure the claimant receives independent advice, her conduct may be characterised as unconscionable.[101] This is reminiscent of the approach taken some of the unconscionable bargains cases. For the reasons given in the last chapter, in a case like *Allcard*, where the only remedy sought is rescission, arguably the 'obligation' is not a real obligation because the only consequence of the defendant's failure to discharge it is that she is disabled from enforcing the transaction.

The characterisation of the need to take steps to ensure the claimant has independent advice about the transaction as a moral or conscientious obligation finds support in later cases,[102] such as *Jennings v Cairns.*[103] The claimants (heirs at law under a will) argued that a gift of £171,694 made by the deceased was procured by her niece's presumed undue influence. The deceased had paid approximately £22,000 in cash for the purposes of meeting certain school fees. She paid the remainder of the sum to the trustees of insurance policies,

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[98] *Allcard v Skinner* (n 61) 189 (Bowen LJ).
[99] Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' (n 70) 207; Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' (n 73) 237; P. Saprai, 'Unconscionable Enrichment?' in R. Chambers, C. Mitchell and J. Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009).
[100] Cf. Birks and Chin, 'On the Nature of Undue Influence' (n 70) 57, 67.
[101] K. Scott, 'Taking the "Undue" out of Presumed Undue Influence? *Hammond v Osborn*' [2003] Lloyds Maritime & Commercial Law Quarterly 145, 151 recognises that the failure to ensure the claimant receives independent advice may be characterised as unconscionable.
[102] *Re Brocklehurst's Estate* (n 75), 42 (Bridge LJ); *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 463 (Fox LJ) (the defendants accepted they owed the claimant such a duty).
[103] *Jennings v Cairns* (n 60) [17] (Arden LJ).

which were held on trust for the benefit of the education of her niece's daughters. Rather than seeking to set aside the transaction, the claimants sought compensation of the original sum. On the facts the relationship was one where influence could be presumed, the gift was substantial and called for explanation and the niece did not ensure her aunt had full independent advice appropriate to her needs.[104] The facts suggest no obvious reason why the gift to the trust could not have been set aside against the beneficiaries as third party volunteers.[105] It is unclear whether this was argued at first instance, but the trial judge made an order of compensation against the niece personally. He found that her 'failure to ensure that [the gift] … was made only after full free and informed thought does place her under a conscientious obligation to make compensation' to her aunt's estate. The niece appealed on the basis that the judge's finding of undue influence was unsustainable but she did not challenge the form of relief. The Court of Appeal upheld the trial judge's decision. Arden LJ held that it had not been suggested that if undue influence was established, the trial judge could not have ordered the niece personally to make compensation rather than order rescission of the transactions. Therefore, the Court of Appeal did not hear argument on that point.[106] Ultimately, the trial judge's approach sends mixed signals. On the one hand, the suggestion that the defendant is required to ensure the claimant gives free consent is consistent with the consent rationale. On the other, the indication that a failure to do so gives rise to compensation is consistent with the wrongdoing rationale.

The judgment of Briggs J in *Liddle v Cree*[107] also supports the view that the relationship of trust and confidence may give rise to moral obligations. The parties' relationship had ended and in 2009 they agreed to partition their farm. They reached agreement in principle in 2009, the partition was substantially completed by March 2010 and it was registered in August 2010. One of the grounds on which Mr Liddle sought to rescind the transaction was presumed

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[104] Ibid [34], [35], [42].
[105] In accordance with the rule in *Bridgeman v Green* (1757) Wilm 58; 97 ER 22. For a recent discussion of this principle, see P. Ridge, 'Third Party Volunteers and Undue Influence' (2014) 130 LQR 112.
[106] *Jennings v Cairns* (n 60) [45].
[107] *Liddle v Cree* (n 92).

undue influence but his claim failed. He argued that as a result of his declining health he placed trust and confidence in Mrs Cree in relation to the transaction, which was ultimately disadvantageous to him. Briggs J accepted that during 2009 Mr Liddle had placed limited trust and confidence in Mrs Cree that she 'would honestly and fairly supervise the steps required to bring [the partition] about,'[108] but she had done nothing to abuse that trust when implementing the partition. He held further that he was troubled by the fact that by the time the partition was registered in August 2010, Mr Liddle's health had declined to the point where the transaction had become a very imprudent one from his perspective. He then asked himself whether during 2010 the parties' relationship imposed on Mrs Cree 'an equitable duty to re-consider the Partition upon which they had agreed in 2009, or at least to encourage him to seek independent advice about its wisdom, before it became irrevocable.'[109] He concluded that she was under no such duty. The deal was effectively concluded between the parties at the end of March 2010 and from then on, it would have been wrong to treat Mrs Cree as under any 'conscientious obligation … to assist Mr Liddle to reconsider, or withdraw from it.'[110] However, Mr Liddle's health only began to deteriorate from late May 2010 onwards. Moreover, although by mid-2010 the deal was an unwise one for Mr Liddle, it was not unfair 'in terms of value'.[111] He added, '[W]hile some elements of an obligation to have regard to Mr Liddle's best interests might have arisen or persisted if his health had failed while they were still co-habiting', it was difficult to see how 'an obligation to have regard to Mr Liddle's best interests'[112] arose for the first time in 2010.

Briggs J's approach to presumed undue influence clearly suggests that he regarded the required relationship of trust and confidence as giving rise to a conscientious or moral obligation but he did not clarify the content, scope or effect of such an obligation. It seems that at the very least it requires the defendant to encourage the claimant to take independent advice and possibly to

[108] Ibid [72] (Briggs J).
[109] Ibid [83].
[110] Ibid [84].
[111] Ibid [86].
[112] Ibid [88].

act in her best interests more generally. Because there was no relationship of trust and confidence at the relevant time and, even if there had been, Mr Liddle sought only to rescind the transaction, Briggs J did not have to decide whether Mrs Cree came under a positive, enforceable moral obligation, the breach of which would have constituted a wrong.

There is other academic and judicial support for the proposition that the relationship of trust and confidence between the parties does generate positive obligations to which the defendant is subject. However, views differ as to the nature and effect of those obligations. Thus, Chen-Wishart argues that rescission for presumed undue influence may be explained by the fact that the defendant comes under an obligation 'to protect the claimant's welfare interest … or successfully emancipate the claimant to protect her own welfare interest'[113] and Bigwood has suggested that the defendant comes under a duty to take reasonable steps to protect the claimant from foreseeable transactional harm.[114] In his view, a failure to comply with this duty is the minimum conduct necessary to excuse the claimant from performing the contract,[115] but proof of exploitation might well generate a right to damages or an account of profits. He and others also support the view that the relationship of trust and confidence between the parties generates a fiduciary obligation (or something like it) to act in the best interests of the claimant.[116] Again, this is consistent with the wrongdoing rationale.

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[113] Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' (n 70) 220-1.
[114] Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (n 84).
[115] Ibid 94.
[116] *Johnson v Buttress* (1936) 56 CLR 113 (HCA), 135 (Dixon J); *Lloyd's Bank Ltd v Bundy* [1975] QB 326, 342-3 (Sir Eric Sachs); *Cheese v Thomas* (n 75), 133 (Lord Nicholls) (this was accepted by the parties); *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 820, [104] (Lord Hobhouse). See also 795, [9] (Lord Nicholls); *Royal Bank of Scotland Plc v Chandra* (n 77) [24]-[26] (Patten LJ); L. Sealy, 'Undue Influence and Inequality of Bargaining Power' [1975] CLJ 21, 22; P. Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214, 219; Bigwood, *Exploitative Contracts* (n 19) 406-23; Bigwood, 'Undue Influence in the House of Lords: Principles and Proof' (n 83) 441-4; P. Ridge, 'Uncertainties Surrounding Undue Influence: Its Formulation, Application and Relationship to Other Doctrines' [2003] NZL Rev 329, 332-8.

The courts have also used the language of unconscionability in cases of actual and presumed undue influence to indicate that the defendant's conduct is morally unacceptable because she consciously takes advantage of the claimant. Where the language of unconscionability is used in this way it suggests that the aim of granting relief in response to undue influence is to prevent the defendant from enforcing obligations resulting from her own wrongdoing rather than excusing the claimant from obligations to which she did not properly consent. For example, in *BCCI v Aboody*[117] Mr Aboody actively and deliberately exercised influence over his wife in order to get her to consent to transactions guaranteeing the debts of the family company of which they were both shareholders. He also deliberately refrained from explaining the risks of the transaction to her but did not intend to cause her harm; rather he was overly optimistic that the fortunes of the family company would recover. Slade LJ held that 'the essence of the law of undue influence is to provide a remedy in cases in which, by the exercise of influence, proved by evidence or presumed, unfair advantage has been taken by another.'[118] Mr Aboody clearly 'intended and knew that without any discussion or consideration of risk [the wife] would sign security documents for a series of increasingly large overdrafts of the company'[119] and he never discussed the risks with her. The fact that he deliberately concealed the risks rather than actively misrepresenting them and did not intend to injure his wife did not 'save his conduct from being unconscionable or absolve him from a charge of actual undue influence.'[120] Therefore, had the transactions been held to be manifestly disadvantageous to Mrs Aboody (they were not), she would have been entitled to rescind them.

In *Dunbar Bank plc v Nadeem*[121] Mr Nadeem owed the claimant bank £1.4 million, which was repayable on demand. He fell into arrears and in order to improve his position, sought to borrow more money to fund the joint purchase

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[117] *Bank of Credit and Commerce International v Aboody* (n 4).
[118] Ibid 969 (Slade LJ).
[119] Ibid 969.
[120] Ibid 969, 970.
[121] *Dunbar Bank Plc v Nadeem* (n 68).

with his wife of a new leasehold of the family home (at the time he was sole lessee). The bank agreed to lend a further £260,000 but did not deal with the wife or advise her to take independent advice. The bank advanced the money, subject to the grant of security by an all monies charge over the family home, under which the wife became liable not only for her joint debts with her husband but also for his personal debts to the bank. The husband used £210,000 to purchase the joint leasehold interest and the remainder to clear his personal arrears. He later fell into arrears again and the bank sought to enforce the charge. The wife argued that her consent had been procured by undue influence. The judge agreed but held that, as she had received an interest in the property, she needed to repay the bank half the money advanced. She appealed against the imposition of the condition and the bank cross-appealed on the basis that the transaction was not manifestly disadvantageous to her.

The Court of Appeal held that the transaction was not manifestly disadvantageous to the wife as she had obtained an interest in the family home. Moreover, the husband had not taken unfair advantage of her and his conduct could not be described as unconscionable. Therefore, her appeal failed and the bank's cross-appeal succeeded. As far as actual undue influence was concerned, Millett LJ rejected the trial judge's finding that it required proof of coercion, pressure or deliberate concealment. In his view, the exercise of dominance *per se* might well suffice and it was established on the facts.[122] However, he held he did not need to decide the point because Mr Nadeem had not taken unfair advantage of his wife, which in his view was an essential ingredient of actual and presumed undue influence. He was not guilty of 'exploiting the trust reposed in him for his own benefit but seeking to turn an opportunity of his own, at least in part, to his wife's advantage'[123] by giving her an interest in the family home. Millett LJ concluded:

> The court of equity is a court of conscience. It sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable. But however the present case is analysed, whether as a case of actual or presumed undue influence, the influence was not

[122] Ibid 883 (Millett LJ).
[123] Ibid.

> undue. It is impossible, in my judgment, to criticise Mr Nadeem's conduct as unconscionable.[124]

Millett LJ's remarks suggest that the defendant's conduct will be unconscionable for the purposes of actual and presumed undue influence only if she exploits the claimant, i.e. by using her influence to extract the claimant's consent to a transaction which is to the claimant's disadvantage and her own benefit. This use of the language of unconscionability suggests that the courts are concerned to prevent the defendant from benefiting from her own wrongful conduct.

Where actual undue influence is pleaded, the courts seem to look for proof of deliberate and conscious acts of exploitation at the time of the transaction. Thus, transactions have been rescinded where, e.g. the claimant gave most of his wealth to the defendant as a result of religious and personal influence, which the defendant had deliberately cultivated for that purpose,[125] and where the defendant 'mercilessly exploited' his cognitively impaired girlfriend by persuading her to take out a mortgage and pay most of the funds to his company without explaining the transactions and without regard to her interests.[126] More recently, in *Daniel v Drew*[127] a nephew deliberately exerted pressure and repeatedly tried to persuade his elderly and vulnerable aunt to resign as trustee of a trust for sale over a farm, of which he, his brother and his cousin (her son) were beneficiaries. Her resignation would have given him and his brother control as trustees and left her son's interests unprotected. When the aunt asked him if her son could replace her as trustee, the nephew untruthfully said he could not. Ward LJ seemed to embrace the consent rationale insofar as he held that 'in all cases of undue influence the critical question is whether or not the persuasion or the advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence.'[128] However, he then went on

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[124] Ibid 884.
[125] *Morley v Loughnan* (n 85) 756 (Wright J).
[126] *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch).
[127] *Daniel v Drew* [2005] EWCA Civ 507.
[128] Ibid [36] (Ward LJ).

to consider not just whether the nephew's conduct impaired or distorted his aunt's consent but also whether his conduct was improper in some way. He held that the nephew had engaged in 'overt acts of improper pressure or coercion or persuasive conduct',[129] which amounted to 'improper or undue influence and the unfair procurement of her consent'.[130] He had seized upon the opportunity to get his aunt to confirm that she had resigned, 'knowing that what she had said was not true … He opportunistically exploited the advantage thus presented to him of having her "cornered". He chose not to involve her solicitors or [her son] in order "to take advantage of his Aunt's naiveté in business matters".'[131] For all these reasons the judge was right to conclude that the aunt's consent '"ought not fairly to be treated as an expression of her free will".'[132] He concluded that the nephew's actions 'were unconscionable'[133] and the deed of resignation should be set aside.

Lord Millett's decision in *National Commercial Bank of Jamaica v Hew's Executors*[134] suggests that where the claimant seeks to set aside a transaction for presumed undue influence, a finding as to whether or not the defendant has been guilty of exploitation may sometimes turn on evidence as to the substantive (un)fairness of the transaction. The 74-year old defendant borrowed money from the claimant bank to fund a housing development project at a place called Barrett Town. The bank insisted the money be applied only in respect of the development project, the interest rate was 20% over prime rate and the bank took security over other land belonging to the claimant. The project failed and the bank sought possession of the other land. The defendant alleged that he entered into the transaction under the presumed undue influence of the bank manager and it should be rescinded. His claim succeeded at first instance and before the Jamaican Court of Appeal. On appeal to the Privy Council, Lord Millett confirmed that in his view unconscionable conduct for the purposes of both presumed and actual undue

[129] Ibid [45].
[130] Ibid [46].
[131] Ibid [46].
[132] Ibid [47].
[133] Ibid [48]-[49], citing *Allcard v Skinner* (n 61) 181-2 (Lindley LJ).
[134] *National Commercial Bank (Jamaica) Ltd v Hew's Executors* (n 75).

influence requires exploitation. He held that undue influence was 'one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them.'[135] In his view, there were two elements to the claim: there had to be 'a relationship capable of giving rise to the necessary influence' and 'the influence … must have been abused'.[136] The trial judge had found that the necessary relationship of trust and confidence between the claimant and the bank's representative had been established to support the presumption of undue influence.

Lord Millett concluded that there was little evidence to support the finding that the parties were in a relationship of special influence but this was essentially a matter of impression and so the court would not gainsay it.[137] He then considered whether the influence had been abused or 'unfairly exploited' by the bank,[138] and held that for these purposes it was always 'highly relevant that the transaction in question was manifestly disadvantageous to the person seeking to set it aside; though this is not always necessary.'[139] Equity would not intervene unless the defendant 'has exploited his influence to obtain some unfair advantage from the vulnerable party.'[140] The bank had derived no unfair advantage from the transaction 'which it would not have sought to obtain from an ordinary arm's length transaction with a commercial borrower',[141] and so the claim failed.

The cases discussed above demonstrate that the defendant's conduct may be described as unconscionable or morally unacceptable because she failed to take steps to ensure the claimant was able to consent to the transaction freely *or* because she behaved wrongfully by exploiting her influence to take unfair

[135] Ibid [28] (Lord Millett).
[136] Ibid [29].
[137] Ibid [31].
[138] Ibid [33].
[139] Ibid.
[140] Ibid.
[141] Ibid [34].

advantage of the claimant. Therefore, as in the case of unconscionable bargains, the language of conscience is consistent with both the consent and wrongdoing rationales and makes it hard to distinguish between them. Moreover, what precisely constitutes exploitative conduct is unclear, but *Dunbar* and *Hew's Executors* suggest it may require the defendant not to use her influence over the claimant deliberately to extract a benefit, which is against the claimant's interests (and possibly, which she knows to be against the claimant's interests). If this is correct, it is very similar to the type of conduct that counts as morally unacceptable for the purposes of lawful act duress and possibly also unconscionable bargains in English law.

***Conscience and the Defendant's Conduct – Doctrinal Function***

In principle, the explanatory force of the language of conscience and unconscionability in the doctrine of undue influence depends on the nature of the relief sought. It is clear that the consent principle alone may justify rescission for undue influence: for these purposes, it is unnecessary to prove that the defendant engaged in wrongful or exploitative conduct at the time of the transaction.[142] As elsewhere, the language of unconscionability plays no necessary explanatory role where the only relief sought is rescission. The doctrines of mistake and misrepresentation demonstrate that if the claimant wishes to set aside a contract on the basis that she did not properly consent to it, she must also show that the defendant either knew or had reason to know about the problem with her consent (mistake) or caused it (misrepresentation). Either is sufficient to make it unreasonable for the defendant to rely on the appearance of consensus. This makes it fair to displace the defendant's interest in security of receipt, and she is disabled from enforcing the contract.

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[142] *Goldsworthy v Brickell* (n 85), 401, 402 (Nourse LJ); *Hammond v Osborn* (n 85) [25], [30] (Nourse LJ), [60] (Ward LJ); *Pesticcio v Huet* (n 5) [20] (Mummery LJ); *R v Attorney General of England and Wales* (n 10) [45] (Lord Scott, dissenting); *Macklin v Dowsett* (n 85) [10] (Auld LJ); *Turkey v Awadh* (n 85) [10], [11] (Buxton LJ). Also *Cheese v Thomas* (n 75) 134, 138; noted J. Mee, 'The Remedies for Undue Influence' [1994] LMCLQ 330, 332-3; M. Chen-Wishart, 'Loss Sharing, Undue Influence and Manifest Disadvantage' (1994) 110 LQR 173, 177.

The nature of influence makes it difficult to decide whether the appropriate analogy in undue influence cases is with mistake or misrepresentation. As far as presumed undue influence is concerned, on the one hand we might say the defendant does not cause the problem with the claimant's consent. It may arise simply from the fact that the claimant trusts her or is in her thrall. On this analysis, the correct analogy is with unilateral mistake or unconscionable bargains and thus, the defendant must know or have reason to know that her influence is causing a problem with the claimant's consent in order to be disabled from setting aside the contract.[143] On the other hand, we might say that the influence (and hence the problem with consent) arises only because of the claimant's relationship with the defendant, so the latter should be treated as having caused it and the better analogy is therefore with misrepresentation.[144] The same choice faces us in cases of actual undue influence: the defendant usually causes the problem with the claimant's consent by exerting pressure, but it seems possible that it may also arise simply by virtue of her position of dominance.[145]

The fact that the defendant's knowledge is not an element of the cause of action for either presumed or actual undue influence (even though it is usually implicit in the former[146] and visible in the latter) suggests that the better analogy is with misrepresentation. On this analysis, the fact that the defendant caused the problem with the claimant's consent is enough to make it unreasonable for her to rely on the appearance of consensus and to displace her interest in security of receipt, so that it is fair to disable her from enforcing the contract. Therefore, any references to unconscionability in cases of undue influence arise *ex post*[147] and the language of conscience plays no explanatory role. Even if the better analogy is with mistake and unconscionable bargains, the language of conscience still plays no or no necessary explanatory role. As

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[143] Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (n 84) 66.
[144] Birks, 'Undue Influence as Wrongful Exploitation' (n 91) 36.
[145] *Dunbar Bank Plc v Nadeem* (n 68) 883 (Millett LJ).
[146] *Johnson v Buttress* (n 116) 135 (Dixon J); *Lloyd's Bank Ltd v Bundy* (n 116) 341 (Sir Eric Sachs); Birks and Chin, 'On the Nature of Undue Influence' (n 70) 85; Bigwood, *Exploitative Contracts* (n 19) 479.
[147] Birks and Chin, 'On the Nature of Undue Influence' (n 70) 60-1.

we saw in the case of unilateral mistake, the defendant's knowledge is *per se* sufficient to displace her interest in security of receipt and make it fair to disable her from enforcing the contract.

We saw earlier that some of the presumed undue influence cases suggest that the defendant may come under an obligation to ensure the claimant is in a position to consent freely to the transaction or perhaps even act in her best interests. If the relationship between the parties does give rise to any such obligations, for the reasons given above we do not need to refer to it in order to understand why the claimant is entitled to rescind.[148] Therefore, questions of rescission and breach of duty ought to be analysed separately even if they arise on the same set of facts.[149] Furthermore, even if the claimant's right to rescind *does* depend on the defendant's breach of an obligation to protect her from foreseeable transactional harm[150] or to protect her welfare interests,[151] the effect of such an 'obligation' is disabling rather than obligatory. Therefore, by contrast with the position where equity is underwriting true moral obligations, the language of conscience adds nothing by way of explanation here. In light of the above, it seems right to conclude that the language of conscience plays no necessary explanatory role in rescission for undue influence.[152]

By contrast, if the defendant seeks relief in the form of compensation or disgorgement for wrongdoing, here the language of conscience and unconscionability does have a discernible but limited role to play. It reminds us that relief depends on the defendant's breach of a pre-existing moral obligation or duty, about which she had reason to know; and that she could only have had reason to know about it through the application of her moral

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[148] Ibid 91-2.
[149] *O'Sullivan v Management Agency and Music Ltd* (n 102); *Mahoney v Purnell* [1996] 3 All ER 61; L. Ho, 'Undue Influence and Equitable Compensation' in F. Rose (ed), *Restitution and Equity: Vol 1: Resulting Trusts and Equitable Compensation* (Mansfield Press 2000) 197; J. Heydon, 'Equitable Compensation for Undue Influence' (1997) 113 LQR 8.
[150] Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (n 84) 66.
[151] Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' (n 70) 220-1.
[152] Cf. R. Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions, Part 1' (2000) 16 JCL 1, 17-18, who argues that it plays a 'corrective justice' function; Bigwood, *Exploitative Contracts* (n 19) 420, 476, 477.

understanding to her knowledge of the facts, i.e. through the operation of her conscience. However, of itself the language of conscience does not help us to identify the content of that obligation, nor can it tell us what or how much the defendant must know before she is bound by it. Here, we need direct moral and legal argument as to what the law is or ought to be trying to achieve in this area. For example, we might treat the duty as essentially a negative one, i.e. not to exercise undue influence deliberately or negligently.[153] Alternatively, as has been suggested, we might characterise it as a positive duty of care to protect the claimant from transactional harm[154] or to protect her welfare interests or enable her to do so herself,[155] or a duty not to exploit the claimant by deliberately compromising her consent in order to extract a bargain that is inimical to her interests,[156] or even a fiduciary duty of loyalty.[157]

***Unconscionability and the Terms of the Transaction***

The courts have occasionally used the language of unconscionability to describe the morally unacceptable nature of the terms of the transaction itself. Thus, a transaction may be morally unacceptable or wrongful because it is 'immoderate or irrational'[158] or 'unconscionable', e.g. because it constitutes a sale at an undervalue.[159] The terms of a transaction have also been described as 'harsh and unconscionable',[160] so much so that the transaction 'shocks the conscience of the court'.[161] Here, unconscionability bears one of its ordinary meanings. The transaction is unconscionable in the sense that it disadvantages the claimant (and benefits the defendant) in an unreasonably excessive way.

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[153] Ho (n 149), esp 207.
[154] Bigwood, 'Contracts by Unfair Advantage: from Exploitation to Transactional Neglect' (n 84).
[155] Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' (n 70) 220-1.
[156] As the judgments of Millett LJ in *Dunbar Bank Plc v Nadeem* (n 68) and Lord Millett in *National Commercial Bank (Jamaica) Ltd v Hew's Executors* (n 75) would seem to suggest.
[157] See the authorities at n 116.
[158] *National Westminster Bank Plc v Morgan* (n 75) 704, 707 (Lord Scarman), citing *Bank of Montreal v Stuart* [1911] AC 120 (PC); *Bank of Credit and Commerce International v Aboody* (n 4) 961 (Slade LJ).
[159] *National Westminster Bank Plc v Morgan* (n 75) 704, 706-7 (Lord Scarman).
[160] *Credit Lyonnais Bank Nederland NV v Burch* (n 75) 146 (Nourse LJ).
[161] Ibid 152 (Millett LJ).

In other words, here the language of conscience points to the fact that the transaction is substantively unfair.

The function of the language of unconscionability in this context is very limited. Although for a while it seemed that the claimant had to prove that the transaction was manifestly disadvantageous to her in all cases of undue influence,[162] subsequently the House of Lords held that manifest disadvantage was not an element of the cause of action for actual undue influence[163] and then held that the term should be abandoned altogether.[164] Now, in cases of presumed undue influence the question is merely whether the transaction 'calls for explanation' because it 'is not readily explicable by the relationship of the parties',[165] and if it does, the burden of proof shifts to the defendant. This requirement really just acts as a check on the presumption that all transfers between parties in a relationship of trust and confidence result from undue influence.[166] More generally, the relevance of substantive unfairness seems to be purely evidential in that its presence or absence may bolster other findings,[167] e.g. as to the nature of the parties' relationship,[168] whether or not the claimant's consent was distorted,[169] whether the defendant was incentivized to exercise influence,[170] and whether the defendant took unfair advantage of the claimant[171] and/or exercised influence.[172] Ultimately, the use of the language of unconscionability to describe substantive unfairness has declined and in any

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[162] *National Westminster Bank Plc v Morgan* (n 75) 704-8; applied, *Coldunell Ltd v Gallon* [1986] QB 1184 (CA), 1194 (Oliver LJ); *Goldsworthy v Brickell* (n 85) 405 (Nourse LJ); *Bank of Baroda v Shah* [1988] 3 All ER 24, 30 (Neill LJ); *Bank of Credit and Commerce International v Aboody* (n 4) 961 (Slade LJ).
[163] *CIBC Mortgages plc v Pitt* [1994] 1 AC 201 (HL), 208, 209 (Lord Browne-Wilkinson); M. Dixon, 'The Special Tenderness of Equity: Undue Influence and the Family Home' (1994) 53 CLJ 21, 22.
[164] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61), 799-800, [26]-[29] (Lord Nicholls).
[165] Ibid 796, [14], 798, [21], 799, [24] (Lord Nicholls).
[166] Ibid 797-9, [24] (Lord Nicholls), 840-1, [155] (Lord Scott).
[167] Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis' (n 70) 211-4.
[168] *Credit Lyonnais Bank Nederland NV v Burch* (n 75) 154 (Millett LJ).
[169] Birks and Chin, 'On the Nature of Undue Influence' (n 70) 82.
[170] Bigwood, *Exploitative Contracts* (n 19) 449.
[171] *National Commercial Bank (Jamaica) Ltd v Hew's Executors* (n 75) [33] (Lord Millett).
[172] *Coldunell Ltd v Gallon* (n 162) (an actual undue influence case), 1194 (Oliver LJ); *National Commercial Bank (Jamaica) Ltd v Hew's Executors* (n 75); G. Andrews, 'Undue Influence - Where's the Disadvantage?' [2002] Conv 456; M. Ogilvie, 'Undue Influence in the House of Lords' (1986) 11 CBLJ 503, 509.

case, has no real explanatory force. A finding that the terms of the transaction were morally unacceptable merely begs the question why and this simply re-directs us to arguments about the moral principles that underpin the doctrine.

***Conscience and Third Parties***

The courts have also used the idea of conscience to explain how undue influence may affect third party creditors in accordance with the principles identified by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien*.[173] Where a wife acting under the undue influence of her husband provides security for his borrowings, if the creditor has actual or constructive notice of the undue influence the wife can set aside the transaction against the creditor[174] unless the creditor has taken 'reasonable steps to satisfy [her]self that the borrower understands what the transaction involves and is entering willingly into it.'[175] Broadly speaking, it can do this by meeting privately with the wife, explaining the transaction to her and urging her to take independent advice.[176] Lord Browne-Wilkinson made it clear that the standard was notice and the test has been gradually refined to the point where 'a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.'[177] It may also apply to other relationships of trust and confidence and then the question is whether the creditor has notice of 'the circumstances from which the presumption of undue influence is alleged to arise'.[178]

Although Lord Browne-Wilkinson did not use the language of conscience in *O'Brien*, the courts have since used it to characterise the way in which the third party creditor is affected by notice of the undue influence, e.g. through

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[173] *Barclays Bank Plc v O'Brien* (n 62).
[174] Ibid 191 (Lord Browne-Wilkinson). Cf. *Yerkey v Jones* (1939) 63 CLR 649, (1939) ALR 62 (HCA); and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, (1998) 155 ALR 614 (HCA), 408-411; noted, S. Gardner, 'Wives' Guarantees of their Husbands' Debts' (1999) 115 LQR 1, 3-4.
[175] *Northern Bank Ltd v McCarron* [1995] NI 258 (Ch) p. 9 of transcript (Carswell LJ).
[176] *Barclays Bank Plc v O'Brien* (n 62) 196 (Lord Browne-Wilkinson); approved, *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61), where the House of Lords further refined the detailed nature of these steps.
[177] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 804, [44] (Lord Nicholls); 823, [110] (Lord Hobhouse).
[178] *Bank of Credit and Commerce International v Aboody* (n 4) 973 (Slade LJ); *Credit Lyonnais Bank Nederland NV v Burch* (n 75) is an example of such a case.

'the action of equity upon the conscience' of the third party.[179] Thus, it has been held that: the question is 'whether, in all the circumstances which exist, the conscience of the party alleged to have constructive notice is affected;'[180] what is required of the creditor 'comes back to the question of notice and the action of equity upon the conscience of the creditor;'[181] 'it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained';[182] and, because the undue influence has been exerted by the husband, 'there has to be some additional factor before the lender's conscience is affected and he is to be restrained from enforcing his legal rights.'[183]

The use of the language of conscience in the third party cases is consistent with our ordinary understanding of conscience in that it reminds us that the principle by reference to which the creditor is disabled from enforcing the contract is a moral principle. However, as elsewhere, it cannot identify the moral principle at stake. Lord Browne-Wilkinson explained the principle underlying his approach by analogy with land law. In his view, 'there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice).'[184] The notice analogy may be inexact[185] but nevertheless it seems right to judge the creditor's ability to enforce the contract by reference to whether it knew or

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[179] *Northern Bank Ltd v McCarron* (n 175) p 9 of transcript (Carswell LJ).
[180] *Allied Irish Bank Plc v Byrne* [1995] 1 FCR 430, 458 (Ferris J). The decision was cited with approval in *TSB Bank Plc v Camfield* [1995] 1 WLR 430 (CA), 435-6 (Nourse LJ). Peter Gibson J used similar language in *Yorkshire Bank Plc v Tinsley* [2004] EWCA Civ 816; [2004] 1 WLR 2380, 2389, [32].
[181] *Northern Bank Ltd v McCarron* (n 175) p. 9 of transcript (Carswell LJ).
[182] *Credit Lyonnais Bank Nederland NV v Burch* (n 75) 153 (Millett LJ).
[183] *Royal Bank of Scotland Plc v Etridge (No. 2)* (n 61) 822, [108] (Lord Nicholls). It has been suggested this means there is no notice requirement at all: A. Berg, 'Wives' Guarantees - Constructive Knowledge and Undue Influence' [1994] LMCLQ 34, 39, but Lord Browne-Wilkinson clearly saw the principle as extending to other relationships: *Barclays Bank Plc v O'Brien* (n 62) 198.
[184] *Barclays Bank Plc v O'Brien* (n 62) 195-6.
[185] J. Lehane, 'Undue Influence, Misrepresentation and Third Parties' (1994) 110 LQR 167, 171-2; J. Mee, 'Undue Influence, Misrepresentation and the Doctrine of Notice' (1995) 54 CLJ 536, 542-3; E. O'Dell, 'Restitution, Coercion by a Third Party and the Proper Role of Notice' (1997) 56 CLJ 71; H. Tijo, 'O'Brien and Unconscionability' (1997) 113 LQR 10, 14; M. Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness' (1997) 56 CLJ 60, 61; D. O'Sullivan, 'Developing O'Brien' (2002) 118 LQR 337, 342-3.

ought to have known that it was produced by influence. If the only question is whether the wife may rescind the transaction against the creditor, the answer arguably depends on the operation of the consent principle.

By analogy with mistake and misrepresentation, the wife must be entitled to rescind the contract *if* she can show that her consent was impaired and the other party (the creditor) either knew or had reason to know of, or caused, the problem with her consent. In third party undue influence cases, clearly the creditor is not actively responsible for the distortion of the claimant's consent. However, if the creditor knows or ought to know that undue influence has been exercised, arguably this is sufficient to make it unreasonable for it to rely on the appearance of the claimant's consent, unless it has taken steps to ensure that consent was freely given, e.g. by insisting the claimant take independent advice. As in the case of unilateral mistake, the only effect of the creditor's knowledge is to disable it from enforcing the contract. The defendant's knowledge is not relevant as a precondition of an enforceable moral obligation. Ultimately, therefore, the language of conscience has no positive explanatory role to play in the context of third party undue influence.

## CONCLUSION

This chapter has outlined the very limited explanatory role that the language of conscience and unconscionability plays in lawful act duress and undue influence. Where the claimant simply seeks to rescind the transaction, the language of conscience adds nothing to our understanding of why relief is granted. If and insofar as undue influence may be said to involve a breach of duty, the explanatory force of conscience is greater. Then, the language of conscience reminds us that in order to be bound by such an obligation, the defendant must have factual knowledge, so as to enable her, through the process of moral reasoning, to discern and comply with it. However, it does not tell us what the obligation is, by reference to which principle it arises or what or how much the defendant must know in order for it to be reasonable to treat her as bound by it. Moreover, the use of the language of conscience in

both doctrines is confusing, as it is consistent with both the consent and wrongdoing rationales and may obscure the distinction between them.

It remains to mention that some argue that the doctrines of undue influence, unconscionable dealing and/or duress are sufficiently similar that they should be merged under a general principle of unconscionability.[186] There is no doubt that in all three doctrines the courts exhibit both a concern to ensure the claimant consents freely to transactions and a concern to prevent wrongdoing. It is also clear that insofar as the courts use the language of unconscionability consistently with the wrongdoing rationale, i.e. to describe positively wrongful conduct by the defendant at the time of the transaction, the same type of conduct appears to be relevant in all three doctrines. Ultimately, however, unconscionability is neither a principle nor a standard by reference to which doctrines can be organised. Moreover, even if the doctrines were to be merged, where the claimant sought only to rescind, the language of conscience would add nothing to our understanding of the reasons for relief. It remains to be seen whether the courts will recognise a wrong based on unconscionable/exploitative conduct and if so, what form that wrong would take. Even if such a wrong were to be recognised and it could be established by proof of conduct common to two or more of these doctrines, the language of unconscionability would still have only limited explanatory force. It would remind us that relief would depend on the defendant being subject to a pre-existing moral obligation of which she had (moral) reason to know, but beyond that it would tell us precious little.

[186] A. Phang, 'Undue Influence - Methodology, Sources and Linkages' [1995] JBL 552; A. Phang, 'Vitiating Factors in Contract Law - The Interaction of Theory and Practice' (2009) 10 Singapore Academy of Law Journal 1, 51, 62-3; A. Phang, 'Doctrine and Fairness in the Law of Contract' (2009) 29 LS 534, 571; M. Pawlowski, 'Unconscionability as a Unifying Concept in Equity' (2001-2003) 16 Denning LJ 79; D. Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 LQR 479, 504; D. Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 LQR 403, 419.

# CHAPTER 8: CONCLUSION

For centuries the courts have used the language of conscience in equity. Although by the end of the seventeenth century, equitable principles had been largely systematised, so that we might expect to be able to point to a sharp decline in usage, the courts still regularly invoke the language of conscience today. Trusts and contract law doctrine are littered with references to 'conscience', 'unconscionability' and 'unconscientiousness'. This fact alone underlines the enduring influence of Judaeo-Christian ethics on the development of our legal system. It also tells us that when the courts are administering equity, even now they are still concerned with underlying issues of morality.

The choice of topic for this thesis was prompted by an evident tension between the fact that on the one hand, the use of the language of conscience by the courts is often criticised as vague or meaningless and, on the other hand, the fact that the courts obviously think it means *something* or they would not continue to use it so prolifically. It is hoped that the thesis shows that an examination of the etymology and ordinary meaning of conscience, together with its development in equity, gives us a clear starting point for an understanding of the idea of conscience in law. If we pay regard to its ordinary meaning, we understand better the synergy between external, objective moral standards and the internal process of moral reasoning. This enables us to avoid confusing debates about whether conscience in law is objective or subjective and whether we are talking about the conscience of an individual litigant or that of the court. In all cases where the courts invoke the language of conscience and unconscionability, they are concerned with whether an individual's behaviour or a particular outcome accords with certain moral standards, to which we all have access and which we are all expected to know.

Ultimately, however, the utility of the language of conscience and unconscionability is limited. This thesis has demonstrated that it does play a useful, albeit limited, explanatory role where the question is whether the

defendant has come under an obligation, e.g. as a trustee, or in knowing receipt or dishonest assistance or to rectify a contract for unilateral mistake. It reminds us that in recognising and enforcing the obligation, equity is underwriting a moral obligation and it will not do so unless the defendant had knowledge of the relevant facts. Here, the purpose is not to identify what the defendant herself thought was right in the circumstances. Rather, it is to ascertain whether she had sufficient knowledge of the facts so as to be in a position to identify what the objective standard of morality (as interpreted and applied by the courts through equitable doctrine) required of her in the circumstances. If she did have such knowledge, the obligation will be recognised and enforced. Here, the language of conscience may be said to perform a necessary doctrinal role. The defendant's knowledge is not merely relevant for its own sake but because it is a necessary element of the moral reasoning process. It is only when the defendant has had the opportunity to engage in this process that equity will enforce the obligation, and the language of conscience helps us to understand this feature of obligations.

Other than as described above, the language of conscience tells us very little. For example, in the law of trusts, it does not tell us why the beneficiary gets equitable title to the property and it cannot help us with difficult questions about when and why trusts arise. Moreover, it does not help us to distinguish between liabilities and obligations, so its use in the context of both the *bona fide* purchase defence and knowing receipt can be confusing. As far as trust obligations and the obligations of third parties go, it cannot tell us what or how much the trustee or third party must know before she will be subject to the relevant obligation. This is particularly clear in the context of knowing receipt and dishonest assistance, where the courts have tied themselves up in knots through the use of the labels of 'unconscionability' and 'dishonesty'. Moreover, it does not help us address the vexed question of the nature and extent of a trustee's obligations under a non-express trust.

The language of conscience plays an even more limited role in the contractual doctrines discussed in this thesis. It can tell us that moral principles underpin them, but beyond this it does not elucidate. In fact, its use in a contractual

context can be confusing. For example, the use of the language of conscience in cases of mistake sometimes tends to suggest that rescission depends on whether the defendant has breached some sort of positive moral obligation to correct the claimant's mistake, when this is clearly not the case. In principle, all that is necessary is that the claimant's consent was impaired and the defendant knew this. Here the defendant's knowledge is *not* relevant as a precondition to the imposition of an obligation; it simply goes to the question of whether it is fair to allow the claimant's lack of consent to trump the defendant's security of receipt. Therefore, the language of conscience adds nothing to our understanding of why rescission is granted, beyond telling us that it would be morally unacceptable for the contract to be enforced. Furthermore, the language of conscience does not help us to identify the principles that justify the grant of relief, nor does it help us to choose between potentially competing rationales. This is particularly clear in the case of unconscionable bargains and undue influence, where the cases suggest that two possible moral principles or rationales are at stake, i.e. a concern to protect the claimant's autonomy and a concern to prevent wrongdoing. The language of unconscionability is consistent with both, does not help us to choose between them and, to the extent that wrongful conduct is or may be required for the purposes of relief, does not help us to identify what conduct is wrongful for these purposes.

The big problem with the language of conscience is that not only that it does not help us to answer the questions referred to above, but also that it tends to obscure them by eliding the different issues together, so that we are sometimes not sure what questions we should be asking, let alone what the answers should be. This has ramifications for the coherence and transparency of commercial law doctrine. In turn, any uncertainty as to the law introduces costs implications for litigants. It is therefore respectfully suggested that if the courts continue to use the language of conscience, they should pay much greater attention to its explanatory limitations. In particular, they could take the following steps, which would assist in terms of providing greater clarity. First, they could and should confirm that ideas of conscience and unconscionability are neither principles nor standards in their own right, nor

should they be regarded as such. Suggestions that doctrines should be combined or merged under a general principle or standard of unconscionability could therefore be safely ignored. Secondly, they could acknowledge that the language of conscience has little, if any, explanatory power in the context of liabilities generally (which do not presuppose an underlying moral obligation) and, more specifically, in the context of rescission of contracts. Ideally, the language of conscience in this context should be abandoned entirely. In turn, this would allow the courts to focus more clearly on the separate question as to whether unconscionable bargains, undue influence and possibly even lawful act duress should generate relief for wrongdoing and if so, identify clearly the basis of any duty and what would be necessary to establish a breach. Thirdly, they could expressly acknowledge the limited explanatory force of the idea of conscience within the context of obligations. Retaining the language of conscience in this context would be unproblematic, as long as we are clear that its only real function is to remind us that: (i) equitable obligations are moral obligations; (ii) such obligations will not be imposed before the defendant has had the opportunity, through the process of moral reasoning, to identify what she ought to do in the circumstances; and (iii) factual knowledge is required for this purpose. If the courts were to take this step, it would facilitate a sharper focus on important questions, such as which principle informs the relevant obligation, what its nature and scope are and/or should be and the scope and level of factual knowledge required in order to trigger it. Arguably, it is only by adopting the suggestions made above that the courts can address the concerns of the critics outlined in Chapter 1 of this thesis and give some much needed intellectual coherence to the idea of conscience in law.

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