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INTRODUCTION TO THE EDITION

Ben Coady
Editor-in-Chief

It is my great pleasure and privilege to introduce the 11th Edition of the Oxford University Undergraduate Law Journal.

Following on from the Journal's 10th anniversary was never going to be an easy task. After a period of expansion—partnerships with other law journals and reviews, introduction of the Podcast (OULP), and exponential growth in the number of annual submissions — the Journal's aim was to consolidate, maintaining the success of previous editions whilst continuing to broaden our horizons. I believe the 11th Edition has handsomely delivered on that vision.

After the tragic passing of the Rt. Hon. Lord Kerr of Tonaghmore left a space on our Honorary Board, the Journal sought to deepen its links to academia via new appointments to our advisory team. As such, we are delighted to welcome Professor Mindy Chen-Wishart (current Dean of Oxford's Law Faculty as well as Professor of the Law of Contract), a vocal and devoted supporter of the OUULJ's work, along with Professor Surya Subedi QC (Professor of International Law at the University of Leeds and Barrister at Three Stone Chambers) and Professor Philippa Webb (Professor of Public International Law at King's College London and Barrister at Twenty Essex), to the Honorary Board.

In addition to joining the Honorary Board, Professor Webb kindly accepted our invitation, along with the Rt. Hon. Lady Arden of Heswall—former Justice of the Supreme Court of the United Kingdom—to adjudicate upon the best public and

private law submissions to the Journal. In their thoughtful forewords, both judges highlight the dynamism, motivation, and quality that punctuate the submissions. I thank Lady Arden and Professor Webb for their time and touching words, and also congratulate the authors for their thought-provoking contributions.

The Oxford Undergraduate Law Podcast (OULP) has also gone from strength to strength thanks to Bianca Dammholz and Siobhan Tan, our outgoing Podcast Editors. Only by virtue of their vision and dedication has the OULP been able to host episodes with Professor Martha Minnow (former Dean of Harvard Law School and 300th Anniversary University Professor) on 'Forgiveness in the Law', Professor Mark Lemley (William H. Neukom Professor of Law at Stanford Law School) on 'The Splinternet', and Professor Samuel Moyn (Chancellor Kent Professor of Law and History at Yale University) on 'Human Rights', amongst others. All episodes are available on Spotify.

The OUULJ has renewed its efforts to increase the Journal's public profile within Oxford by hosting a series of events, both in person and online. In October, we held a very popular academic writing workshop to familiarise first-year lawyers with writing tutorial essays and articles. Later in November, our first online event, 'How to Secure a Pupillage', featured a discussion by barristers from Pump Court Tax Chambers, Serle Court, and Radcliffe Chambers on their varied journeys to pupillage. In the New Year we also held a joint panel discussion with academics from our partner, the LSE Law Review, on 'The Criminalisation of Disease Transmission'. Thanks must go to the Vice-Editors and Events Officer Victoria Goldstraw; without their endeavour and drive, such successful events would simply not have been possible.

The OUULJ's mission—to allow undergraduates to publish leading legal research—would be unattainable were it not for the generosity of our sponsors. Thanks must be extended to our Platinum Sponsors, South Square Chambers, Latham & Watkins, and Radcliffe Chambers, who have all borne the costs of the 11th Edition, our various events, and the OULP's output. The prizes for the best private and public law submissions have been funded by Maitland Chambers and Matrix Chambers respectively. Finally, 7KBW kindly provided the prize money for our OUULB Blog Essay Competition, new for this year, won by Connie Trendle on the topic of 'Does and Should Differential Treatment Based on Vaccination Status Constitute "Discrimination" in English Law?'.

Underneath the bonnet of a Ferrari (if the Journal can ordain itself with that descriptor) lies a series of first-class components working in harmony to bring about the finished product. The Associate Editors are those parts: they have performed their editing with diligence and dedication, allowing the 11th Edition to achieve a level—as commended by Lady Arden in her foreword—'of the highest standard'. That this academic rigour is a feature of their work whilst completing one of the hardest law degrees in the world is testament to the talent and motivation within our ranks. Thanks must also go to our Secretary, Cheryl Bee, and Treasurer, Jackel Cheung, who helped us effectively manage the administrative side of the Journal.

My final 'thank you' must go to the Senior Editorial Board. Our Editor, Lester Ho, has been both indispensable and outstanding. From obtaining the largest sponsorship package in OUULJ history, to putting on a remarkable array of events, all whilst co-ordinating the entire editing process, Lester has gone over and above on every occasion. To echo the thoughts of previous Editors-in-Chief, 'the OUULJ stands in even better

stead at the end of this [11th] Edition than it did at the end of the [10th]',[1] and the three Vice-Editors—Amy Hemsworth, Weronika Galka, and Sahil Thapa—have been instrumental in that result, ably supporting Lester where necessary and also focussing on areas beyond the Editor's official ambit.

When I arrived in Oxford and realised that academic law was 'for me', I knew I wanted to be involved with the OUULJ's work in some capacity. My incredibly fortunate stint on the Editorial Board, formerly as Editor and latterly as Editor-in-Chief, has lived up to my expectations, being both challenging and enriching in equal measure. First, the scholarship published in the Journal has taught me that few aspects of the law are settled, which is what makes its study so interesting. For instance, in her foreword Lady Arden focuses on the fundamental principle of relativity of title. Yet even that principle is still contested: in *Armory*,[2] did the chimneysweep's boy acquire a right to the exclusive possession forever when he picked up the jewel, suggesting that there can be multiple possession-independent 'titles' of varying strengths to a chattel, or did he acquire the possessory interest (as opposed to the ownership interest) which is possession-dependent?[3] Second, the quality of work of my peers has humbled me in a way few other societies could have done. And finally, I am lucky enough to be able to call members of the Board friends, and for that I am incredibly thankful. I wish the Journal's team every success for the 12th Edition.

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[1] Adrian Burbie & Niamh Kelly, 'Introduction to the Edition' [2020] 9 OUULJ 8, 10.

[2] *Armory v Delamirie* (1722) 1 Strange 505, 93 ER 664.

[3] Luke Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP 2021), advocates for the former view, David Fox, 'Enforcing a Possessory Title to a Stolen Car' [2002] 61 CLJ 27, for the latter.

FOREWORD (PUBLIC LAW)

Professor Philippa Webb
Professor of Public International Law, King's College London
OUULJ Honorary Board Member

Justice Michael Kirby, Australia's longest serving judge and an international jurist who held senior posts on United Nations bodies, observed that younger people have an ability to perceive and understand legal dynamics better than the older generations:

> …domestic/ municipal courts are in a sense exercising an international jurisdiction by dealing with matters where international law has some relevance to the case. That is the way that the interface between municipal law and international law is likely to develop in the future. Young people generally see this; older people may not. They grew up in a time when international law was the plaything of princes. They may be hostile to the role of international law. Somehow we have to reconcile the growing body of international law with the municipal legal system. *Younger people, younger lawyers, … I think understand this.*[1]

This observation is apt not only for the interaction between domestic and international law, but also for the development of public law.

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[1] Justice Michael Kirby, 'Interview with the Hon Michael Kirby AC CMG' (King's College London, 26 October 2013) <https://www.kcl.ac.uk/archive/news/law/assets/hon-michael-kirby-ac-cmg-formatted-v3.pdf> accessed 10 June 2022 (emphasis added).

The two papers included in this edition of the OUULJ are impressive examples of younger people grasping contemporary legal problems and seeking solutions in a creative and open-minded manner. In both papers there is a sense of dynamism and a willingness to embrace and induce change.

Jaime Teo engages with the question of whether consent is adequate for the evaluation of sexual activity. On the one hand, this is a problem as old as human relations, but it is also the subject of heated current debates. Since allegations of sexual abuse against the film producer Harvey Weinstein became public in 2017, the #MeToo movement has grown from a hashtag to a phenomenon in multiple jurisdictions and across various sectors, including universities and the legal profession.[2] Some parliaments are, for example, reforming sexual consent laws to introduce a requirement of communicative and affirmative consent.[3]

Jaime blends legal analysis with philosophy to develop a nuanced argument that due to the special expressive aspect of sexual activity, it is possible for parties to make a genuine agreement to have sex while retaining a high degree of discretion to change their minds, even if such a change was not contemplated as possibility at the time of agreement. The paper is enriched by the author's engagement with the work of John Gardner, especially his concern against agreement-making and his concept of 'sex-as-teamwork'. Binaries of public/private and

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[2] University and College Union, *Eradicating Sexual Violence in Tertiary Education* (December 2021); Sally Williams, 'Sexism, MeToo and the legal profession' *The Times* (London, 31 January 2020) <https://www.thetimes.co.uk/article/sexism-metoo-and-the-legal-profession-2f6kmvrv9> accessed 10 June 2022.

[3] Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW, Australia); Student safety: sexual assault, SB 967 (2014) (California, USA).

individual/community are tested and dissolved as Jaime reveals that sexual activity 'is an especially potent vehicle for the reinforcement of negative stereotypes and beliefs about members of oppressed groups'.

Katharina Neumann's paper addresses climate change, in particular the potential of the intergenerational justice doctrine for successful climate activism through the courts. Even more than the #MeToo movement, climate activism has been driven by the younger generation. In 2018, Greta Thunberg, aged 15, staged a lone protest outside the Swedish Parliament, demanding that the government meet carbon emissions targets. Her 'School Strike for Climate' grew into a global movement. Thunberg has repeatedly expressed frustration with the generation in charge:

> Adults keep saying: 'We owe it to the young people to give them hope.' But I don't want your hope. I don't want you to be hopeful. I want you to panic. I want you to feel the fear I feel every day. And then I want you to act.[4]

Katharina, in a way, takes up Thunberg's call to action and brings it to the courtroom. The paper argues for a rights-based approach to intergenerational justice and recommends that promising practices be adopted globally. In line with Justice Kirby's observation, Katharina demonstrates an aptitude for understanding that legal solutions must transcend national borders. Katharina uses three judgments by courts in Ireland, Germany and Australia to illustrate three approaches to

[4] Greta Thunberg, "'Our house is on fire": Greta Thunberg, 16, urges leaders to act on climate' *The Guardian* (London, 25 January 2019) <https://www.theguardian.com/environment/2019/jan/25/our-house-is-on-fire-greta-thunberg16-urges-leaders-to-act-on-climate> accessed 10 June 2022.

intergenerational justice: an unenumerated rights approach that may be adopted by jurisdictions with unwritten or partially unwritten constitutions; a constitutional rights approach that would be applicable in jurisdictions with constitutions that enshrine the right to a healthy environment or can read such a right into another constitutional protection, such as the right to life; and a tort law approach that uses intergenerational justice to relax the requirements of foreseeability and causality. Of the three, the author favours the two rights-based approaches.

Katharina wisely acknowledges that taking the fight for climate justice from the streets to the courtroom may lead to judicial overreach in environmental policymaking, but concludes that this risk can be mitigated by courts making reference to legal standards when deciding climate change cases. The arguments in this paper based on domestic practice have relevance for climate action on the international judicial stage. Vanuatu is building support for the UN General Assembly to ask the International Court of Justice for an advisory opinion on states' obligations to protect people, including future generations, from the effects of climate change.[5] Antigua and Barbuda, Tuvalu and Palau have formed a Commission of Small Island States on Climate Change and International Law that intends to ask the International Tribunal for the Law of the Sea for an advisory opinion on the impact of climate change on oceans,[6] deeply conscious of the fact

[5] Vanuatu Prime Minister Bob Loughman, 'Address to the United Nations General Debate' (UN General Debate 76th session, 25 September 2021) <https://www.youtube.com/watch?v=izucIT9V3NQ> accessed 10 June 2022.

[6] President of Palau Surengel S. Whipps, 'Imagine if the Rich Countries that Caused Climate Change Actually Took Responsibility' *Time* (New York City, 6 January 2022) < https://time.com/6137289/climate-change-responsibility/> accessed 10 June 2022.

that rising sea levels mean their children and grandchildren may have no territory to call home.

I congratulate Jaime and Katharina for their thoughtful and thought-provoking papers, and for confirming that the younger generation is well equipped to take on some of the most pressing challenges of our time.

June 2022

FOREWORD (PRIVATE LAW)

The Rt. Hon. Lady Arden of Heswall
Former Justice of the Supreme Court of the United Kingdom

In his recent Foreword to this Journal, Lord Neuberger wrote with great erudition about the valuable contribution that academic writings make to the business of judging. I agree with him, and I hope the work to which he was referring will include the work of contributors to this journal. Their initiative in selecting their topics and reasoning through their arguments indicates that, in the fullness of time, they will become thought leaders in the law, with that great gift not just for reciting the history or established content of the law but looking at it critically.

I would like to ask you, the reader, to think back to your reaction to the first case or principle of law that you learnt about when you began your journey to study law. My recollection is that the first principles to impact on my consciousness concerned settled land. I thought then that those principles had little to do with the law as it is practised and after many years in practice and on the Bench, I cannot think of an occasion when I had to look at the subject again. There is an important point here. Law is not simply about the satisfaction obtained from mastering a complex area of law but also understanding its implications for modern society. As a judge, I considered it part of my role to consider those perspectives, in particular how changes in commercial law will affect practitioners and users, and work towards (within the limits of the judicial role) a legal system that is modern, accessible and fair, and in particular that commercial law is also flexible enough to encourage appropriate creativity and entrepreneurialism.

In my early university career, much attention was also paid to public international law, which was fascinating. This field of study involves law of a completely different nature from property or commercial law. The great Professor HLA Hart was prepared to accept that international law was still law, but he pointed out that it lacked institutions in which there were rules binding all aspects of conduct of the state. Too often international law seems to reflect what Thucydides recorded in the Athenian dialogues with the Melians: 'the strong do what they can and the weak suffer what they must'. Yet, one must not overstate this. There are many rules of international law which are generally observed by civilised nations in one way or another.

I wonder if you recall the first case that made an impression on you. Was it *Donoghue v Stevenson*[1], which celebrates its 90th anniversary this year? The facts, like the facts of any case, were unique to it. They are also well-known. The plaintiff and her friend had attended a café and the plaintiff had chosen an ice-cream and a ginger beer, the latter to be poured over the former to make an ice-cream float. Her friend paid the bill. The ginger beer came in an opaque bottle. The plaintiff enjoyed the first half of the bottle until she poured out the remains in the bottle and discovered a decomposing snail there. She became ill, but not so ill that she, a doughty character, could not pursue a case against the manufacturer of the beer even though she had no contract with him. She lost in the Scottish courts but then had a historic success in the House of Lords. Did the manufacturer owe a duty to the consumer? Lord Atkin departed from the idea that the common law recognised only a series of individual duties of care. He enunciated the overarching neighbour principle in those immortal words:

[1] [1932] UKHL 100, [1932] AC 562.

'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[2]

This was a remarkable judgment which established that there was a general duty of care and it spawned a new and fast-growing tort of negligence. It is easy to underestimate the effect on society of this judgment. Tort law was transformed.

The first case which had an immense impact on me was *Armory v Delamirie*.[3] I particularly liked this story about the chimney sweeper's boy who found a diamond ring and showed it to a crooked goldsmith for valuation purposes who refused to hand the stone back. Sir John Pratt Chief Justice held that the diamond ring was the property of the chimney sweeper's boy, even though he had just found it in a chimney, and also that if the goldsmith did not give it back it should be presumed in fixing the damages that it was a diamond of the finest water that would fit in the ring.

As my analytical skills improved, I realised that *Armory* was not a case about caring for chimney sweepers' boys, those very young children who went up chimneys to scrape soot from the chimney lining – this was not just child labour but hard and life-shortening work too. *Armory* was decided about 125 years

[2] ibid 580 (Lord Atkin)
[3] [1722] EWHC J94, (1722) 1 Strange 505

before Charles Kingsley wrote his famous The Water Babies, which drew attention to their plight. Nor is it a great 'David and Goliath' story whereby the common law shone in its protection of the weak and rejection of the powerful.

What *Armory* did was establish a fundamental principle of English and Welsh property law that title is relative. The poor, and probably illiterate, chimney sweeper's boy was not the owner of the ring; of course not. He was only its finder, but his title was good against all the world in the absence of the true owner claiming that he had not abandoned it or of a purchaser for value and without notice. Moreover, it showed that what counts in establishing the right to any thing is not the wrongful conduct of the other party (though that doubtless had an effect on the basis for assessing damages), but the possession of the finder.

The principle of relativity of title is even now considered to have derived from *Armory v Delamirie*.[4] It is applied to many varieties of property and property rights. It has led to waves of litigation: was it good enough that the person in possession was an agent for the person claiming it and what happened if he had acquired possession without authority? In what circumstances could the principal come in and claim that the agent held the property or right on the principal's behalf?

In some respects, the law on these matters is still controversial and difficult, but, leaving that aside, what is also significant (as I see it) is that the common law developed the concept of relativity of title and that this has contributed to society's economic development. An asset was not sterilised, as in some legal systems, because the owner could not be found. Even then, it could still be used for the economic benefit of society. So, in this way even a principle established in an extraordinary case

[4] ibid

about a poor chimney sweeper's boy exactly three hundred years ago this year has contributed to the success of society under the common law.

The report of this famous case is incredibly short – perhaps half a page. That may lead you to think that modern judgments are overlong. Many will have sympathy with that point. I have also written on that subject. But the production of judgments is a personal matter for each judge and constitutionally a very important one too. A judge must demonstrate why he or she has come to a certain conclusion. That is an aspect of the Rule of Law.

I hope that the law will continue to interest you throughout your career if you choose to stay with it. There is an argument that you do not really obtain a focused view of legal issues and legal principles until you have seen them in practice. I think there is something in that. However, what you have learnt at university will at least give you the right grounding and analytical skills to tackle new problems and new areas of law, of which you will find very many.

The demands on the law are always changing. In your career, driverless cars will be the norm and there will be many difficult issues arising from the accidents they may sadly cause. There will be new law on AI and environmental issues to name but two other fields.

If you enter practice, you may well find that there are cases which are as bitterly fought as blood feuds and that much time is spent on tactics and the gathering of evidence. Those are obviously important matters. The principles for which the law stands may be a long way from your immediate strategy, but I hope that in formulating your strategy you will always have regard to them, and for the values of the common law.

I have great admiration for the student contributions to this issue shown to me ahead of writing this Foreword. I was struck by the motivation with which they were written, and the interest and curiosity shown by the writers. They are uniformly of the highest standard and I found it very difficult to choose between them.

May you all achieve fulfilment in your careers ahead.

July 2022

PRIZES

Best Public Law Submission to the Eleventh Edition of the Oxford University Undergraduate Law Journal (2022):

From the Streets to the Courtroom: The Potential of an Intergenerational Justice Doctrine as a Key for Successful Judiciary Climate Activism.
Katharina Neumann
Trinity College Dublin

Professor Webb made this comment:

'I have chosen Katharina's article as the best public law article for demonstrating an aptitude for understanding that legal solutions to global problems must transcend national borders. She takes the fight for climate justice from the streets to the courtroom, brandishing tools gathered from promising cases around the world. Since the article was submitted, the United Nations General Assembly passed an historic resolution recognising the right of access to a "clean, healthy and sustainable environment" on 28 July 2022. Katharina's article contributes a roadmap for turning those words into action.'

The Editors are deeply grateful to Professor Webb for adjudicating upon the public law articles.

Best Private Law Submissions to the Eleventh Edition of the Oxford University Undergraduate Law Journal (2022):

The Scope of the Penalty Jurisdiction: A Critical Analysis of the Application of the Rule against Penalties to Contentious Clauses.
Fred Halbhuber
Trinity College, Cambridge

To Hope or Hurt? Clarifying Remedial Objectives in Proprietary Estoppel.
Henry Fahrenkamp & Sushrut Royyuru
Magdalen College, Oxford

Lady Arden made this comment:

'It was very difficult to select a winner from the papers submitted. I applied the same criteria to each but found that two papers came equal first.'

The Editors are deeply grateful to Lady Arden for adjudicating upon the private law articles.

The Editorial Board wishes to thank our prize sponsors:

***Matrix Chambers**—for their funding of the Public Law Prize*

***Maitland Chambers**—for their funding of the Private Law Prize*

PUBLIC LAW ARTICLES

From the Streets to the Courtroom: The Potential of an Intergenerational Justice Doctrine as a Key for Successful Judiciary Climate Activism

Katharina Neumann*

Abstract—The fight against climate change has multiple disguises and climate litigation is playing an increasingly important role. However, several recurring challenges in mounting climate-based claims prevail. This article examines the potential of a developing intergenerational justice doctrine within domestic climate litigation that addresses these issues and empowers judges to properly intervene. Three judgements from the courts in Ireland, Australia, and Germany are considered to demonstrate the increased attention given to intergenerational justice in domestic litigation. Analysing these judgements, the paper advocates for a rights-based approach to intergenerational justice as opposed to the law of tort and presents this as the key to a new era of climate change litigation.

* Trinity College Dublin. The author would like to thank the OUULJ editorial team, Dara Neylon Marqués, Franka Nodewald and especially Fergus Maclean for their helpful comments on an earlier draft of this piece. All errors remain my own.

Introduction

Climate advocacy unfolds in multiple forms. It ranges from the lone activist tied to a tree, to the passionate declaration before the UN General Assembly, to tens of thousands of students taking to the streets as part of Fridays for Future Demonstrations. However, alongside this, international and domestic courtrooms also increasingly play a role in setting the scene for climate activism, which means the increased involvement of courts in finding ways to mitigate climate change. *L'Affaire du Siècle* (France),[1] *ENvironnement JEUnesse* (Canada),[2] *Demanda Generaciones Futuras* (Colombia),[3] *The People's Climate Case* (EU),[4] *Pandey* (India),[5] *Do-Hyun Kim et al* (Korea)[6] and *Union of Swiss Senior Women for Climate Protection* (Switzerland)[7] are examples of the many cases around the world that demand stronger climate protection policies, public and private liability for environmental damages, and a more proactive political approach to climate change and sustainability.

Although many of those climate change cases have been at least partly successful, several recurring challenges confronting claimants mounting climate-based claims in the courts prevail.

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[1] *Notre Affaire à Tous and Others v France ('L'affaire du siècle')*, Paris Administrative Court, Decision of 3 February 2021, Nos 1904967, 1904968, 1904972, and 1904976/4.

[2] *Environnement Jeunesse c Procureur général du Canada,* 2021 QCCA 1871.

[3] *Future Generations v Ministry of the Environment and others* (Colom Sup Ct, 11001–22–03–000–2018–00319–01, 5 April 2018).

[4] Case T–330/18 *Armando Carvalho v European Parliament and Council of the European Union* (GC, 8 May 2019).

[5] *Ridhima Pandey v. Union of India and Central Pollution Control Board* (2017) No 187/2017.

[6] *Do-Hyun Kim et al. v South Korea* (2020).

[7] *Verein KlimaSeniorinnen Schweiz et al. v DETEC* Public Law Division I – Judgment 1C–37/2019 of 5 May 2020.

Many reflect the complexity of climate change itself.[8] The first issue is causality, emphasising the 'degree of connection (…) necessary to sustain a link between an activity and particular climate change impacts'.[9] As 'climate change may lead to injury to all peoples and is possibly caused by actors all over the world',[10] it is often unclear whether an actor caused the damages it is accused of inciting. Further, even where causality is established, there may be an issue of apportionment, posing the question of the degree to which the actor may be held accountable for climate change-related damage. This highlights the 'drop in the ocean' issue, a common problem that refers to the difficulty of holding any single actor responsible for the global impacts of climate change.[11] A plurality of actors contributes to damage through progressive acts or omissions in an unequal manner, which frequently raises the issue of quantification of the damage in question.[12] Additionally, proving cumulative and indirect harm caused by a particular project's or legislation's climate change implications, necessary for successful litigation in most jurisdictions, is difficult and leads to issues of standing.[13] Lastly, climate litigants face issues of judicial legitimacy, concerning the extent to which the courts can interfere with the exercise of powers that are exclusively granted to the executive without violating the separation of powers. While executive and judicial powers often overlap, the difficulty with climate change lies in the fact that it is often contested and inherently more political than other questions. The lack of specific climate change laws in many

[8] Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) Carbon & Climate L Rev 15, 15.
[9] ibid 22.
[10] Joyeeta Gupta 'Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change' (2007) RECIEL 16, 80.
[11] ibid 17.
[12] Anders Henriksen, *International Law* (2nd edn, OUP 2019).
[13] Peel (n 8) 15.

jurisdictions indicates that climate change litigation is often not concerned with enforcement so much as with forcing regulatory action.[14]

This article examines the potential of developing an intergenerational justice doctrine within domestic climate litigation that addresses these issues and empowers judges to intervene properly. Importantly, it considers the doctrine from the perspective of sustaining existing legal principles, generating new rationales for the current law. It advocates for a rights-based approach to intergenerational justice, as opposed to the law of tort, and advances that such an approach should be adopted globally. After suggesting a definition for an intergenerational justice doctrine, this paper examines three judgments by the courts in Ireland, Australia, and Germany to show the increased attention given to intergenerational justice in domestic litigation. For Ireland, it discusses an approach based on the unenumerated rights doctrine from *Friends of the Irish Environment v Government of Ireland*.[15] The German example showcases reliance on expressed constitutional rights using a recent constitutional complaint forwarded by climate activist groups. Lastly, for the Australian case, the article discusses the usefulness of tort law in the realm of intergenerational justice, basing its analysis on the judgment in *Sharma v Minister for the Environment*.[16] Overall, it is argued that that rights-based approaches provide more promising results than reliance on tort law. Finally, the paper considers that an intergenerational justice doctrine has great potential to address common issues in climate change litigation and considers remaining issues of judicial overreach.

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[14] ibid 23.

[15] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49, [2020] 2 ILRM 233 2.

[16] *Minister for the Environment v Sharma* [2022] FCAFC 35.

1. Towards a Definition for an Intergenerational Justice Doctrine

Intergenerational justice proposes that, provided that a good is to be distributed among two generations with the same number of members, each generation will, where possible, receive half, indicating that we have an obligation to future generations to leave behind a world with at least equal accessible resources to those we currently have available.[17] Political philosopher John Rawls identified the concept as 'fairness in the quantity and quality of diverse resources distributed and in the access to them given by one generation to the next'.[18] This concept is based on indirect reciprocity, asserting that it is equitable and just to give back to future generations what is received from predecessors.[19]

Environmental issues remain some of the most important examples of intergenerational justice. Climate change is a global issue and, due to its long-term and potentially irreversible consequences, will impact many generations to come.[20] The concept of intergenerational fairness regarding environmental protection in the legal realm is not a novel idea, as it has been successfully implemented in several non-Western jurisdictions such as the Philippines, where jurisprudence and the Constitution establish intergenerational responsibility and justice as twin concepts embedded in the right of the people to a

[17] Joerg Chet Tremmel, *A Theory of Intergenerational Justice* (1st edn, Routledge 2007) 218.
[18] Burns H Weston, 'Climate Change and Intergenerational Justice: Foundational Reflections' (2008) 9 Vt J Envtl L 375, 409.
[19] ibid 412.
[20] Meguro M, 'Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy' (2020) 33 Leiden Journal of International Law 933; Tremmel (n 17) 7.

'balanced and healthful environment in accord with the rhythm and harmony of nature'.[21] This principle necessitates intergenerational justice, because the future of the environment depends on decisions made today. Further, the principle has been enshrined in international law instruments such as the 1946 International Whaling Convention, Principle 3 of the Rio Declaration, which states that the 'right to development must be fulfilled so as to meet developmental and environmental needs of present and future generations',[22] and the Preamble of the Paris Agreement, which states that parties should take intergenerational equity into account when taking actions to address climate change.[23] However, these inclusions of similar intergenerational principles lack real substance as they do not impose any substantive legal obligations and must be separated from an enforceable intergenerational justice doctrine proposed in this article. Nevertheless, they provide normative value to identify the scope and obligations under such a doctrine.

Contrasting these vague notions presented in international law, environmental lawyer Brown Weiss cites the three basic principles of intergenerational ecological equity; (i) the conservation of options, (ii) the conservation of quality, and (iii) the conservation of access, through which she recognises that future generations are 'entitled to diversity of, quality of and access [to natural and cultural resources] comparable to that enjoyed by previous generations'.[24] These create enforceable rights opposed to normative structures. Weiss explains that the

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[21] Minors Oposa et al. vs. Factoran et al. d 1993 <https://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html> (Supreme Court) accessed 21 May 2022.

[22] Principle 3, 1992 Rio Declaration on Environment and Development.

[23] Paris Agreement to the United Nations Framework Convention on Climate Change, December 12, 2015.

[24] Burns H Weston (n 18) 395–6.

right to comparable options entails conservation of the diversity of the natural resource base so that future generations may use it to satisfy their generational values. The right to comparable quality involves ensuring that the quality of the environment is, on balance, comparable between generations. The third right, comparable access, means that access to Earth's resources among generations must be non-discriminatory.[25] Invoking the interests of future generations as a justification for conservation, which environmental protection implies by its very nature, lays the foundation for a particular measure of protection to which such generations are entitled and which must be protected by today's judiciaries.[26] These rights must be applied and enforced now, because they otherwise cannot be guaranteed due to the increasingly destructive effects climate change has on our planet. However, as these interpretations of rights to 'option', 'quality' and 'access' are quite broad, they must be qualified by the rights of current generations, engaging courts in a balancing act between upholding 'option', 'quality' and 'access' for future as well as current generations. By introducing measures that prevent carrying the burdens of climate change unduly into the future, but that are not too strenuous, future generations' rights are safeguarded without encroaching on current generations' rights.

Tying together these analytical points, an intergenerational justice doctrine in environmental litigation may be defined as a legal principle that dictates that future generations must have the benefit of the same quality of environment enjoyed

[25] Edith Brown Weiss, Climate Change, Intergenerational Equity, and International Law' L9 Vt J Envtl L 615–627 (2008) 616.
[26] Richard P. Hiskes, 'The Right to a Green Future: Human Rights, Environmentalism, and Intergenerational Justice' (2005) 27 Human Rights Quarterly 4 1346, 1356.

by previous generations in order to retain the exercise of the same rights and freedoms as former and current generations.

2. Case Law

This section will analyse three judgments regarding their consideration of intergenerational justice principles, highlighting different legal approaches to bringing intergenerational justice to life. It considers an approach based on tort law, basing the principle on the law of negligence, and two approaches based on constitutional rights, one relying on expressed rights and one adopting the unenumerated rights doctrine. It concludes that a rights-based approach is inherently superior to an approach based on tort law and highlights the benefits and drawbacks of both.

A. An Unenumerated Rights Approach – Ireland: *Friends of the Irish Environment v Government of Ireland*

The case concerns the abolition of the Irish National Mitigation Plan, the former centrepiece of the Irish Government's climate mitigation policy, following a complaint from the Irish environmental NGO Friends of the Irish Environment. The complaint was because the legislation failed to specify concrete measures to achieve the national transition objective required under the 2015 Climate Act.[27]

In their original complaint to the High Court, the claimants claimed that the 2017 National Mitigation Plan,

[27] Climate Action and Low Carbon Development Act 2015.

adopted under the 2015 Climate Act, was *ultra vires* and violated rights under the Constitution and the ECHR.[28] The 2015 Act stipulates a 'transition to a low carbon, climate resilient, and environmentally sustainable economy'[29] by 2050 and requires the Government to take account of climate justice and of existing commitments under Irish, European, and international law. The complainants argued that the plan in place failed to achieve short-term emissions reductions and thus violated domestic and international law, specifically, the rights to life and respect for private and family life enshrined in the ECHR, as well as rights protected under the Irish Constitution, including the rights to a reasonable environment and intergenerational solidarity. The state opposed this by pointing to its wide margin of discretion in drafting the plan and the principle of separation of powers, from which it deduced the plan's non-justiciability. The High Court sided with the state, holding that the plan was *intra vires* the 2015 Act.

The Supreme Court overturned the lower Court's decision, and quashed the National Mitigation Plan. The seven-judge panel of the Supreme Court held that the plan fell 'well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act'.[30] It stipulated that to meet the necessary standard of transparency any 'interested member of the public' must be able to decide whether the Plan is 'effective and appropriate' to meet the National Transition Objective by 2050.[31] This was not the case for the National Mitigation Plan. Importantly, Justice Clarke

[28] *Friends of the Irish Environment v Government of Ireland* [2019] IEHC 747, [2019] 9 JIC 1901.
[29] Climate Action and Low Carbon Development Act 2015, s.4.
[30] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49, [2020] 2 ILRM 233 2 [9.3].
[31] ibid [6.37].

proposed that the Plan be quashed on grounds which are substantive rather than purely procedural, ensuring that the Plan will never be assessed again, for any new plan must meet the set standards.[32] While the Court accepted that the legislation clearly contemplates that the Plan's detail will become more fixed over time, it decided that this did not prevent there being a statutory obligation to formulate a plan with some realistic level of detail about how climate targets will be met.[33]

I. Intergenerational Justice within Irish Constitutional Law

The case achieved its objective to deny the National Mitigation Plan mostly based on procedural arguments, and the Court merely engaged with the claimants' concerns regarding the infringement of their rights on an *obiter* basis. Nevertheless, an initial awareness of an intergenerational justice doctrine can be ascertained from the original complaints, which argued that the plan breached the 'unenumerated constitutional commitment to intergenerational solidarity'.[34] Although the judges in both Courts decided against commenting on the intergenerational justice issue, this initial attention to intergenerational justice shows the possibility of introducing an intergenerational justice doctrine in Ireland, which would assist in arguing the case on a substantive basis. This is strengthened by the notion that reliance on pure procedural issues is a probable reason for the lack of engagement with intergenerational justice by the judges in the first place.

The claimants' proposal of founding Irish constitutional rights on intergenerational justice demonstrates a powerful possible use for the doctrine, especially considering the Irish

[32] ibid [6.49].
[33] ibid [6.45].
[34] *Friends of the Irish Environment v Government of Ireland* (n 30) [26].

constitutional tradition of reading 'unenumerated rights' into the Constitution. Article 40.3, which provides various personal rights, exhibits a textual gap, indicating that the state shall 'in particular' protect certain rights, which demonstrates that there are rights protected by the Irish Constitution that are not directly set out in the text but are 'derived rights', which have some root of title in the text or structure of the Constitution.[35] The Irish courts have used this provision to recognise a variety of rights that are not mentioned in the Constitution, such as the right to privacy in communication,[36] the right to travel,[37] and the right to integrity of the human personality.[38] Although the unenumerated rights doctrine declined in the late 1990s, recent case law has seen its resurgence exemplified by *Flemming,*[39] establishing a right to personal autonomy, and *NHV,*[40] which concerned the unenumerated right to seek work. In fact, Clarke CJ's judgment in *Friends of the Irish Environment* discusses unenumerated rights, involving the right to an environment consistent with human dignity. This had been previously recognised as an unwritten, latent personal constitutional right and an essential condition for the fulfilment of all human rights by the High Court in 2017,[41] and affirmed by the High Court in the present case.[42] In the decision at hand, the Supreme Court rejected the existence of such a right, considering that it would be 'either superfluous or

[35] *Ryan v Attorney General* [1965] IR 294, [1965] IR 294 [8.6].
[36] *Kennedy v Ireland* [1984 No. 5011P], [1988] ILRM 472 and *McGee v. Attorney General* IRDLTR [1974] IR 284, (1973) 109 ILTR 29.
[37] *State (M) v AG* [1979] IR 73 (HC).
[38] *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 IR 467.
[39] *Flemming v. Ireland* [2013] IEHC 2.
[40] *NHV v Minister for Justice and Equality* [2018] 1 IR 246, [2017] 1 ILRM 105.
[41] *Merriman v Fingal County Council* [2017] IEHC 695, [2017] 11 JIC 2104.
[42] *Friends of the Irish Environment* (n 28) [133].

excessively vague',[43] however it is possible that, had the Court considered the proposed 'unenumerated constitutional commitment to intergenerational solidarity', such a right could have been derived, showcasing the operation of an intergenerational justice doctrine.

Such a doctrine can arise from several provisions within the Irish Constitution, including Article 42A affirming 'the natural and imprescriptible rights of all children' and the state's duty by its laws to 'protect and vindicate those rights', or Article 40.3 imposing a duty on the Irish state to 'respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen' which may be read so as to safeguard future rights in peril due to climate change. Particularly, the special position of children's rights within the Irish Constitution highlights the idea that present and future children should be able to enjoy 'natural and imprescriptible rights' throughout their life. Although conceptually difficult, the provision clearly extends rights to all children, justifying an interpretation which includes as yet unborn children. Such an interpretation might further be justified regarding binding EU legislation. Future generations are mentioned in the preamble of the Charter of Fundamental Rights of the European Union, which lays down the most important personal freedoms and rights enjoyed by citizens of the EU. The Charter provides for similar rights under Article 24 as the Irish Constitution, highlighting the right to 'such protection and care as is necessary for their well-being'. Read in conjunction with the preamble, this might be extended to future generations, which in turn influences the interpretation of the Irish provision as the Charter is a legally binding document. Finally, this indicates that the Irish Constitution provides for the identification of an

[43] ibid [9.5].

intergenerational justice doctrine which operates as an unenumerated right.

The recognition of an intergenerational justice doctrine, in turn, assists in introducing a general unenumerated right to a healthy environment, giving the right an updated rationale, indicating that it would neither be 'superfluous' nor 'excessively vague'. It would not be superfluous because when looked at in conjunction with an 'unenumerated constitutional commitment to intergenerational solidarity,' the right to a healthy environment would exceed the rights to life and bodily integrity. While the 8th Amendment of the Irish Constitution provides the right to life to a particular unborn child, there is no provision that provides the rights to life or bodily integrity to future generations.[44] An 'unenumerated constitutional commitment to intergenerational solidarity' would thus guarantee additional rights to the rights to life and bodily integrity, indicating that it would not be redundant. Importantly, the extension of rights to future generations must be inherently founded on 'justice' and 'solidarity', as otherwise extending all rights might have suboptimal outcomes. Conferring, for example, a broad right to life upon future generations may be very difficult, especially considering the status of stem cell research, freezing embryos and other medical practices. However, by conditioning the application of the doctrine on whether it is just and solidary, its scope is restrained to those situations where conferring future rights has a benefit for society as a whole. This indicates that the right to life might still be upheld if it is beneficial to society as a whole, for instance in situations where the government would have to protect people from cancerous substances which may impact gene mutation and cause diseases in future offspring.

[44] 8th Amendment, Bunreacht na hÉireann.

Additionally, vagueness is rejected on the basis that the intergenerational justice doctrine proposes concrete rights and environmental standards to be enjoyed by future generations, limited to 'environmental quality enjoyed by current generations', setting a measurable scope for a right to a healthy environment.

Ultimately, the analysis above establishes the usefulness of the doctrine in identifying new constitutional rights under the Irish Constitution, which would reflect the continuous development and advancement of society and enable the law to react to current challenges of climate change. The doctrine creates a novel connection between constitutional provisions and the dangers of climate change. Thus, an intergenerational justice principle within Irish law would have the potential of turning the unenumerated rights concept into a powerful tool to protect the planet by giving rise to new rights to safeguard the environment from a human-centred perspective.

II. Practicability of Unenumerated Rights for Intergenerational Justice

While the Irish constitutional context is unique, involving the unenumerated rights doctrine, similar doctrines operate in other common law jurisdictions. In Australia, the High Court has progressively established rights that are said to be implied by the very structure and textual form of the Constitution, including the right to freedom of communication on political matters[45] and a limited right to vote.[46] Further, in the US the Supreme Court has historically found unenumerated rights to travel,[47] vote,[48] and

[45] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[46] *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[47] *Ward v Maryland* 79 US 418 (1871); The *Slaughter-House Cases* 83 US 36 (1873); *United States v Harris* 106 US 629 (1883).
[48] *Shelby County v Holder* 570 US 529 (2013).

keep personal matters private,[49] indicating that the findings from the Irish jurisdiction are identifiable and perhaps transferable throughout the common law world. Thus, while the proposed approach may only work in jurisdictions with similar constitutional provisions, many common law jurisdictions in fact provide for a mechanism akin to the Irish unenumerated rights doctrine, demonstrating great potential for the operation of an intergenerational justice doctrine in conjunction with unenumerated rights.

B. A Constitutional Rights Approach – Germany: Constitutional Complaints against the Climate Protection Act

The case concerns a historic decision handed down by the German Federal Constitutional Court (FCC), inferring a duty from the German Constitution to provide effective climate protection. It involved four constitutional complaints alleging that the German state has not created sufficient regulations for the reduction of greenhouse gases (GHGs). Acknowledging the plaintiff's complaint, the Court declared part of the German Federal Climate Change Act 2019[50] (the Act) unconstitutional because it could not achieve the necessary CO2 reductions to keep global warming below a two-degree increase, a requirement of the Paris Agreement, and unjustly delegated the responsibility of making economically and socially painful sacrifices to future generations.

The claimants argued two points. Firstly, that the 2019 Act omits the creation and fulfillment of CO2 reduction goals

[49] *Griswold v Connecticut 381 US 479* (1965).
[50] 'Klimaschutzgesetz',<https://www.gesetze-im internet.de/ksg/BJNR251310019.html> accessed 12 October 2021.

beyond 2030 and moreover, that it allows for excessive CO2 emission until 2030. This carries the reduction burden unduly forward beyond 2030, which would jeopardise the freedom of the younger generation and future generations, as indicated by scientific evidence of the impacts of surpassing a 1.5 degree increase threshold.

Declaring the Act partly unconstitutional, the FCC held that the 'legislator has violated fundamental rights because it has not taken sufficient precautions to cope with the potentially very high emission reduction obligations … in a manner that does not violate fundamental rights.'[51] Importantly, the Court found no fault with the emission budgets set prior to 2030, so long as these are substantiated by the possibility that the set 55 per cent reduction requirement achieves the two-degree goal and that, after 2030, sufficient and not overly burdensome measures are taken.[52] However, the First Senate of the FCC found Articles 3(1) and 4(1) of the Act, which refer to the lack of any measures from 2031 until the time of climate neutrality required by Article 20a of the Basic Law, to be unconstitutional[53] as the carbon budget will be almost entirely depleted by 2030.[54]

Ultimately, the FCC clarified that the current German policy of 'kicking the can down the road' is a violation of the constitutional rights of younger generations.[55] It obligated the

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[51] Constitutional complaints against the Climate Protection Act 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 2021 [182].
[52] ibid [166]–[168] and [242].
[53] ibid [266].
[54] ibid [231] –[233].
[55] Frank Biermann, 'Germany's climate law ruled unconstitutional: First reflections' May 2021 <https://www.frankbiermann.org/post/germany-s-climate-law-ruled-unconstitutional-first-reflections> accessed 12 October 2021.

Government to rewrite the Act in order to create a coherent system to reach the goals under the Paris Agreement, facilitating an equal burden on generations.[56] In response to this, the Government has since passed a new and more ambitious law.[57] The tightening of the reduction path in the legislation comes as little surprise, making it considerably easier, if not possible at the outset to shape the path to climate neutrality after 2030 in conformity with fundamental rights.[58]

I. An Intergenerational Justice Doctrine within German Constitutional Law

The judgment is ground-breaking not only because it advances German climate protection but because of the novel legal principles that the FCC applied. One of these is the introduction of future fundamental rights for younger generations, clearly showcasing the development of an intergenerational justice doctrine and its potential to incite constitutional rights.

Intergenerational justice has previously been envisaged in the German legal tradition, exemplified by Article 20a of the Basic Law enshrining protection of natural livelihood, mentioning the German Government's 'responsibility for future generations'.

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[56] Constitutional complaints against the Climate Protection Act (n 51) [192].

[57] Article 3, Federal Climate Change Act (n 50).

[58] Holger Schmitz, 'Climate compliance: After the German Federal Constitutional Court and the District Court of The Hague, ECJ increases pressure to act' (June 2021) <https://www.noerr.com/en/newsroom/news/climate-compliance-after-the-german-federal-constitutional-court-and-the-district-court-of-the-hague-ecj-increases-pressure-to-acthttps://www.noerr.com/en/newsroom/news/climate-compliance-after-the-german-federal-constitutional-court-and-the-district-court-of-the-hague-ecj-increases-pressure-to-act> accessed 17 December 2021.

In the case at hand, the court relied expressly on an intergenerational analysis substantiated by a vivid illustration of the extensive restrictions of freedom that will be necessary in the near future if emissions trends are sustained at current levels. The right to life and bodily integrity[59] must be read in conjunction to the right to protection from impairment from environmental pollution, and from a unilateral shift of the greenhouse gas mitigation burden to the future,[60] entrenched in the German Constitution under Article 20a. The Court thus clarified that 'it follows from the principle of proportionality that one generation should not be allowed to consume large parts of the CO2 budget under a comparatively mild reduction burden if, at the same time, future generations are left with a radical reduction burden and expose their lives to severe loss of freedom.'[61] We must act now in order to preserve future freedoms, which will otherwise be 'curtailed suddenly, radically and without replacement'.[62] By putting forward this intergenerational justice narrative, the Court identifies a 'fundamental right to intertemporal freedom protection' embedded within the German Constitution.[63] The judges clarify that 'the state's duty to protect [its citizens] under Art.2(2) is not only to intervene when violations have already occurred but is also directed towards the future.'[64] In practical terms, the protection of future freedom demands that the transition to climate neutrality be initiated in good time.[65] Ultimately, the intergenerational justice doctrine assists in creating

[59] Article 2, Basic Law for the Federal Republic of Germany.
[60] Article 20a, Basic Law for the Federal Republic of Germany.
[61] Constitutional complaints against the Climate Protection Act (n 51) [192].
[62] ibid [253].
[63] 'Grundrecht auf intertemporale Freiheitssicherung'.
[64] Constitutional complaints against the Climate Protection Act 1 (n 51) [146].
[65] ibid [248].

a novel constitutional right, indicating that Germany's Basic Law imposes a special duty of care on the legislator to ensure that future generations can enjoy the same rights as past generations.[66]

A 'fundamental right to intertemporal freedom protection' involves the protection against a unilateral shift of the GHG reduction burden imposed by Article 20a of the Basic Law to the future. As part of the Basic Law, these provisions must only be derogated from by law if the law applies generally and not only to an individual case. In no case may the essence of the fundamental right be affected.[67] As fundamental rights must be contemplated in every policy decision and every legislative act, the introduction of this new right into the German Basic Law provides strong protection to the environment as a corollary of protecting future generations' rights to a liveable planet.

On a different note, by inferring a fundamental right to efficient climate protection from Article 20a, entailing an attribution to intergenerational justice by referring to state's responsibility to future generations, the court elevates the Article to a 'justiciable legal norm that should bind the political process in favour of ecological concerns, also with a view to future generations'.[68] Thus, Article 20a has explicit legal consequences and every citizen can put the legislator's climate protection measures to the test before the Federal Constitutional Court.[69] This provides for a broad right to standing before the German Courts and further indicates the usefulness of intergenerational justice as a tool to newly rationalise existing legal principles.

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[66] Anna-Julia Saiger, 'The Constitution speaks in the Future Tense' April 2021 https://verfassungsblog.de/the-constitution-speaks-in-the-future-tense/ accessed 19 December 2021.
[67] Article 19, Basic Law for the Federal Republic of Germany.
[68] Constitutional complaints against the Climate Protection Act (n 51).
[69] Holger Schmitz, (n 58).

Ultimately, the above analysis confirms that an intergenerational justice doctrine within German Constitutional Law has the potential to incite new constitutional rights and novel operations of the law, confirmed by the Federal Constitutional Court. In such a way it contributes to overcoming common issues within climate litigation.

II. Practicability of Explicit Constitutional Provisions for Intergenerational Justice

The operation of the doctrine within Irish and German constitutional law is promising and such a doctrine may assist in providing novel rationales to incite new (constitutional) rights. Regarding the German case, although the operation of the doctrine is specific to German Constitutional law, similar provisions regarding the rights to life and physical integrity, and protection from impairment from environmental pollution, exist in other constitutional contexts. The very first Constitution to protect environmental rights was Portugal's, stating that 'everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.'[70] Other examples for constitutional environmental protection can be found in the Colombian and the Kenyan Constitutions.[71] This indicates that principles established in the German case might be applied more widely.

Considering whether it is preferable to read the provision into existing protection of rights or whether it is better for the right to be created and protected by the courts, explicit constitutional provisions might be more desirable. They offer greater protection to future generations as they allow for more

[70] Constitution of Portugal (1976), Article 66

[71] Constitution of Colombia (1991), Article 79; Constitution of Kenya (2010), Article 42(a).

certainty that rights will be safeguarded by providing for explicit constitutional provisions which can be pointed to and relied on in court. Further, it possible for them to be treated as having a wider scope as they have an expressed footing in the Constitution, the most superior legal document in most jurisdictions, and courts might be wary to give extensive protection to rights created without any input from the legislature.

The adoption of a resolution on the right to a clean, healthy, and sustainable environment by the UN Human Rights Council, the first formal recognition of this right at the global level, might further incentivise governments to include explicit provisions in their national constitutions. However, it is acknowledged that changing constitutional provisions is one of the most difficult and onerous endeavours in most jurisdictions. Countries are generally unlikely to implement major constitutional change by amending their constitutions or bills of rights because of a UN resolution, as these are mostly non-binding. Further, most countries do not have governments willing to use their parliamentary majorities to push these amendments through and, even if they do, this would require extensive public debate, which hardly ever achieves the desired results for the environment due to powerful industrial and agricultural lobbies. This indicates that reading rights into existing provisions, despite its limited application, might ultimately be more practical.

Ultimately, the intergenerational justice doctrine is very useful in a right-based context, sustaining existing provisions and allowing for the creation or expansion of intergenerational rights which can be used as a tool to further climate litigation.

C. A Tort Law Approach – Australia: *Sharma v Minister for the Environment* (2022)

The case concerns a recent decision by the Federal Court of Australia on an action brought against the Commonwealth Minister for the Environment by eight Australian children. The applicants argued that the defendant owes them, and other Australian children, a duty of care, which would be breached if the Minister approved the expansion of mining production of the coal company Vickery Coal Pty Ltd, as this would lead to an extra 100 million tonnes of carbon dioxide being produced.[72] Under Sections 131(a) and 133 of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC) the Minister for the Environment has discretion to approve or reject said mining operation.[73] The applicants argued that the expansion would cause them harm, as the additional carbon dioxide would accelerate global warming, which directly impacts their physical, mental, and economic wellbeing in the proximate future and would thus breach the Minister's duty of care under Australian laws of negligence.[74] On this basis, the children contented that they are vulnerable to a 'known, foreseeable risk of serious harm, which the Minister can control, but they cannot', seeking an injunction to stop the expansion.[75]

The applicants argued that a novel duty of care arises as a natural extension of the historical development of the law of tort. This would make a person responsible for harm who has the ability to cause or control such harm to their 'neighbour'.[76] Such a duty arises because today's adults have a previously

[72] *Sharma v Minister for the Environment* [2021] FCA 560 [7].
[73] ibid [9].
[74] ibid [11].
[75]ibid [12].
[76] *Sharma* (n 72) [14].

unimaginable power to harm future generations, and an equally unprecedented ability to control such harm.[77]

In the Federal Court (FCA), Bromberg J accepted that a duty of care was owed to the Australian children by the Minister for the Environment, obligating the respondent to take reasonable care to avoid physical harm when making decisions under the EPBC. The judgment is grounded in the vulnerability of Australian children as well as an acknowledgment of a special relationship between the applicants and the defendant. The Court also found that the imposition of a duty of care does not overstep judiciary boundaries of the separation of powers. The FCA held that the existence of the relationship in the case at hand is justified by observing that 'common law jurisdictions have historically identified, and [Australian] courts continue to identify that there is a relationship between the Government and the children of the nation, founded upon the capacity of the Government to protect … the special vulnerability of children.'[78] The Court ruled that children's vulnerability is negatively affected by the lack of action on climate change by the Minister.[79] Nevertheless, an injunction to stop the expansion of the mining project was denied,[80] as the applicants failed to satisfy the Court that the balance of convenience lies with granting the injunction, due to

[77] ibid [14].
[78] *Sharma* (n 72) [311].
[79] Noam Peleg, 'Has the Federal Court put the heat on the Environment Minister over climate change and children's rights?' June 2021 Australian Human Rights Institute UNSW <https://www.humanrights.unsw.edu.au /news/has-federal-court-put-heat-environment-minister-over-climate-change-and-childrens-rights> accessed 12 October 2021.
[80] *Sharma* (n 72) [510].

insufficient certainty as to whether the Minister will in fact breach her duty of care.[81]

In March 2022 the Full Federal Court of Australia (FCAFC) rejected this duty of care on the basis that 'the relationship that founds the duty is one between the government and the governed and lacks the relevant nearness and proximity necessary for the imposition of a duty of care.'[82] The absence of proximity was based on the lack of special vulnerability and reliance, holding that the children's reliance is merely based on the expectation of good government, identical to that of all other Australians.[83] Two further 'features' of the proximity issue were indeterminacy of the class of likely vulnerable victims,[84] and the lack of control of the harm, and liability for climate damage.[85] Citing the lack of proximity as the core reason for rejecting the duty of care, the Court also stated that such a duty is unsuitable for judicial determination and must be decided by the legislature given that it involves 'core government policy considerations'.[86] Lastly, the duty would create a form of mandatory consideration beyond the considerations in respect of the decision in question provided for by the EPBC Act on its proper construction.[87]

I. Intergenerational Justice in Australian Tort Law

The decision of the FCAFC is not only regrettable because it puts an enormous damper on climate litigation efforts, but also because it limits the operation of an intergenerational justice

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[81] ibid.
[82] *Minister for the Environment v Sharma* [2022] FCAFC 35 [344].
[83] ibid [340].
[84] ibid [747].
[85] ibid [343].
[86] ibid [247.]
[87] ibid [268].

doctrine within the law of tort, advocated for by the previous judgment.

Despite the decision, attention to intergenerational justice may be observed within Australian legal tradition more broadly. The EPBC itself has a clause referring to the importance of intergenerational equity, relied on by Bromberg J in the FCA when he states that the climate crisis 'is to fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next'.[88] An intergenerational justice doctrine would therefore be introduced in the Australian context not on a rights basis, as is the case in Ireland and Germany, but rather based on the duty to uphold domestic legislation, namely 'that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations', as specified by section 3A(c) of the EPBC.

The mechanism used by the Australian Court at first instance to incite climate action through intergenerational justice is the law of negligence, determining a duty of care between current generations and future generations to allow for equal opportunities, quality and access to environmental resources. The FCAFC judgment denies this expansion of negligence principles by holding that not all necessary ingredients for a duty of care are present. However, it is submitted that had the Court put more emphasis on intergenerational justice the imposition of a duty of care would have potentially been attainable. Importantly the Australian judges recognise that a duty can be imposed without damage,[89] and showed comfort with the issue of reasonable foreseeability in this context, holding that the increase in risk of

[88] *Sharma* (n 72) [292].
[89] *Sharma* (n 82) [268].

harm from the Act cannot be seen to be so small that it is not reasonably foreseeable.[90] The main problem regarding establishment of a duty of care was that of necessary proximity between the parties,[91] based on the relationship between the parties, described as 'being one between the governing and the governed in a democratic polity'.[92]

It is submitted that an intergenerational justice doctrine may create rationales to overcome the proximity issues of sufficient closeness and directness.[93] Contemplating the safeguarding of environmental quality for future generations to enjoy the same freedoms as current ones, closeness might be established by creating a link between current governments and individuals who are members of future generations, making current generations responsible for future ones. An intergenerational justice doctrine creates specific rights to option, quality and access, which may have the potential to create the necessary link between current governments and individual members of future generations which has been declared missing by the FCAFC. Thus, the neighbourhood principle might be invoked based on the rights created by an intergenerational justice doctrine. Viewing future generations as the 'neighbour' under the law of negligence, one must take reasonable care to avoid acts or omissions that could reasonably be foreseen as likely to injure them.[94] Current generations must act as 'reasonable persons' would in a similar situation, to ensure future generations enjoy the same rights as former generations.[95]

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[90] ibid [329].
[91] ibid [344].
[92] ibid [232].
[93] *Donoghue v Stevenson* [1932] AC 562 (HL) 580–581 (Lord Atkin).
[94] ibid.
[95] ibid.

However, it is doubtful whether the doctrine could entirely alleviate proximity issues as it is difficult to imagine how it addresses the lack of control over climate change and the lack of vulnerability and reliance also cited by the FCAFC. It is rather unlikely that it can overcome the Court's argument that simply being alive at the time the harm might come to pass is not sufficient to establish proximity. Moreover, such an extensive expansion of tort law might also be unjustified. For example, it entitles private individuals to completely remote claims, acting on behalf of future generations. Further, extending proximity to all as yet unborn generations makes the requirement of proximity redundant, indicating that while it is a rather stringent requirement regarding any other tortious claim, it would be essentially eliminated. This would lead to imposing a general duty of care relating to environmental issues, a massive and unjustified expansion of the current law.

The FCAFC itself emphasises, however, that the principle of proximity 'in [its] present form may have reached [its] shelf life, particularly where one is dealing with acts or omissions that have wide-scale consequences that transcend confined temporal boundaries and geographic ranges',[96] indicating potential receptiveness for the intervention of intergenerational justice to amend currently rigid legal principles, though this would require an inherent restructuring of the law of tort to avoid the difficulties described above and is therefore rather unlikely.

This confirms that the current principles make tort law an inferior approach to the rights-based approach used in Germany and Ireland. The case is currently under appeal to the High Court, indicating that there is a slight possibility that the

[96] *Sharma* (n 72) [754].

previously identified duty of care to the Australian children might still be upheld.

II. Practicability of Tort Law for Intergenerational Justice

Distinctions must be made regarding the usefulness of the doctrine within different legal contexts. From the analysis adopted in this article, it is submitted that the doctrine may be less applicable in tort law, which is regrettable as tort law has a similar structure in most common law jurisdictions, indicating that a principle based on tort could have far-reaching effects in advancing climate change litigation. Although the principle may assist in overcoming the hurdles of foreseeability and causality the FCAFC made a compelling case that it will be difficult to meet the proximity requirement of a duty of care, even with the help of the intergenerational justice doctrine. Here the German and Irish rights-based approaches yield significant advantages.

Lastly, obtainable remedies provide that a rights-based approach is preferable. Although tort claims have the advantage that they can be brought against private individuals, the default remedy is damages and in very exceptional cases an injunction. Damages are only of limited use in the environmental context as natural destruction cannot be reversed with financial means. Instead, an appropriate remedy must end harmful practices, mandate future improvements and ensure progressive change towards a more sustainable world. Rights breaches can allow for such remedies. If a practice is found to have breached rights, then it must be reviewed and amended so as to be rights compliant. Thus, available remedies further indicate the superiority of a rights-based approach.

Ultimately, this suggests that the answer to the wider application problem is that countries should adopt either the Irish

or German approach depending on which is closest to their constitutional order. Such an approach has proven successful in sustaining existing rights by allowing for a new intergenerational justice rationale, leading to the creation of additional rights. Having a distinct intergenerational character, such rights inherently advance climate litigation in order to allow for the conservation of option, access and quality.

3. Assessment

A. The Potential of an Intergenerational Justice Doctrine

The preceding cases prove intergenerational justice is increasingly related to climate change issues both within the general society and from domestic courts. This heightened attention supports the introduction of an intergenerational justice doctrine into domestic litigation, where it would operate in conjunction with existing legal principles to ensure sufficient environmental quality for future generations to enjoy the same rights and freedoms as current generations. Several courts, such as the German Constitutional Court, have expressly stated the existence of such a doctrine in national law and applied it in litigation. While the solutions of the three courts are conceptually and fundamentally different, and are thus not interchangeable in the substantial solutions that they offer, it remains useful to consider their cumulative impact in offering insights regarding the potential of a general intergenerational justice doctrine for the advancement of domestic climate change litigation, especially by addressing common issues within litigation.

First, intergenerational justice can address issues of causation by connecting two formally remote parties. For example, causational issues within climate change litigation arose in *Kivalina v ExxonMobil,* where the District Court of the Northern District of California stated that the claimants were unable to demonstrate either a 'substantial likelihood that ExxonMobil's activities had caused the plaintiffs' injuries or that the 'seed' of their injuries was 'fairly traceable' to the defendant's GHG emissions.[97] Thus, the case was dismissed, indicating the importance of resolving issues of causation to conduct successful climate litigation. An intergenerational justice doctrine may resolve these issues of causation by fostering a new relationship between the parties through the imposition of rights, such as in the German and Irish cases. Rights to 'option,' 'quality', and 'access' imposed by intergenerational justice expressly link environmental destruction inflicted by current generations to damages incurred by future generations. This link alleviates showing causation on the necessary balance of probabilities as environmental damage can be attributed to current generations more easily by simultaneously engaging future generations rights. Thus, this highlights one instance where an intergenerational justice lens assists in overcoming issues of past climate litigation.

Further, intergenerational justice can address issues of apportionment and quantification of damage. It leads the court to embrace climate change as a 'multiscale environmental problem with both particular and localised impacts, as well as broader global ones'.[98] Shifting the focus from an abstract 'global environment' to a concrete regional or local living space of future generations, a doctrine assists in alleviating the 'drop in the ocean'

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[97] *Native Village of Kivalina v. ExxonMobil Corporation, et al.* No. 4:08-cv-01138 (ND Cal) 2009.
[98] Peel (n 8) 17.

issue. This act of assertively quantifying climate change impact is sufficiently demonstrated within the Australian Federal Court judgment, where the plaintiffs showcased specific future impacts on the climate in Australia, citing increased flooding in Northern New South Wales and magnified bushfires, partly caused by the mining project identified in their complaint. The German Constitutional Court expressly addressed the issue of minimal impact on the state level, establishing that a 'state could not evade its responsibility by referring to higher greenhouse gas emissions in other countries',[99] but instead must take responsibility for its population's emissions and local impacts. Thus, an intergenerational justice doctrine may assist in determining the particular scope of climate damage an actor should be responsible for by defining a concrete standard of environmental quality, one that facilitates the enjoyment of the same freedoms for future generations as enjoyed by current ones and practically applying this to a local living space.

Lastly, indirect reciprocity, upon which the intergenerational justice doctrine is founded, introduces a different view as to whether a party has standing. It suggests that a rigorous step-by-step proof of causal chains between greenhouse emissions and particular climate change impacts in order to uphold claims is unnecessary to prove that a claim is actionable. Such an approach led to the failure of many climate change cases, including for example the *People's Climate Case* where the European Court of Justice denied standing to challenge the EU's climate targets, rejecting that the applicants' occupations made them particularly affected by climate change.[100] Under the

[99] Constitutional complaints against the Climate Protection Act (n 51) [203].

[100] People's Climate Case (Litigants' website) <http://www.peoplesclimatecase.caneurope.org> accessed 17 March 2022.

intergenerational justice doctrine, standing might be justified simply by involving future generations' rights to option, access and quality, loosening standing rules for those seeking to advance climate protection today. In the German case, by rendering environmental protection for future generations a 'matter of constitutional concern', the Court declared that Article 20a grants a subjective right, conferring the legal power on an individual to assert his or her legitimate interests for her own protection and extending the right to efficient climate protection to every citizen, allowing claims on behalf of damage to future generations. Overall, intergenerational justice provides a narrative to show adverse effects by a statute or action and thus alleviates standing. This also aligns with the precautionary principle within international environmental law, providing a fundamental policy basis to anticipate, avoid and mitigate threats to the environment as delaying action until there is compelling evidence of harm will often mean that it is then too costly or impossible to avert the threat.[101] NGOs or individuals must be able to try important cases today before it is too late to protect future generations' rights. Thus, putting future generations into the focus of litigation assists in overcoming traditional standing issues.[102]

This analysis indicates that an intergenerational justice perspective has great potential to solve current issues of climate change litigation and thus might be the key for strong judiciary climate activism. The introduction of the doctrine may provide new rationales to existing legal principles, including those in tort and constitutional law. Overall, by shifting the focus of climate change measures towards an anthropocentric worldview, the

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[101] See <https://www.iucn.org/sites/dev/files/import/downloads/ln250507_ppguidelines.pdf> accessed 17 December 2021.
[102] Peel (n 8) 20.

doctrine incites more effective action, as it connects environmental destruction to humans, instead of referencing it as an abstract threat, inciting more judicial will to combat climate change. The doctrine has great potential, and it will be interesting to follow its development in litigation around the world and perceive whether it activates the rather reserved judiciaries internationally.

B. Remaining Issues within Climate Litigation

One issue that remains is that of judicial overreach regarding environmental policymaking. Allsop CJ in *Sharma* adequately captured this point, asserting that 'the role of the Judicial branch of government is to quell controversies between citizens or the state and citizens on the basis of evidence tendered by the parties, not on the basis of policy formulation by the court.' However, while this poses an issue for future climate litigation, Bromberg J has conversely expressed that such 'a political controversy can never provide a principled basis for a Court declining access to justice.'[103] Adopting the German approach would also somewhat remedy this issue as in this scenario rights are explicitly conferred by the Constitution. However, the courts are still in a position to confer broad interpretative meanings on such rights, which might be perceived as straying outside their competence.

Judicial climate interference is crucial as 'court cases are perhaps the only way to break through the political apathy about climate change.'[104] While it is arguable that necessity indeed justifies that the courts overstep their competence, it must also be

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[103] *Sharma* (n 83) [484].

[104] Jaap Spier, 'A ground-breaking judgment in Germany' May 2021 Climate Law Blog <http://blogs.law.columbia.edu/climatechange/2021/05/10/guest-commentary-a-ground-breaking-judgment-in-germany/> accessed 12 October 2021.

noted that, similarly to legislatures, courts provide a public forum for affected persons to have their concerns heard and resolved.[105] They have a duty to determine justiciable climate change claims, as opposed to the political branches of government, which often brush public concerns aside. Courts might thus assist in the progressive and principled development of climate change law and policy by creating legal precedent for more ambitious policies, building a 'common law for the environment'.[106] Taking the points raised by the court in *Sharma*, it is submitted that to be justified in making decisions that might look like policy, the courts must make reference to legal standards when engaging with climate change issues.[107]

Conclusion

Climate litigation is a sincere means of vindicating normative climate commitments, forcing governments to review their policy priorities. The three recent judgments examined in this paper shed light on developing momentum within domestic climate change litigation towards an intergenerational justice doctrine. This article has highlighted that such a doctrine has the potential to solve important issues that plaintiffs in climate cases currently face. Thus, it is the key to a new era of climate change litigation in which currently reserved national judiciaries raise to be a major forum for climate action. However, considering the recent

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[105] Brian Preston, 'The Role of the Courts in Tackling Climate Change' (2016) 28 Journal of Environmental Law 11, 12.
[106] ibid 15.
[107] *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, 200 CLR 1 [87] (McHugh J, Gleeson CJ agreeing).

judgment of the FCAFC, the article also finds that such a doctrine is more effective within some legal contexts than others, finding in favour of a rights-based approach, using the doctrine to sustain existing rights and create new rights as proposed by both the German and Irish courts.

The intergenerational justice doctrine may also have wider implications and be applied to various other vital concerns of earth system governance, such as the current depletion of biodiversity, or developed further by accounting for intra-generational justice, between the global north and south. The doctrine can be construed broadly, and it is well-suited to bring climate activism from the streets into the courtrooms.

Is Consent Adequate for the Evaluation of Sexual Activity?

Jaime Teo*

Abstract— The central thesis of this article is that sexual activity has a 'special expressive aspect' which affects the concept of consent as a metric for evaluating sexual activity. In his analysis of the notorious case of *R v Brown*, Jonathan Herring appears to suggest that there may be certain types of BDSM which should be criminalised despite the genuine consent of the parties involved. This article relies on the simple idea that one generally cannot consent to harm caused to *another*. Thus, if it is shown that BDSM (or a sub-category thereof) causes harm to third-parties who have not themselves consented to being so harmed, then there is a good reason for such BDSM to be criminalised. This article suggests that *certain* types of BDSM meet this criterion; namely, BDSM that is centred on the oppression of women, members of certain races or religions, members of the LGBTQ+ community, etc. This article first argues that sex (and other forms of sexual activity) has a widely understood social meaning, rendering it a potent tool of expression. In this context, the effect

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of oppression-themed BDSM is not only to trivialise and glorify oppression in the minds of the parties who choose to engage in the BDSM themselves, but also in the minds of members of society at large. In anticipation of the objection that the 'special expressive aspect' of sexual activity is too restrictive of sexual autonomy, it is also argued that conceptualising sexual activity as a potent tool of expression has its liberating effects, especially in 'advance consent' cases.

Introduction

It seems obvious that consent plays an important role in the regulation and social perception of sexual activity. Somewhat provocatively, then, John Gardner wrote:

> Consent, it seems to me, has been expected to do far too much work in the sexual mores of our age. That some sexual encounter was 'between consenting adults' is widely taken to be the only judgment we need, and indeed are entitled, to make. Everything else is sexual taste, and (so they say) there's no accounting for taste. Taking consent to be the only legitimate currency for the evaluation of sex puts the concept under a lot of pressure to do a lot of work.[1]

The question is then whether consent is adequate as a currency for evaluating sexual activity. The first possibility – that it is *sufficient* – is dismissed quickly in Part 1. This leads to the second possibility – that it is *necessary but not sufficient*, because 'something more' is needed. One candidate, as hinted at by Gardner's quote, is the acceptability of sexual tastes. In Part 2, I endeavour to explain why this may be true in certain limited circumstances where sexual activity, despite being intensely private, can still cause serious harm to a community. To this end, I will argue for the 'special expressive aspect' of sexual activity. In case it is thought that this would be too great an infringement of sexual autonomy, I demonstrate in Part 3 that this 'special expressive aspect' has liberalising implications as well. This is done mainly as a response to Gardner's argument that parties who have made an advance agreement to engage in sex necessarily are

[1] John Gardner, 'The Opposite of Rape' (2018) 38 Oxford Journal of Legal Studies 48, 58-59.

precluded from achieving its 'regulative ideal' (i.e. sex-as-teamwork). This argument featured ancillary to the main thesis in Gardner's article, which was that consent was *neither necessary nor sufficient* for the evaluation of sexual activity, because it presupposed a power imbalance between sexual partners. This then explains why I have divided my essay into three sections, discussing the three possibilities about the necessity and sufficiency of the concept of consent. It should, however, become apparent that this division was drawn in the interests of tidiness more than anything else. My focus is rather on the 'special expressive aspect' of sexual activity, which I argue is capable of both restricting and enhancing sexual autonomy.

1. Consent as Necessary and Sufficient

A person who may otherwise have committed an offence under the Sexual Offences Act 2003 will usually avoid committing said offence if the complainant consented to whatever it is that the defendant did (although sexual offences against children are exceptional in this regard). Under section 74 of the SOA 2003, a person consents only when they agree by choice and have the freedom and capacity to make that choice. It is possible to interpret Gardner's remark (that consent 'has been expected to do far too much work') as targeting the *definition* of consent; as an argument that the formal conditions of consent do not match the actual conditions of consent.

I do not wish to replicate the various arguments against minimalist definitions of 'consent' but will explain briefly one reason why a rich definition of consent is called for, but also show that attempting to develop such a definition tends to generate

much controversy. Consider cases where the complainant argues that their consent is negated by the fact that they were pressured into giving it. The 1981 *Olugboja* judgment established a spectrum of pressure in which 'reluctant acquiescence' would amount to valid consent while 'mere submission' would not.[2] The stakes become even higher when we realise that defining consent in a sufficiently robust manner could help to address the problem of domestic abuse, where psychological manipulation of victims leads them to believe that they *deserve* to be treated abusively,[3] and can dispose them towards accepting violent sexual activity. But the line between 'reluctant acquiescence' and 'mere submission' is notoriously hard to draw in practice.[4] For example, patriarchal cultures generate expectations that women should agree to sexual activity with men, and that men should want to engage in sexual activity with women, but social pressures of this kind are so pervasive that criminalisation would border on ridiculousness.

Without commenting on how exactly consent should be defined, I conclude this section by noting that the lack of consensus regarding the concept does not preclude a meaningful discussion on its broader role within the framework of regulating sexual activity. That is, it is possible to identify issues regarding consent that are independent of its exact definition. These are the issues to which I now turn.

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[2] *R v Olugboja (Stephen)* [1982] QB 320, 332.

[3] Evan Stark, *Coercive Control* (Oxford University Press 2009) 363.

[4] Rebecca Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2008) 124 Law Quarterly Review 132, 156. Williams also suggests that this may explain why Parliament has created evidential presumptions in certain circumstances where force has been used or threatened, making it easier for the jury to reach conclusions.

2. Consent as Necessary but Not Sufficient

Even if consent could be defined to the perfect degree of nuance and richness, some critics may still be unsatisfied. The problem as they view it is that no matter the standard of consent there are still further conditions that need to be satisfied before certain kinds of sexual activity can be justified. In this section, my aim is to address the possibility of having 'appropriate' or 'acceptable' sexual tastes as a condition additional to consent in the evaluation of sexual activity. My focus is on sexual activity involving bondage, dominance, or sadomasochism (hereon 'BDSM'), although it is anticipated that my argument will be applicable to other types of sexual activity (such as prostitution).

A. Consent and the Utilisation of that Consent

One argument that consent should be regarded as insufficient in BDSM cases is based on the operation of consent as conceptualised by Michelle Madden Dempsey, rather than the perceived immorality or harm of BDSM. This is an attractive position to take, since it relies on the formal mechanism of consent and avoids controversial argument about BDSM itself. I regard Madden Dempsey's account of how consent works as highly plausible, but reject the argument against BDSM. Nevertheless, some treatment of the argument is warranted because it emphasises the need to move beyond consent as the fulcrum of liability in sexual offences.

According to Madden Dempsey, consenting grants the consent-recipient permission to exclude from consideration the reasons against conduct that are *grounded in the consent-giver's well-*

being.[5] Since it is a central feature of sadism that it is precisely the pain and harm caused to the other party that motivates the sadist to engage in the harmful conduct, the sadist does not exclude from consideration the reasons grounded in the well-being of their sexual partner, despite the permission to do so. In other words, the sadist engages in conduct with the active intention to *diminish* their partner's well-being. This means that the moral position of (some) sadists are not transformed by the other party's consent, so their sadistic conduct remains unjustified.[6] The argument, then, is that in addition to the *giving* of consent, the recipient must also conduct themself in a way that *actually makes use of that consent*, before sexual activity can be justified. The implementation of this additional requirement is likely to preclude a large proportion of BDSM activities from being justifiable.

If sadists are deliberately disregarding their partner's permission to exclude consideration of their well-being, then we would expect sadists to choose to participate in sadistic conduct regardless of the presence or absence of consent. Far from engaging in such obviously criminal acts, however, consent is regarded as the 'first law' of BDSM.[7] This suggests that BDSM practitioners *do* utilise their partner's consent by disregarding rather than actively trying to diminish their well-being. It is quite easy to see that a masochist may regard a sadist's deliberate exclusion of their first-order well-being concerns from consideration as pleasurable and therefore indirectly beneficial to their well-being. It then becomes difficult to argue that sadists

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[5] Michelle Madden Dempsey, 'Victimless Conduct and the *Volenti* Maxim: How Consent Works' (2013) 7 Criminal Law and Philosophy 11, 20-22.

[6] ibid 24-26.

[7] Monica Pa, 'Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex' (2001) 11 Texas Journal of Women and the Law 51.

actively intend to detract from their BDSM partner's well-being. Taking a more nuanced view of 'well-being' may thus be enough to defeat the suggestion that sadists cannot take advantage of the 'moral magic' of consent.

B. Consent and the Absence of Harm to the Community

Alternatively, Herring identifies a subcategory of BDSM activities which he argues are particularly harmful and should be kept illegal. These are the practices in which participants imitate Nazi-Jew, White-Black, straight-queer, or other oppressor-oppressed roles, which are popular types of BDSM.[8] Herring bolsters his position by pointing out that BDSM practitioners engage in *real* violence (in contrast to fake injuries incurred during dramas and other forms of 'play' acting) and depend on the *real* occurrence of rape, violence, racism, anti-Semitism, homophobia, and so on, to derive pleasure. Oppression-themed BDSM reduces and makes a mockery of victims' sufferings,[9] and can even be conceptualised as an 'appropriation' of their experiences.[10] Notice, however, that *feeling* pleasure at another's pain demonstrates nothing more than bad character, if it does that at all. Yet the criminal law usually punishes people for what they do, not who they are. Thus, one

[8] These were found to be amongst the most common role-playing scenarios for BDSM practitioners. See N Nordling, N Sandnabba and P Santtila, 'Differences and Similarities between Gay and Straight Individuals Involved in the Sadomasochistic Subculture' in P Kleinplatz and C Moser (eds), *Sadomasochism: Powerful Pleasures* (Harrington Park Press 2006).

[9] Jonathan Herring, '*R v Brown*' in Handler, Mares and Williams (eds), *Landmark Cases in Criminal Law*| (Hart Publishing 2017).

[10] ibid 355, citing Susan Hawthorne, 'Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians' (2005/06) 4 J Hate Stud 33, 43.

might prefer to appeal instead to the utilitarian argument that one's consent to being harmed cannot negate the normative force of reasons against conduct that are grounded in harm caused to *another*. But there is a leap from the claim that one feels pleasure at another's past suffering to the claim that one causes actual harm to another. At one point, Herring wonders whether it is possible for the people who engage in oppression-themed BDSM to detach the hateful attitudes espoused during BDSM from the rest of their lives.[11] The contingent nature of this approach, however, still seems to attribute culpability to 'bad character', albeit in slightly modified terms which associate character with dangerousness and risk to society.[12] This form of liability is not of course entirely alien to the criminal law in England and Wales (for example, terrorism-related legislation has been expanded time and time again to widen the scope of pre-inchoate offences, demonstrating the increasing use of preventive justice and risk-based liability),[13] but it remains an outlier. Furthermore, various theoretical models of BDSM raise serious doubts about the validity of the minor premise itself (that BDSM practitioners cannot help but adopt the attitudes they mimic during BDSM activities).[14]

Is it then possible to bridge the gap between feeling pleasure at another's harm and causing actual harm to third-

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[11] Herring (n 9) 353: 'Is it possible to re-enact and play with the values [of objectification, domination and power within society] without adopting those values?'

[12] Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP 2016) ch 5, 147.

[13] Joanna Simon and Lucia Zedner, 'Countering Terrorism at the Limits of Criminal Liability in England and Wales' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2020).

[14] Theodore Bennett, 'Persecution or Play: Law and the Ethical Significance of Sadomasochism' (2015) 24 Soc & Legal Stud 89.

parties? Herring makes this leap[15] by arguing that oppression-themed BDSM reinforces negative messages about oppressed groups in society, thereby contributing to cultures of repression.[16] How? Herring argues that this sort of BDSM is not merely 'bad taste', as may be the case for someone who finds it thrilling to watch rape scenes in a film, because the harm to the victim is being re-enacted (to the extent of spilling real blood) rather than just beheld.[17] Worse, BDSM-practitioners cannot claim to do what they do to secure some future good by educating people on the wrongness of various forms of oppression.[18] (Film-makers may not be able to either, if their films glorify rather than condemn rape, but mainstream films do not usually explicitly endorse any value or pleasure in raping. If they did, then presumably they too would be very objectionable.)

Herring's remarks make a salient point about the potential for those engaging in oppression-themed BDSM to cause external harm. Yet the word 'potential' alerts us to the concern that this risk is too uncertain and open-ended to justify punishment. For some, this worry may be defeated by the argument that we are justified in lowering the threshold of criminal liability on the ground that oppression is a worse harm than murder, rape, theft, and so on. A violent crime against a single member of an oppressed group affects not only the individual victim but also all other members of that group, by generating a fear that they too will be targeted in the future.

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[15] Herring also makes two alternative arguments. First, he uses Madden Dempsey's conceptualisation of consent to make the argument I advanced and rejected above (Part 2.A.). Second, he argues that the risk of domestic abuse may justify criminalisation of BDSM. This is certainly a serious concern but would not apply in 'genuine' BDSM cases.

[16] Herring (n 9) 351.

[17] ibid 354-55.

[18] ibid.

However, this is bound to be an unattractive approach for many people who object to criminalising something on the sole ground that it *could* result in future and remote harm. Thus, in what follows, I attempt to explain why Herring is right (that oppression-themed BDSM reinforces negative messages about certain communities) without relying on this line of argument.

C. Accounting for the Special Expressive Aspect of Sexual Activity

I nonetheless maintain that it is possible to bridge the gap between engaging in BDSM activities (especially oppression-themed ones) and causing actual harm to others. I do not appeal to the notion that BDSM practitioners have bad character, nor that they present a danger to society. Instead, I seek to bolster Herring's claim that BDSM reinforces negative messages about certain groups in people by arguing that sexual activity has near-universal social significance that renders it a potent tool of expression. This, in combination with the particular message being sent by engaging in oppression-themed BDSM, explains why there is a strong case to be made for consent to be regarded as insufficient in these cases.

John Gardner described the familiar picture of penetrative sex as 'a perfect union of two selves through two bodies'.[19] I am hesitant about whether this is genuinely the familiar picture of penetrative sex, but I wholeheartedly agree with Gardner on his point that the familiar picture, regardless of whether it is over-romanticised, generates a social meaning that

[19] John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) ch 1, 22.

becomes attached to the activity.[20] My argument rests on the lesser claim that the social meaning of penetrative sex is one of pleasure derived from engaging in the activity itself. Obviously, some people do not enjoy having sex and some people engage in it for purely instrumental reasons, but the familiar picture of sex is not as such. For the purposes of my argument, I would add that this social meaning attaches not just to penetrative sex but also to a myriad of other sexual activities, though I refrain from setting hard boundaries on which ones exactly.

The social meaning of sexual activity is different from that of most other activities because it is so widely understood: even those that do not themselves find it pleasurable to engage in sexual activities know that other people regard sexual activities as pleasurable. In contrast, while it is possible to conjecture that a person reading a Nazi-Jew BDSM novel holds anti-Semitic beliefs, there are too many alternative meanings (maybe they were reading the book as an educational resource, or maybe they had a morbid curiosity without further endorsing anti-Semitic beliefs) for any significant social meaning to attach to the activity. Perhaps there is also a general perception that one reason (out of the many possible reasons) people engage in sexual activities is that humans have a biological (hormonal) desire to do so. The widespread belief that sexual desire is *fundamental* to being human and that sexual activities are regarded as *pleasurable* activities give rise to a special expressive ability that most non-sexual activities lack. This, in turn, lays the groundwork for me to challenge the view that sexual activity carried out in private spaces can never have public consequences.

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[20] Gardner (n 1) 49. For Gardner, this social meaning is so important that the acts that subvert it, such as rape, also take on greater social significance than other objectifying and non-consensual activities.

My argument has thus far focused on demonstrating that sexual activity is an especially potent vehicle for the reinforcement of negative stereotypes and beliefs about members of oppressed groups. But it is important to elucidate exactly *what* messages are being reinforced, if this is to show that oppression-themed BDSM practices cause actual harm to others. To this end, the points above describing oppression-themed BDSM as appropriating[21] and making a mockery of[22] victims' sufferings are insightful. These criticisms highlight the sense in which oppression-themed BDSM trivialises and normalises the past sufferings of the oppressed. This sends a message – not that BDSM practitioners have questionable tastes, since I have argued that this is irrelevant unless we wish to endorse character- or dangerousness-based liability – but that the persecution endured by members of oppressed groups was 'not *that* bad'. Additionally, oppression-themed BDSM also *subverts* the feelings of horror attached to oppressive regimes by implying that they are instead a source of amusement, thrill, fun, and pleasure. Note here the parallels to Gardner's argument that the especial wrongness of rape comes from the subversion of the familiar picture of good sex into a model of contempt and subordination. Crudely put, Gardner's point is that rape subverts something good into something bad, while my point is that oppression-themed BDSM subverts something bad into something good. Glorification of oppression in this way goes one step further than trivialisation and normalisation, sending a message that the power imbalances between the oppressor and the oppressed are not just things to make light of, but things to *prima facie* aspire towards.

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[21] Herring (n 9) 355, citing Susan Hawthorne, 'Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians' (2005/06) 4 J Hate Stud 33, 43.
[22] Herring (n 9) 354.

Note that the notions of trivialisation, normalisation, and glorification have little mileage in the argument for the criminalisation of oppression-themed BDSM *unless* we account for the expressive aspect of sexual activity. Mocking someone or appropriating their experiences does not harm anyone if it is kept entirely private. But if sexual activity is as powerful a tool of expression as I suggest it to be, then such mockery or appropriation transforms from being a mere reflection of bad character into a something that advances cultures of repression. This, in turn, explains why Herring is right to say that oppression-themed BDSM risks reinforcing negative messages. In other words, it is the trivialisation, normalisation, and glorification of oppression *in combination with* the potent expressivity of sexual activity that enables us to make the leap from the premise that BDSM practitioners take pleasure in another's suffering to the claim that they thereby cause harm to the community.

3. Consent as Neither Necessary Nor Sufficient

I have just argued that sexual activity may not be as private as we think it is, on the ground that it has a special and potent expressivity that has thus far not been sufficiently accounted for in arguments for and against BDSM. My aim was to illustrate, by challenging the view that consent alone is sufficient currency for the evaluation of sexual activity, that sexual activity is capable of sending messages to the community. An obvious concern arises that endorsing this expressive aspect of sexual activity threatens sexual autonomy, since it suggests that people need to obtain not only the consent of their partners but also the reassurance that no

significant negative message is being sent out by their engaging in the sexual activity of choice. One response to this is to emphasise that the sexual expressive aspect of sexual activity imposes no burden on those that do not engage in oppression-themed forms of BDSM.[23] Nevertheless, I hope to set out another response in this section, by demonstrating that the special expressive aspect of sexual activity can be as liberating in some ways as it is limiting in others.

A. Is Consent the Wrong Concept for the Evaluation of Sexual Activity?

To begin, I set out a problem raised by Gardner in 'The Opposite of Rape'. Gardner took issue with the notion of consent, not because it was insufficient for the evaluation of sexual activity, but because he felt that it was the wrong concept to start with. Consent 'presupposes that the sexual activity was not agent-agent symmetrical', since consent is the act of confining, qualifying or surrendering one's agency in some regard to some other agent.[24] Michelle Madden Dempsey's conceptualisation of consent, which is that it gives B the permission to exclude from consideration the reasons for or against certain conduct that are grounded in A's well-being, also shows that consent is relevant only to *B*'s normative position, not to A's. As Gardner put it: 'It is all about what B gets to do, not about what A gets to do.'[25] In contrast, sex

[23] Admittedly, it could be argued that this would cover the most common forms of BDSM, since the statistics show that they tend to imitate Man-Woman, Nazi-Jew, White-Black, straight-queer, or other oppressor-oppressed relationships. Nonetheless, my point here is that if a particular instance of BDSM does seem to trivialise, normalise or glorify oppressive behaviour, then it lacks the outward harm typically necessary for criminalisation.

[24] Gardner (n 1) 57.

[25] ibid.

as 'teamwork'[26] (a 'regulative ideal'[27] of good sex) requires sexual partners to be agents of equal standing. Thus, if one aspired to this ideal, then consent would be the wrong currency for the evaluation of sex. I take Gardner to be right, so I share the concern that promoting of consent as the paradigm of responsible sexual activity perpetuates the subconscious belief that power imbalances in sexual activity are normal or even desirable.

B. Is Making an Agreement the Right Concept for the Evaluation of Sexual Activity?

An alternative to consent is the concept of *making an agreement*. This kind of agreement must not be reducible to an exchange of consents, as that would still presuppose agent-patient asymmetry. The key difference is thus that when making an agreement, each party exercises a power that changes their *own* normative position, not their partner's. But while consenting and making an agreement differ in terms of what is being committed to (whose normative position is being affected), they are similar in that both entail *commitment*, which is, by definition, something that happens *in advance*.[28] And it was this that Gardner objected to. For Gardner, the exercise of a power which necessarily entails commitment to action that lies ahead, such as the making of an agreement, is incompatible with the spontaneity of sex-as-teamwork.[29] The element of 'temporal extension' is, according to

[26] ibid 51.
[27] ibid 50.
[28] ibid 62.
[29] ibid 61-63. Gardner called this 'performative' agreement. Gardner preferred a different version of agreement, known as 'cognitive' agreement, for which the conditions obtain during the activity itself, not when the agreement is made. Cognitive agreement is 'enduring' and 'continuous'. See Gardner (n 1) 64.

Gardner, incapable of accommodating the spontaneity of good sex, since good sex requires that each party has the 'ongoing ability to bring its acceptability to an immediate end simply by ending the consensus'.[30] In other words, 'when a sexual partner says "enough", that's enough'.[31]

At this point, the feminist reader will be tempted to agree enthusiastically with Gardner, for it is a serious concern in our society that many people believe that once consent has been given there is no taking it back.[32] This is, of course, a problematic view, but it seems to me that the 'temporally extended' normative effect of agreement does not necessarily prevent sexual partners from being spontaneous, or from having the ability to end sex at virtually any point they want to. In what follows, I attempt to bear out this claim. I start by explaining what I believe to be a flaw in Gardner's logic.

Gardner asks, 'What does making an agreement to Φ achieve if it cannot commit either party to Φing? If each retains *total* latitude not to be interested in Φing and not to Φ when the time comes, what was the point of agreeing to Φ?'[33] These two questions appear at first glance to bring out the same idea, but they are in fact distinct and mutually exclusive points. The first is that an agreement to Φ is only a genuine agreement if each party thereby waives *all* their discretion to choose not to Φ at the relevant time. In other words, each party promises to Φing no matter what. The second question Gardner poses, however, implies that the requirements of legitimate agreement-making are

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[30] ibid 64.
[31] ibid.
[32] See Matthew R Lyon, 'No Means No: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape' (2004-2005) 95 J Crim L & Criminology 277.
[33] Gardner (n 1) 65 (footnote omitted) (emphasis added).

not so onerous. Since only a situation of 'total latitude', i.e. total discretion to not Φ, would defeat the point of the agreement, each party need only waive *some* of their discretion to decide not to Φ at the relevant time. Depending on the circumstances, then, one may choose not to Φ despite having agreed to do so earlier, without demonstrating the ingenuity of the earlier communicated agreement. So which of these two conceptions of agreement does Gardner believe to be correct?

One response is that the second conception I have suggested is not theoretically possible; that any discretion to derogate from the agreement amounts to there having been no real agreement in the first place. Genuine agreement (so the argument goes) requires that any circumstances for a party to choose not to Φ must constitute part of Φ itself. So if A and B agree at t1 to have sex at t2 'unless B doesn't finish their essay', then they will not be derogating from their agreement if, at t2, B has yet to complete their work and tells A that the sex is no longer happening. After all, 'Φ' does not mean 'have sex *simpliciter*' but rather 'have sex unless B doesn't finish their essay'. It may be contended that, apart from these situations where any derogation is contemplated and stipulated for within the initial agreement, deciding not to Φ entails that no genuine agreement to Φ had ever taken place. Notably, to run this argument one must also argue that Gardner's use of the phrase 'total latitude'[34] was a pleonasm of sorts: if there is no reason to exclude less-than-total latitude from the conclusion that genuine agreement has not occurred, then the only explanation for his use of the word 'total' was that he thought that any degree of latitude *amounts* to total latitude.

[34] ibid 65 (emphasis added).

I would argue, however, that genuine agreement is possible even if each party retains some discretion to decide not to Φ, despite the fact that the conditions of derogation were not explicitly stated, nor even contemplated, at the initial agreement-making stage. Thus, if A and B agree at time t1 to Φ, where 'Φ' is 'have sex at time t2 unless B has yet finish their essay', B's decision not to engage in sex at t2 because they feel tired instead does *not* prove that genuine agreement had never taken place.

How is this possible? If parties are allowed to conjure up 'phantom' terms to derogate from their commitment to Φ, it is hard to claim that they were ever committed to Φing at all. But the fact that a term of the agreement was not stated explicitly does not automatically mean that it is a 'phantom' one. On the contrary, it could be very real. Recall my argument above that sexual activity has a near-universal social significance, such that even those that do not themselves find it pleasurable to engage in sexual activities know that other people regard sexual activities as pleasurable. When B chooses not to have sex with A despite their earlier agreement to do so, B does not rely on a 'phantom' term at all, but rather on the widely understood precondition that people engage in sexual activity when they believe it will bring them pleasure (or, more precisely, when they believe the pleasure they will derive from the sexual activity is greater than the displeasure of engaging in it).[35] If B feels tired at t2, then the decision not to have sex with A is based not on any prior explicit qualification of the agreement but rather on the implicit terms of the agreement determinable from the social meaning of sexual activity. This will not be limited to feelings of tiredness. Thus, for example, the smallest change in either person's mood,

[35] For example, the displeasure of exerting effort to coordinate movement with one's partner.

circumstances, or comfort, will likely be sufficient to justify[36] their refusal to have sex at time t2, even if the parties were absolutely sure when they made their agreement at t1 that nothing could get in their way. Those that feel discomfort at this level of vagueness and uncertainty may find solace in the fact that even the law, which tends to be more precise than moral and ethical theory, is willing to recognise customs and trade practices as sources of implied contractual terms.

For all this, however, I have only shown that derogating from a genuine agreement to engage in sexual activity is *possible*. I have not yet shown that agreement in this kind can achieve the regulative ideal of teamwork. Thus, the question becomes: does sex-as-teamwork really require parties to retain *full* discretion to choose not to engage in sexual activity? Is it necessary for parties involved to be completely and utterly spontaneous?

Gardner answered this question in the affirmative. As mentioned above, his view was that sexual partners aspiring towards the ideal of teamwork 'cannot validly exercise any kind of normative power, even by the most active kind of consent or agreement.'[37] In simpler terms, this means that 'when a sexual partner says "enough", that's enough'.[38] However, this way of summarising his position stacks the cards in his favour; for it implies, misleadingly, that if my account of agreement to engage in sexual activity were to be accepted, then B would be entitled, in the name of 'teamwork', to ignore A's protestations that they

[36] Some might interpret the use of the word 'justify' to mean that B would be entitled, in the name of 'teamwork', to disregard an unjustified refusal by A. This is both objectionable and mistaken (even if it is extremely rare for A's refusal to be unjustified). As I explain below, B will at most be entitled to feeling disappointed.
[37] Gardner (n 1) 65.
[38] Ibid 64.

no longer want to have sex with B. Obviously, this would be an objectionable view to take. But, as I have already explained, the social significance of sexual activity means that agreements to engage in it are supplemented by the implicit condition that such engagement is believed by each party to bring them more pleasure than displeasure. If B says 'that's enough', A could hardly be mistaken that this condition is no longer satisfied. In accordance with the terms of the agreement, then, A must respect B's decision and end the sex. On this view, parties to a genuine agreement to engage in sexual activity will have a virtually unlimited range of reasons justifiably to decide not to do so when the time comes. Indeed, I have difficulty imagining what would constitute an unjustified reason, since the very suggestion that a person does not 'want' to do something seems sufficient to satisfy the conditions I set out. Thus, it is also true on my account that 'when a sexual partner says "enough", that's enough'.

Still, supporters of Gardner's view may not be convinced. They may argue that, if my position is to be any different from Gardner's, then there must be *some* situations in which B's decision not to go through with having sex at t2 is *un*justified because the B's reason falls outside the scope of B's retained discretion. In these cases, A would still be doing a grievous wrong by disregarding B's refusal and going ahead with the sex. This is right, of course. My response would be that even if B's decision not to engage in sex with A exceeds their retained discretion (which would be rare indeed), A will at most be entitled to feel disappointed, nothing more. Ignoring B's refusal or retaliating with force or harsh words would generate further harm which would be disproportionate to B's unjustified derogation. However, we can at least understand A's surprise, bewilderment, or disappointment at B's sudden manoeuvre, and would not condemn A for feeling this way unless A took further action. We should be particularly alert to this possibility in light of the

expressive aspect of sexual activity. In our earnestness to eschew rape myths, we must be careful not to erode a central element of sex-as-teamwork: namely, that each party is genuinely invested in the pleasure that the other party derives from their sexual encounter. Setting expectations and then having the ability to dismiss such expectations without any reason whatsoever, might even be said to be antithetical to the idea of teamwork. This in turn suggests that parties are entitled to having negative feelings in response to unjustified derogations from prior agreements to engage in sexual activity, although further action would be disproportionate. In the final analysis, people will *always* be entitled to end sexual activity when they want to; but in some rare cases their partners will also be entitled to a sense of disappointment.

I have thus argued that sexual activity is unique because of its social significance. Thus, while spontaneity may be necessary for teamwork in other contexts (such as Gardner's example of the band), it is not so in the context of sexual activity. So it is not automatically less of a team effort – a team success – if parties make an agreement to engage in sexual activity prior to engaging in it. It might be thought, somewhat sceptically, that after all the qualifications I have made to explain how genuine agreement is possible even for parties aspiring to teamwork when engaging in sexual activity, my argument is really not that significant at all. As I stated above, unjustified derogations will be very rare, and even when they occur they entitle parties at most to feelings of surprise and disappointment. However, my argument will have practical significance in law if it is accepted that any instance of sexual activity that achieves the 'regulative ideal' of teamwork cannot possibly be a criminal wrong. This seems intuitively unobjectionable: while not all instances of failure to achieve the teamwork ideal should lead to criminal liability (Gardner acknowledged that teamwork was only one dimension

of the ideal of 'good' sex[39] – and, indeed, that different dimensions may exist in pluralistic relation to one another[40] – so he never claimed not achieving sex-as-teamwork warranted criminal liability), all instances of success in teamwork must be considered un-criminalisable. Otherwise, the very concept of an 'ideal' would be undermined.

With this in mind, consider cases on whether sexual activity can ever be committed to *in advance*. The Canadian position in *HM Queen v JA and Attorney General of Canada and Women's Legal Education and Action Fund* was that consent required the complainant be conscious throughout the sexual activity in question and thus did not extend to 'advance' consent to sexual acts committed while the complainant is unconscious.[41] (Naturally, the case-law uses the concept of 'consent', the disapproval of which I shared with Gardner. Nevertheless, my focus is on the temporally extended nature of advance consent or agreement to engage in sexual activity, so the case-law is still

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[39] ibid 50-51.

[40] This means that in some cases it will be necessary, or at least possible, to achieve ideal sex despite agent-patient asymmetry. For example, if one's sexual appetite cannot be satisfied unless one engages in sexual activities *premised* on the unequal status of parties involved, for example in many types of BDSM, then it will not be possible for one to achieve sex-as-teamwork *and* satisfy one's appetites at the same time. Another example is where sex is undertaken in a purely instrumental fashion – for instance, where the aim is solely to impregnate. In such cases the dimension of teamwork may be out of sight and out of mind, but the sex may nevertheless be 'good' in other dimensions.

[41] 2011 SCC 28. Per McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: 'Parliament's definition of consent does not extend to advance consent to sexual acts committed while the complainant is unconscious. The legislation requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.'

relevant). Similarly, Jennifer Temkin and Andrew Ashworth have argued that 'consent is necessarily regarded as absent once it is proved beyond doubt that C was asleep or unconscious at the time sexual intercourse took place'.[42] However, in *R v White*, where the defendant had taken photographs of himself digitally penetrating the complainant while she was asleep, the Court of Appeal opined that if the complainant had given consent prior to falling asleep then the defendant would likely be able to use consent as a defence.[43] Thus, proof that the complainant had been asleep was not regarded as sufficient for a conviction. Indeed, in English law, sleep is classified as a rebuttable presumption under section 75 of the 2003 Act, instead of an irrebuttable presumption under section 76, suggesting that the fact that consent is given in advance will not necessarily result in that consent being invalid.

On Gardner's account, advance consent (agreement) will never meet the regulative ideal of sexual activity, so there is no basis to argue for either the Canadian or the English position. Gardner's account has little bearing on the criminal law status of advance consent. However, on the approach I suggested, which accounts for the social meaning of sexual activity and allows parties to make agreements to engage in sexual activity, advance consent would not necessarily preclude parties from achieving teamwork. Consider, for example, in the hypothetical scenario in which A and B agree for A to sexually touch B in the morning while B is still asleep, because B has a desire to be awoken in this manner. In this case, B's state of unconsciousness becomes one of the explicitly established terms of the agreement, so the fact

[42] Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Criminal Law Review 328.
[43] [2010] EWCA Crim 1929, [8]-[14] (Goldring LJ).

that A is asleep cannot be used as the basis of B's criminal liability. If, on the other hand, A and B agreed at t1 to have sex at t2 but did not discuss what to do if one of them happens to fall asleep, then in the overwhelming majority of cases[44] it is implied, based on the social meaning of sexual activity, that the parties will not engage in sex if one of them is unconscious. Thus it is submitted that advance consent cases can in principle achieve the regulative ideal of teamwork. Being an ideal, the case for criminalisation becomes much harder to make. The practical significance of my suggestion is thus demonstrated in the support it provides for the English law position on advance consent (and, as a corollary, the attack it launches against the Canadian one).

In sum, I have argued that, due to the special expressive aspect of sexual activity, it is possible for parties to make a genuine agreement to engage in sexual activity while retaining a high degree of discretion to change their minds even if the reason for doing so was neither explicitly accounted for nor contemplated as a possibility at the initial agreement-making stage. Within this (extremely encompassing) discretionary zone, parties will be justified in deciding not to engage in sexual activity. Furthermore, outside this zone, derogation as such may be unjustified but parties will be *always* entitled to do so because their partners cannot disregard their refusal or retaliate against them. This then dissolves Gardner's concerns against agreement-making. If it is accepted that a prior agreement to engage in sexual activity does not bar teamwork status, then there is no reason to think advance consent cases in law (such as where parties agree to begin sexual activity while one of them is still asleep) cannot in principle achieve this regulative ideal. This in turn suggests that

[44] I say 'majority' because in some cases B could have a reasonable belief that A's state of unconsciousness is irrelevant, for example if A and B have an established practice of engaging in sex while one party is asleep.

criminal liability should not be the *automatic* consequence of engaging sexual activity with an unconscious sexual partner. Ultimately, then, the special expressive aspect of sexual activity can be seen as 'liberating' insofar as it enables parties to participate in certain kinds of sexual arrangements that they would otherwise have more difficulty justifying.

Conclusion

The central thesis of this essay has been that sexual activity has a near-universal social meaning. I sought to demonstrate the effect that 'private' sexual activities can have on the public, by relying on the claim that sexual activity is a potent tool of expression. This then enabled me to explain why I believe Jonathan Herring to be right in arguing that criminalisation of oppression-themed BDSM – because the trivialising, normalising and glorifying effects of BDSM do not merely reflect bad character; they cause actual harm to third parties. It sends a message to the community that the sufferings of oppressed peoples were 'not *that* bad' and perhaps even a good thing. In sum, then, recognising sexual activity as a powerful tool of expression demonstrated how certain sexual activities could harm the public, even if they were conducted in private.

In anticipation of the objection that the special expressive aspect of sexual activity was too restrictive of sexual autonomy, I sought to demonstrate the liberating side of my thesis. I did this by asking whether it is possible to make an agreement (which is, by nature, something done in advance) to engage in sexual activity while still achieving its 'regulative ideal' of teamwork. In short, I argued that the near-universal social

meaning of sexual activity allowed participants to achieve teamwork even without being completely and utterly spontaneous, while the same would not be true for other activities (such as playing in a band). The practical implication of this is that 'advance consent' cases, where the complainant agrees to sexual activity prior to falling asleep or becoming unconscious, should not automatically lead to criminal liability. This then demonstrates one way in which the special expressive aspect of sexual activity can, indirectly, *enhance* sexual autonomy.

PRIVATE LAW ARTICLES

The Scope of the Penalty Jurisdiction: A Critical Analysis of the Application of the Rule Against Penalties to Contentious Clauses

Fred Halbhuber*

Abstract— The joint decision of the Supreme Court of the United Kingdom in *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis* has sparked fresh interest in the scope of the penalty jurisdiction. By empowering courts to strike down clauses which impose a 'penalty' on the other party, the penalty jurisdiction acts as a limit on contracting parties' ability to liquidate damages for breach of contract. This article considers the operation of the restated law by critically engaging with several clauses to which the application of the rule against penalties has proved controversial. These clauses are: (i) bad leaver provisions and other property transfer clauses; (ii) deposit forfeiture clauses; (iii) withholding of payment clauses; and (iv) take-or-pay and take-and-pay clauses. By drawing from the principles laid down by the Supreme Court, each of the above clauses will be analysed in turn to determine whether—and, if so,

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when—the penalty jurisdiction applies. Several clause-specific recommendations will be made to properly delimit the scope of the penalty jurisdiction going forward.

Introduction

Since the Supreme Court's seminal restatement of the law on penalties in the joint cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis,*[1] there has been much renewed interest in the debate surrounding the role of the penalty jurisdiction in England and Wales. The normative arguments as to the proper extent of the jurisdiction have been well-rehearsed[2] and will not be repeated here. What is lacking in the literature is a focused evaluation of the practical application of the current law on penalties. This article aims to fill that void. By providing a detailed examination of the law's application to a select number of contentious clauses, this article will explore how the uncertainties surrounding the penalty jurisdiction affect the operation of the law in practice. It will be demonstrated that both pre- and post-*Makdessi* analyses of penalty clauses are in need of re-evaluation. This article makes suggestions as to how the law should be applied to those areas where judicial treatment and academic commentary are lacking or inconsistent and considers what factors may be relevant in delimiting the scope of the penalty jurisdiction going forward.

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[1] [2015] UKSC 67.

[2] For a discussion of these arguments see, for example, Francis Dawson, 'Determining Penalties as a Matter of Construction' [2016] LMCLQ 207; Jonathan Morgan, 'The Penalty Clause Doctrine: Unlovable but Untouchable' (2016) CLJ 11; Edwin Peel, 'The Rule against Penalties' (2013) 129 LQR 152; James Fisher, 'Rearticulating the Rule against Penalty Clauses' [2016] LMCLQ 169. For an excellent review of the law on penalties and the changes brought about by *Makdessi*, see Sarah Worthington, 'Penalty Clauses' in Graham Virgo & Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2017), 366–389.

In examining the practical application of the rule against penalties to individual clauses and identifying shortcomings in the current case law, this article is split into two parts. Part I briefly sets out the current law's distinction between primary and secondary obligations. This section will also reconcile the Supreme Court's emphasis on substance over form with its explicit acceptance that a conditional primary obligation may not constitute a penalty clause.

In Part II, this distinction between primary and secondary obligations is applied to individual clauses with the aid of both pre- and post-*Makdessi* case law. First, bad leaver provisions and other property transfer clauses will be analysed. It will be demonstrated that property transfer clauses are, as a matter of principle, capable of falling within the penalty jurisdiction. However, contrary to other suggestions, bad leaver and related clauses cannot be uniformly classified as creating either primary or secondary obligations. Instead, whether such a clause is caught by the rule against penalties will depend on the trigger which brought the clause into effect, with only those clauses triggered by breach falling within the penalty jurisdiction.

Second, deposit forfeiture clauses will be considered. There has been some academic and judicial disagreement as to whether a depositor suffers a detriment capable of triggering the penalty jurisdiction when a deposit forfeiture clause takes effect. It will be argued that a depositor does suffer a detriment. This detriment stems not from any lost proprietary interest in the deposit, but from the depositor's lost personal restitutionary claim against the depositee. Pre-*Makdessi* case law suggesting that a deposit cannot fall within the penalty jurisdiction for want of detriment should not be followed. It will be argued that the same reasoning can be used to analyse clauses purporting to forfeit instalment payments upon breach. Where the instalment

constitutes an advance-payment, a clause forfeiting the payment upon breach again causes the payor to lose a valuable restitutionary claim and therefore engages the rule against penalties.

Third, withholding of payment clauses will be analysed. Lords Neuberger and Sumption in *Makdessi* expressed scepticism, *obiter*, as to whether such a clause falls within the penalty jurisdiction. By applying the analysis developed in the context of deposit forfeiture clauses and payments by instalments, it will be argued that this scepticism is misplaced: the withholding of payment clauses cause the breaching party to lose a valuable personal claim and therefore falls within the penalty jurisdiction.

Fourth, take-or-pay and take-and-pay clauses will be considered. A take-or-pay clause requires a buyer to buy and take a minimum specified amount of product or to pay for that amount of product without taking it; a take-and-pay clause requires a buyer to buy and take a minimum specified amount of product. It will be argued that post-*Makdessi* authority classifying take-or-pay clauses as secondary obligations runs counter to the guidance laid down by the Supreme Court. Since the obligation to take and the obligation to pay are alternatives, both are primary obligations beyond the scope of the penalty jurisdiction. Moreover, it will be demonstrated that, contrary to other suggestions, no principled distinction can be drawn between take-or-pay and take-and-pay clauses.

1. Distinguishing Primary and Secondary Obligations

Parties' ability to settle the quantum of damages for breach at the stage of contractual formation by incorporating a liquidated damages clause into their contract is restrained by the rule against penalties.

As was recently clarified by the Supreme Court in *Makdessi*, this rule empowers courts to strike down a contractually agreed quantum if two conditions are met. The first condition is that the clause must impose a secondary, rather than a primary, obligation. The parties' primary obligations 'fix the price' (i.e., consideration) under the contract.[3] The parties' secondary obligations are those that are contingent upon breach of a primary obligation,[4] acting as an 'alternative to common law damages'.[5] The second condition is that the loss caused to the breaching party by the clause must be 'out of all proportion' with any 'legitimate interest' in securing compliance with the primary obligation.[6] Where the clause causes no loss, the rule against penalties cannot bite.

The Supreme Court in *Makdessi* was tasked with evaluating the application of the rule against penalties to an agreement between Mr Makdessi and Cavendish Square

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[3] *Makdessi* (n 1) [74] (Lords Neuberger and Sumption). The Court considered that the fact that the penalty jurisdiction only applies to secondary obligations had been settled '[a]s a matter of authority' by the House of Lords in *Export Credits Guarantee Department v Universal Oil Products* [1983] 1 WLR 399: *Makdessi* (n 1) [12].

[4] See Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 828.

[5] ibid [12], [14] and [74].

[6] *Makdessi* (n 1) [32], [100], [287].

Holdings, under which Mr Makdessi promised to sell Cavendish a stake in his company. Two clauses in this agreement were of particular interest, both of which could be invoked by Cavendish if Mr Makdessi breached the restrictive covenants under the contract. Clause 5.1 entitled Cavendish to withhold the last two instalments of the purchase price owed to Mr Makdessi. Clause 5.6 entitled Cavendish to compulsorily purchase Mr Makdessi's remaining shares at a price excluding the goodwill value.

Although the Supreme Court itself was split on the question of whether clause 5.1 constituted a primary or secondary obligation,[7] the Court did make some observations to help navigate the uncertain terrain. First, the Court staunchly affirmed that the rule against penalties depends 'on the substance of the term and not on its form'.[8] Therefore, a clause which imposes a secondary obligation in substance, even if not in form, may be a 'disguised punishment'[9] and is just as much subject to the penalty

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[7] With Lords Neuberger and Sumption (with whom Lord Carnwath agreed) classifying the obligation as primary and Lord Mance, Hodge and Clarke reserving judgment.

[8] *Makdessi* (n 1) [15], [43] (Lords Neuberger and Sumption), [158] (Lord Mance). See also the judgement of Lord Atkinson in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, 91–92; and *Clydebank Engineering v Yzquierdo y Castaneda* [1905] AC 6.

[9] *Makdessi* (n 1) [77] (Lords Neuberger and Sumption), [258] (Lord Hodge). It is important to emphasise that the clause 'may be', not *must* be, a disguised punishment. Although a clause which is in substance a secondary obligation will fall within the penalty jurisdiction, the clause is not a penalty unless it also fails the validity test. The terms 'disguised punishment' or 'disguised penalty' may therefore be slightly misleading, especially since Lords Neuberger and Sumption consider the term in the context of their discussion of the question of scope (i.e., the distinction between primary and secondary obligations). In the interest of avoiding this confusion, it is suggested that the term 'disguised secondary obligation' is a more appropriate label.

jurisdiction as any other secondary obligation.[10] In short, the court must look behind the label used by the parties to inquire into the "'the real nature of the transaction" or what "in truth" it is taken to be'.[11]

Second, and seemingly contradictorily, Lords Neuberger and Sumption affirmed that 'in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument'.[12] This may appear inconsistent with the Court's emphasis on substance over form. However, the two propositions are not necessarily in conflict, since both indicate that the classification of a clause as primary or secondary is ultimately a question requiring a contextual approach to contractual construction.[13] That the parties elected to frame the clause as a conditional primary obligation (i.e., an obligation conditioned on the occurrence of a particular event[14]) rather than a secondary obligation is a good indication that this was the 'real nature' of the transaction.[15]

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[10] As Marcus Smith J recognised at [653] in *Signia Wealth Ltd v Vector Trustees Ltd* [2018] EWHC 1040 (Ch), 'the court must be astute to detect disguised penalties'.

[11] *Makdessi* (n 1) [15] (Lord Radcliffe), citing *Campbell Discount Co Ltd v Bridge* [1962] AC 600, 622.

[12] *Makdessi* (n 1) [14] (Lords Neuberger and Sumption).

[13] *Makdessi* (n 1) [99] (Lords Neuberger and Sumption): '[T]he question whether a contractual provision is a penalty *turns on the construction of the contract*, which cannot normally turn on facts not recorded in the contract unless they are known, or could reasonably be known, to both parties' (emphasis added). See also the post-*Makdessi* case of *Vivienne Westwood Limited v Conduit Street Development Limited* [2017] EWHC 350 (Ch) at [48]: 'What amounts to the primary obligation in any given case *is a question of interpretation*' (emphasis added).

[14] An event which can include breach, as will be seen below: *Makdessi* (n 1) [73] (Lords Neuberger and Sumption).

[15] *Campbell Discount* (n 11).

These two guiding principles clearly do not operate in isolation from one another. As Lords Neuberger and Sumption noted, the 'capricious consequences' to which the treatment of conditional primary obligations may give rise are 'mitigated' by the fact that the substance of the clause will prevail over its form.[16] Therefore, as this article goes on to consider the application of the rule against penalties to select clauses, it is important to bear in mind that the application of the penalty jurisdiction 'can still turn on questions of drafting', but only where this reflects the substance of the clause.[17]

2. Analysis of Select Clauses

Agreed damages clauses are the 'classic' example of a penalty clause[18] because they provide a straightforward 'alternative to common law damages'[19] and can therefore be readily classified as secondary obligations arising upon breach.[20] Whether other clauses engage the rule against penalties is often less clear. This article will analyse four types of clauses, in turn, to determine whether they fall within the penalty jurisdiction: (i) bad leaver provisions and other property transfer clauses; (ii) deposit forfeiture clauses; (iii) withholding payments clauses; and (iv) take-or-pay and take-and-pay clauses.

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[16] *Makdessi* (n 1) [15] (Lords Neuberger and Sumption).
[17] ibid [43].
[18] ibid [16].
[19] ibid [12], [14] and [74].
[20] A further complication may arise where the clause purports to vary a primary obligation rather than provide an alternative to damages.

A. Bad Leaver Provisions and Other Property Transfer Clauses

Clauses obligating the transfer of property upon breach can arise in a wide variety of agreements. One of the most common is a bad leaver provision. Under a bad leaver provision, a company is entitled to acquire the shares of a shareholder-employee leaving the company for a 'bad' reason (such as gross misconduct) for consideration less than their fair market value. The relevant question for present purposes is whether such an obligatory transfer of shares for less than fair value can fall foul of the rule against penalties.

I. Pre-*Makdessi* Authorities

Once it is accepted that agreed damages clauses represent the archetypal term falling within the penalty jurisdiction, it takes only a small step to extend the scope of the jurisdiction to encompass clauses obligating the transfer of property. This was largely settled by pre-*Makdessi* authority. In *Jobson v Johnson*,[21] a contract for the sale of shares in a football club included a clause obligating the purchaser to transfer the shares to the vendor for a fixed sum upon breach. It was accepted that this transfer obligation fell within the penalty jurisdiction because there was 'no distinction in principle' between an agreed damages clause and a clause requiring the breaching party to 'transfer … 1,000 shares in a certain company for no consideration'.[22] The authority of *Jobson*

[21] [1989] 1 WLR 1026.

[22] ibid 1034–1035 (Dillon LJ). The Scottish case of *Watson v Noble* also lends support to this approach. In the context of a clause which purported to transfer a captain's share in a trawler upon breach of an obligation to remain sober, Lord Young held that the obligation to 'forfeit the shares which he has bought and paid for … [was] a penalty'

remained controversial, however, because of its suggestion that a penalty clause 'can be sued upon' but not 'beyond the sum which represents … the actual loss of the party seeking payment'.[23] The suggestion that a penalty provision can be scaled down to reflect common law damages was explicitly rejected in *Makdessi*.[24] Importantly, however, the Court accepted that *Jobson* remained good authority for the proposition that a compulsory property transfer could constitute a secondary obligation falling within the penalty jurisdiction.[25]

II. Treatment in *Makdessi*

That a clause obligating a transfer of property upon breach fell within the penalty jurisdiction was also accepted by several of their Lordships in *Makdessi*. Lords Neuberger and Sumption commented that 'there is no reason why an obligation to transfer assets (either for nothing or at an undervalue) should not be capable of constituting a penalty'.[26] Lord Mance[27] and Lord Hodge[28] made statements to similar effect.

III. Post-*Makdessi* Authorities

Re Braid Group (Holdings) Ltd[29] has affirmed this position post-*Makdessi*. *Re Braid* concerned a bad leaver provision, which entitled the company to acquire, at a fixed subscription price, the

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and could therefore not be enforced: *Watson v Noble* (1885) 13 R 347, 353; approved in *Summit Lease Finance (No2) Ltd v Lithoprint (Scotland) Ltd* [1999] ScotCS 174.

[23] ibid 1040.

[24] *Makdessi* (n 1) [42] (Lords Neuberger and Sumption).

[25] ibid [84], [87].

[26] *Makdessi* (n 1) [16].

[27] ibid [183].

[28] ibid [230].

[29] [2016] CSIH 68.

shares of a shareholder-employee who had committed gross misconduct.[30] The Court of Session held that the clause fell within the penalty jurisdiction, with Lord Menzies clearly and succinctly addressing the issue of scope:

> The only circumstance in which a Bad Leaver can be compelled to transfer his shares at subscription price is where the reason for ceasing to be employed … is fraud or gross misconduct. It is the fraud or gross misconduct in the circumstances of the present case which constitutes the breach of the primary obligation; the provision as to transfer at subscription price is a secondary provision.[31]

Although the Court ultimately found that the clause was a 'legitimate and proportionate' response to what could be 'highly damaging' behaviour by the bad leaver,[32] the unanimous classification of the bad leaver provision as a secondary obligation is a powerful authority for the proposition that a compulsory transfer of property upon breach falls within the penalty jurisdiction.

Despite the affirmation in *Re Braid* that property transfer clauses can fall within the penalty jurisdiction, two recent cases have introduced uncertainty into this area of the law. Each case will be considered in turn.

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[30] At the time of the case, the fair market value of the shares greatly exceeded the fixed subscription price.

[31] *Re Braid* (n 29) [82]. Note, however, that Lord Menzies was in the minority on the question whether the clause failed the penalty test, holding that it was 'exorbitant and unconscionable having regard to [the company's] interest in the performance of the contract': [84].

[32] ibid [125].

(1) *Richards v IP Solutions Group Ltd*

Richards v IP Solutions Group Ltd[33] concerned a clause that provided for the compulsory transfer of the shares of a bad leaver for £1.00. May J held, *obiter*, that the transfer of shares was a primary obligation and therefore not within the penalty jurisdiction. Two key factors influenced this decision. First, unlike clause 5.6 in *Makdessi*,[34] the bad leaver provision was contained in IP Solution's articles of association and therefore in a 'separate document' rather than in a 'single agreement'.[35] Second, the employer's option to purchase could arise 'in a range of situations', with breach of the employment contract justifying summary dismissal being 'only one' of the possible triggers.[36]

With respect, May J's first point is difficult to reconcile with both principle and precedent. *Prima facie*, the relevant obligation in *IP Solutions* was secondary: although the bad leaver provision is not contained in the same document as the contract, it clearly imposed an obligation that was triggered upon breach of the contract and therefore engaged the penalty jurisdiction. However, *Makdessi* made clear that the fact that an obligation is a secondary obligation as a matter of form is not necessarily conclusive; it is always necessary to look at the substance of the obligation. Therefore, the question that May J should have considered is whether the location of the obligation in the company's articles of association changed the nature of this obligation from secondary to primary. May J gives no reason, and no reason is apparent, why changing the location of the obligation should change the nature of the obligation in this way. If the location of the obligation does not change the nature of the

[33] [2016] EWHC 1835 (QB).
[34] But like the clause in *Re Braid Group* (n 29).
[35] *IP Solutions* (n 33) [84].
[36] ibid.

obligation from secondary to primary as a matter of substance, then the initial presumption—that the obligation, being triggered by breach, is a secondary obligation—has not been rebutted. If this presumption has not been rebutted, then the clause imposed a secondary obligation falling within the penalty jurisdiction.[37]

May J's second point—that the clause did not fall within the penalty jurisdiction because the breach of a primary obligation was only one of many routes by which IP Solutions could acquire the right to effect the compulsory transfer—raises a more difficult issue. Lords Neuberger and Sumption in *Makdessi* accepted that the rule against penalties only applies to clauses operating upon breach.[38] Therefore, it is clear that, if the bad leaver provisions in *IP Solutions* had been triggered upon the occurrence of one of the other triggers, the provisions would not have fallen within the penalty jurisdiction. Is it possible that the provisions take on a different character when triggered by breach? In other words, if the 'circumstances must be taken as a whole'[39] when considering the status of a clause, can a single clause take on a different character depending on which event happens to trigger its effect?[40]

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[37] See, similarly, William Day, 'Disproportionate Penalties in Commercial Contracts' in Davies and Raczynska (eds), *The Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart, 2020).

[38] *Makdessi* (n 1) [12] (Lords Neuberger and Sumption). Barring the situation where the clause is a 'disguised penalty': *Makdessi* (n 1) [77] (Lords Neuberger and Sumption), [258] (Lord Hodge). There was no suggestion in *IP Solutions* (n 33) that any of the other events triggering IP's option to purchase were disguised penalties.

[39] *Commissioner of Public Works v Hills* [1906] AC 368, 376.

[40] This issue is not limited to cases concerning bad leaver provisions and other property transfer clauses, but frequently arises in this context.

This issue has received attention in the post-*Makdessi* case of *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV*.[41] Hamblen J addressed the point head-on:

> Some clauses may trigger payment (or other penal consequence) in several events, some of which involve breach whilst others do not. In such a case the application of the rule depends upon whether breach is in fact the trigger of the penal consequence.[42]

This outcome may at first seem odd: how can the same clause be both a primary and secondary obligation? However, this approach can be justified on grounds of both policy and principle.

From a policy perspective, it has been pointed out that any other solution would mean that the penalty jurisdiction could be evaded 'by simply including, among the events on which the sum was payable, one event which was not a breach'.[43] This would allow the courts' jurisdiction to be easily circumvented through the addition of a boilerplate provision triggering the bad leaver

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[41] [2015] EWHC 150 (Comm).

[42] The Court of Appeal in *Edgeworth Capital* (n 41) affirmed Hamblen J on this point [7]: 'The event which constituted an Event of Default under the JLA and caused the loan to fall due for repayment was not a breach of the JLA itself but a breach of the PLA by the borrowers … Accordingly, it does not fall foul of the rules against penalties'. This is also the position adopted by the leading textbook writers: see, for example, Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019), vol 1 [26-234]: 'If the sum is payable on one of several events, some of which are breaches and others are not, the penalty rule will apply if the event that in fact triggered the payment was a breach, but not otherwise.'

[43] Edwin Peel (ed), *Treitel on The Law of Contract* (15th edn, Sweet & Maxwell 2020) [20-131].

provision (or other suspect clauses) on the occurrence of an event explicitly stated not to constitute a breach of contract.

Such a formalistic approach also runs counter to the principle laid down in *Makdessi*. Rather than defining the scope of the penalty jurisdiction *negatively* as not encompassing those clauses which can be triggered by something other than breach, the Court defined its scope *positively* as applying to 'a provision operating upon a breach of contract'.[44] Therefore, the fact that a particular clause could have been triggered by an event which is *not* a breach of contract is neither here nor there.[45] The question is always whether, in the case before the court, the clause was triggered by a breach of a primary obligation.

The rationale employed in *Edgeworth Capital* should also have been directly applicable in *IP Solutions*. In light of this clarification, much of the relevance that May J attached to the existence of the 'range of [other] situations' which triggered the effect of the relevant clause falls away. The focus of the court's analysis should have been on the breach that ultimately triggered the clause.

(2) *Signia Wealth Ltd v Vector Trustees Ltd*

Signia Wealth Ltd v Vector Trustees Ltd,[46] the second relevant post-*Makdessi* case, also considered a leaver provision in a company's articles of association. Here, Marcus Smith J concluded that the relevant clause constituted a primary obligation and was therefore

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[44] *Makdessi* (n 1) [12] (Lords Neuberger and Sumption).
[45] The other triggers may be relevant insofar as they indicate that the parties did not intend breach to play a defining role in their obligations and may therefore suggest that breach was a mere 'occasion' for the operation of the clause: *Makdessi* (n 1) [74] (Lords Neuberger and Sumption).
[46] *Signia Wealth* (n 10).

outside the scope of the penalty jurisdiction. The distinction between *Signia Wealth* and *IP Solutions* can again be traced back to the clarification provided in *Edgeworth Capital*. Unlike in *IP Solutions*, the trigger of the leaver provision in *Signia Wealth* was not a breach of contract. As the court recognised, '[n]one of the Transfer Events triggering the process [i.e., the process for transferring shares from the leaver to the company at an undervalue] have anything to do with the shareholder's breach of contract'.[47] Since the penalty doctrine only 'applies to the consequences of a breach of contract', it had no role to play here.[48]

Where do these more modern authorities leave the application of the penalty jurisdiction to clauses obligating a transfer of property? *Edgeworth Capital* and *Signia Wealth* do not cast doubt on the proposition—long settled as a matter of precedent—that a clause providing for a compulsory transfer of property for little or no consideration may be subject to the rule against penalties. Rather, the cases serve as a useful reminder that breach is at the centre of the current law on penalties and that courts must remain alert to the conduct triggering the relevant clause.

The weight of pre- and post-*Makdessi* authority, therefore, lends support to the proposition that bad leaver provisions and other property transfer clauses may impose secondary obligations and therefore fall within the penalty

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[47] ibid [653].

[48] ibid. Of course, the fact that there is no formal breach does not necessarily undermine the conclusion that a clause falls within the penalty jurisdiction if, as a matter of substance, the clause imposes a secondary obligation. In other words, a clause may constitute a 'disguised penalty'. Day, for example, has criticised the decision in *Signia Wealth* for adopting a 'highly formalistic approach': Day (n 37), 221.

jurisdiction. This does not mean, however, that all such provisions create secondary obligations. The approach adopted in *Edgeworth Capital*—that only provisions triggered by a breach of contract are within the courts' jurisdiction—is sound as a matter of both policy and principle. Contrary suggestions in *IP Solutions* should be rejected going forward.

B. Deposit Forfeiture Clauses

Commercial parties frequently use deposits to encourage compliance with primary contractual obligations. Contractual agreements typically provide that if the party granting the deposit performs his primary obligations, the deposit forms part of the purchase price. If not, the deposit is forfeited.[49] Does a provision providing for a deposit to be forfeited upon breach fall within the penalty jurisdiction?[50]

I. Pre-*Makdessi* Authorities

It was accepted in pre-*Makdessi* authority that a clause allowing for the retention of a deposit could constitute a secondary obligation, and therefore fall within the penalty jurisdiction, if it was contingent upon breach. For example, in the context of deposits, Lord Radcliffe in *Campbell Discount Company Ltd v Bridge*[51]

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[49] *Howe v Smith* (1884) 27 Ch D 89.

[50] As was discussed above, a compulsory transfer of property may fall within the penalty jurisdiction. Since a clause providing for the retention of a deposit also constitutes a transfer of ownership from the breaching party to the innocent party, these clauses have often been considered in the same context (for example, *Makdessi* (n 1) [16] (Lords Neuberger and Sumption), [170] (Lord Mance); see also *Summit Lease Finance* (n 24) and *Signia Wealth* (n 10) [653]). While there are important similarities between the two provisions, deposit forfeiture clauses also raise some unique issues. This article therefore considers them separately.

[51] *Campbell Discount* (n 11).

opined that he could 'not see any sufficient reason why in the right setting a sum of money may not be treated as a penalty, even though it arises from an obligation that is essentially a guarantee'.[52] The same conclusion was reached by the Privy Council in *Commissioner of Public Works v Hills*,[53] where the rule against penalties was applied to a clause which provided that monies deposited with the Commissioner of Public Works in the Cape of Good Hope should be forfeited 'as and for liquidated damages'.[54] In *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*[55] the Privy Council followed its own authority and held that a deposit of 25 per cent of the purchase price could be a penalty, depending on whether it 'was reasonable as earnest money' or 'operating … as a penalty'.[56]

However, some cases have cast doubt on the suggestion that the penalty jurisdiction encompasses deposit forfeiture clauses. One such case is the Privy Council decision in *Linggi Plantations Ltd v Jagatheesan*.[57] Here, relying on Jessel MR's judgment in *Wallis v Smith*,[58] the Board held 'that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty'.[59] More recently, this sentiment was echoed in *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC*.[60] Although recognising that the issue had been disputed, Eder J

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[52] ibid 624.
[53] *Hills* (n 39).
[54] ibid 376.
[55] [1993] AC 573.
[56] ibid 580.
[57] [1972] 1 MLJ 89.
[58] (1882) 21 ChD 243.
[59] *Linggi* (n 57) 94.
[60] [2013] EWHC 214 (Comm).

held that 'modern English courts do not appear to apply the penalty rules to deposits'.

II. Treatment in *Makdessi*

The Supreme Court was generally supportive of the notion that a deposit forfeiture clause could fall within the penalty jurisdiction. Lords Neuberger and Sumption commented that:

> the fact that a sum is paid over by one party to the other party as a deposit … does not prevent the sum being a penalty, if the second party in due course forfeits the deposit in accordance with the contractual terms, following the first party's breach of contract[61]

Similarly, Lord Hodge noted that 'in both English law and Scots law … a deposit which is not reasonable as earnest money may be challenged as a penalty'.[62] Admittedly, not all speeches in *Makdessi* were so unequivocal, with Lord Mance merely commenting that '[s]uch uncertainties as may exist regarding the doctrine's applicability to deposits … must await decision in due course'.[63]

III. Identifying the Detriment

Some academic commentary has also called into question whether, as a matter of principle, a clause that causes the depositor to 'forfeit' a deposit falls within the penalty jurisdiction.

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[61] *Makdessi* (n 1) [16].
[62] ibid [238].
[63] ibid [170].

In particular, Conte has disputed the suggestion that the clause causes the depositor (the breaching party) any detriment:[64]

> deposits clauses cannot engage the rule, for no detriment exists. A depositor will forfeit nothing on breach. X cannot forfeit the right to the deposit payment, as X transfers that right to Y before X breaches the contract. Nor can X forfeit any right to restitution of the payment in unjust enrichment, for there is no failure of basis. X transfers the deposit payment to Y on the basis that, if X does not perform, the deposit payment is lost and Y can keep it (*Howe v Smith* (1884) 27 Ch. D. 89 at 102 CA). Consequently, upon breach the basis does not fail; rather, it is fulfilled.[65]

With respect, Conte's argument that deposit forfeiture clauses do not fall within the scope of the penalty jurisdiction as their enforcement does not cause any detriment, does not hold up to scrutiny. To demonstrate this, it is important to carefully identify the nature of the detriment suffered. It will be considered whether the purchaser (the depositor) suffers any detriment by forfeiting (1) a proprietary interest in the property or (2) a personal claim against the vendor.

(1) Proprietary Interest in the Deposited Sum

If the purchaser retains a legal or beneficial interest in the deposit after paying it to the vendor at the time of contracting, and if that interest is then forfeited by the deposit forfeiture clause upon the purchaser's breach, then there would be a straightforward

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[64] If the clause causes the breaching party no detriment, the obligation imposed can never be 'out of all proportion' with the innocent party's interest in compliance so as to engage the rule against penalties.

[65] Carmine Conte, 'The Penalty Rule Revisited' (2016) 132 LQR 382, 386.

detriment against which the rule against penalties could operate. The key question is therefore whether any such proprietary interest can be identified.

The standard practice in land conveyances (where the use of deposits as guarantee and part-payment is common) offers a useful illustration of how proprietary interests in cases of 'true deposits' are analysed.[66] The deposit will generally be paid to a third party, typically the vendor's solicitors. The solicitors will hold the deposit as 'stakeholders' in the client account for the vendor. Importantly, the depositor does not retain any proprietary interest in the deposit once it has been transferred to the stakeholders. As *Hastingwood Property Ltd v Saunders Bearman Anselm*[67] makes clear:

> neither party to the contract of sale [i.e., neither the vendor nor the purchaser/depositor] *has any proprietary interest in the deposit*. Each has merely a contractual or quasi-contractual personal right of action to recover it from the stakeholder which is dependent on whether the contract proceeds to completion or not.[68]

Therefore, at the time of contracting, the depositor has transferred all proprietary interest in the deposited monies to the stakeholder. The consequences that this has for the application of the penalty jurisdiction to deposit forfeiture clauses are as follows: (i) the purchaser does not have any proprietary interest to lose at

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[66] Although the discussion that follows is focused on standard practice, it is important to recognise that the exact language of the parties' contract will always be determinative.

[67] [1991] Ch 114.

[68] ibid 123 (emphasis added). Another revealing comment can be found in the judgment of Sir John Pennycuick VC in *Potters v Loppert* [1973] Ch 399, 406. See also Farrand and Clarke, *Emmet and Farrand on Title* (Sweet & Maxwell, 2021) [2.059].

that time of breach; (ii) therefore, a clause forfeiting the deposit to the vendor upon breach does not cause the purchaser to lose any proprietary interest in deposit; (iii) therefore, the clause has not caused the purchaser to suffer any detriment; (iv) therefore, the court cannot invoke the penalty jurisdiction to strike down the deposit forfeiture clause. In short, because the deposit forfeiture clause does not cause the purchaser to lose any proprietary interest at the time of breach, the purchaser cannot rely on any proprietary interest in the deposited sum to have the clause struck out as an unlawful penalty.

While the purchaser does have a proprietary interest in the deposit when the proprietary interest in the deposit is transferred over to the vendor, this original agreement to pay over the deposit is also not capable of triggering the rule against penalties. Since the 'deposit is a sum paid over prior to breach, not payable as a consequence of breach',[69] the obligation to transfer the proprietary interest in the deposit is a *primary obligation* and therefore does not fall within the scope of the penalty jurisdiction.[70] Hence, the loss of a proprietary interest cannot form the basis for invoking the penalty jurisdiction against deposit forfeiture clauses. It must therefore be considered whether the deposit forfeiture clause causes the depositor to lose any valuable personal right.

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[69] *Amble Assets LLP (In Administration) v Longbenton Foods Ltd* [2011] EWHC 3774 (Ch) [75].

[70] This was also recognised in *Cadogan Petroleum*, where Eder J noted that '[h]ere, the obligation to pay the instalments was not triggered by breach in any way. It preceded and was quite independent of any breach': *Cadogan Petroleum* (n 60) [33].

(2) Personal Claim against the Vendor

As Conte recognises, '[i]f an obligation to transfer a proprietary right suffices [to establish detriment], then an obligation to transfer a personal right must also do'.[71] If the deposit forfeiture clause causes the purchaser to lose any personal claim against the vendor, then the purchaser will have suffered a detriment capable of engaging the rule against penalties. Since this obligation to forfeit, being triggered by breach, would also be a secondary obligation, the deposit forfeiture clause would fall within the penalty jurisdiction.

The relevant personal claim is a restitutionary claim for unjust enrichment. If the vendor has transferred money 'subject to condition … and this condition has not been satisfied, it is possible to conclude that there has been a failure of consideration' giving rise to a claim for unjust enrichment.[72] At this stage of the analysis, it is important to keep in mind the dual function of the deposit as a guarantee and (if the contract is properly performed) as part payment of the purchase price. Because one purpose of the deposit is to operate as a security for the purchaser's performance—thereby allocating risk to the purchaser for non-performance—there is, in general, no 'failure of basis' that could give rise to an unjust enrichment claim if the contract is not performed. This was clearly recognised in *Howe v Smith*[73], where the Court of Appeal held that, because a deposit was a guarantee for the performance of the contract (in addition to potential part-payment), the plaintiff could not bring a restitutionary claim to

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[71] Carmine Conte, 'Deposit Clauses' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) 390–413, 392.
[72] Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 305.
[73] *Howe* (n 49).

have the deposit returned after failing to perform. The basis of the contract had not failed; in fact, its purpose in the case of a breach (shifting the risk of breach to the claimant) had been wholly satisfied.

Conte relies on *Howe* to argue that a deposit forfeiture clause does not cause the purchaser to lose any restitutionary claim for unjust enrichment and, therefore, that the penalty jurisdiction does not bite for want of detriment. This argument seems to run as follows:[74] (i) there is no failure of basis upon breach, since the purpose of the deposit as a guarantee for performance has been fulfilled[75]; (ii) therefore, the purchaser has no claim for unjust enrichment against the vendor; (iii) therefore, the clause forfeiting the deposit to the vendor upon breach has not caused the purchaser to lose any claim for unjust enrichment; (iv) therefore, the clause forfeiting the deposit to the vendor upon breach has not caused the purchaser any detriment; (v) therefore, the court cannot invoke the penalty jurisdiction to strike down the deposit forfeiture clause.

With respect, this argument is circular. Conte assumes, in an argument that aims to prove that the deposit forfeiture clause is enforceable, that the deposit forfeiture clause is, in fact, enforceable. It is nonsensical to rely on the 'purpose' of a void clause to deny a restitutionary claim for unjust enrichment. Only if the deposit forfeiture clause is enforceable does it make sense to say that 'X [the purchaser/depositor] transfers the deposit payment to Y [the vendor] on the basis that, if X does not perform, the deposit payment is lost and Y can keep it'.[76] If the deposit forfeiture clause is unenforceable as an unlawful penalty, Y has no legal basis on which she can retain the deposit payment.

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[74] Conte (n 71) 405.
[75] *Howe* (n 49).
[76] Conte (n 65) 386.

The mere fact that a void clause purports to give the vendor a right to keep the deposited money cannot preclude the purchaser from bringing a restitutionary claim in unjust enrichment. In short, the vendor cannot rely on the effect that the allegedly void clause would have *if it were valid* to prove that the clause *is valid*. The clause under review cannot pull itself up by its own bootstraps.

Conte makes this mistake by applying the counterfactual incorrectly. It will be recalled that a deposit serves the dual function of acting as a guarantee of performance and (upon completion) as part payment of the purchase price. Conte terms the former function of the deposit as the 'commitment basis' of the deposit. The parties sometimes insert an express clause to this effect (an 'express commitment clause'); if they fail to do so, and barring an express provision to the contrary, the court will imply such a clause into the contract (an 'implied commitment clause').[77] When analysing the counterfactual, Conte relies on the fact that the courts will always imply such a clause to support his conclusion:

> one must ask whether, but for the relevant clause, a party would have held a right against another party (for instance, a right to be paid, or repaid, money). If the answer is 'yes', then an extinguishment has occurred. So, suppose that a contract between X and Y includes a deposit payment clause and an express commitment clause. If we remove the express commitment clause, does X hold an unjust enrichment claim right against Y for a return of the deposit payment? The answer is 'no'. If no express commitment clause exists, a court

[77] *Re Parnell* (1875) 10 Ch App 512; *Howe* (n 48) 95, 101; *Hall v Burnell* [1911] 2 Ch 551, 556; cf *Casson v Roberts* (1863) 32 LJ (Ch) 105.

> inevitably will imply a commitment clause, such that the basis of the payment will not fail. It follows that no extinguishment has taken place.[78]

The fallacy here is that the relevant question is not whether, but for an *express* commitment clause, would the purchaser have a claim against the vendor. Saying that the courts would imply a commitment clause '[i]f we remove the express commitment clause'[79] merely avoids the question of whether the obligation to forfeit upon breach (the 'commitment basis' of the deposit) imposes a penalty on the breaching party. The relevant question is therefore whether, but for any commitment obligation at all (express or implied), the purchaser would have an unjust enrichment claim against the vendor. Here, the answer is clearly 'yes': if there was no commitment clause (express or implied), the vendor would not have acquired the deposit on any valid legal basis. As such, the purchaser would have a restitutionary claim for unjust enrichment. Enforcing the commitment clause deprives the purchaser of that claim and thereby imposes a penalty.

In summary, although a deposit forfeiture clause does not cause a depositor to forfeit any proprietary interest in the deposit (the depositor having no such interest at the time of breach), the clause does cause the depositor to forfeit a restitutionary claim to have the deposited sums returned. By causing the breaching party to lose a valuable personal claim the clause causes a detriment and engages the penalty jurisdiction.

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[78] Conte (n 71) 406.
[79] ibid.

IV. Forfeiture of Payments by Instalments

Does this reasoning also apply to clauses forfeiting payments made by instalments? Several pre-*Makdessi* authorities suggest that a distinction should be drawn between cases concerning the forfeiture of deposits and forfeiture of payments made by instalment. For example, in *Stockloser v Johnson*[80] the court was confronted with a clause which provided that, upon breach, instalments of the contract price would be forfeited. Denning LJ held that the law on penalties was inapplicable on the basis that the vendor 'only wants to keep money which already belongs to him'.[81]

This suggestion was picked up on in *Else (1982) Ltd v Parkland Holdings Ltd*,[82] where Hoffmann LJ relied on *Stockloser v Johnson* to distinguish between money paid as a deposit and money paid in instalments, finding that only the former fell within the penalty jurisdiction:

> [R]etention of instalments which have been paid under the contract so as to become the *absolute property* of the vendor does not fall within the penalty rule and is subject only to the jurisdiction for relief against forfeiture. The position will be different when the money has been deposited as security for due performance of the party's obligation and has not become the *absolute property* of the other party.[83]

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[80] [1954] 1 QB 476.
[81] ibid 489. As Denning LJ pointed out, the 'money was handed [over] in part payment of the purchase price and, as soon as it was paid, it *belonged to him absolutely*' (emphasis added).
[82] [1994] 1 BCLC 130.
[83] ibid 146 (emphasis added).

Else (1982) was considered in several judgments in *Makdessi*. Although Lords Neuberger and Sumption (with whom Lord Carnwath agreed) expressed some support for Hoffmann LJ's view,[84] others were more equivocal.[85]

Applying the reasoning developed in the context of deposit forfeiture clauses, a few things immediately become clear. First, the payor retains no legal or equitable title in the instalment payment once it has been made.[86] A clause that requires the payor, upon breach, to forfeit these instalment payments to the payee therefore cannot cause detriment in the form of any lost proprietary interest in the instalment payments. As with the case of deposit forfeiture clauses, lost proprietary interest cannot form the basis for invoking the rule against penalties.

Second, in the absence of any proprietary interest in them, whether the payor suffers detriment by forfeiting the instalment payments depends on whether the clause causes the payor to lose any personal claim against the payee. As above, the counterfactual is whether, but for the clause, the payor has an unjust enrichment claim for the return of the payments. Since the relevant ground for this restitutionary claim is again total failure of basis, properly carrying out this counterfactual depends on whether any consideration has been provided for the instalment payment. Therefore, where both payment and performance have been rendered in instalments, there will have been no failure of basis and an unjust enrichment claim will not arise. In such a case, a forfeiture of instalments clause would not cause any unjust

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[84] *Makdessi* (n 1) [16], [72].

[85] Ibid [156], [170] (Lord Mance), [229] (Lord Hodge), [291] (Lord Clarke).

[86] This seems to be recognised in the references to the vendor's 'absolute' ownership of the instalment payments: *Else (1982)* (n 80); *Stockloser* (n 78).

enrichment claim to be forfeited and therefore no detriment would be suffered which could trigger the penalty jurisdiction. Where, by contrast, the instalment payments are merely advance payments, a straightforward unjust enrichment claim would be available to the claimant but for the clause.[87] Therefore, a forfeiture of instalments clause that requires a payor to forfeit this personal right upon breach would constitute a secondary obligation imposing a detriment upon the vendor and thereby engage the penalty jurisdiction.

In conclusion, the weight of authority suggests that deposit forfeiture clauses are capable of falling within the penalty jurisdiction. Contrary to Conte's suggestion, a deposit forfeiture clause, properly enforced, deprives the purchaser of an unjust enrichment claim against the vendor and thereby imposes a detriment. It is on this basis that the rule against penalties can bite. Similarly, where payment by instalment amounts to an advance payment, a clause purporting to forfeit that payment causes the purchaser to lose a valuable personal claim and therefore causes detriment, engaging the rule against penalties.

C. Withholding Payment Clauses

A withholding payment clause purports to allow one party to withhold payment otherwise due to the contract-breaker.[88] If the

[87] See, for example, *Giles v Edwards* (1797) 7 Term Rep 181, where advance payment had been made to have wood cut and corded; because the defendant failed to cord all of the wood, the plaintiff was permitted to claim back his payment.

[88] That such a clause might impose a significant burden is emphasised by Lord Reid in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 698: 'Not only would the withholding of the excess permanently deprive the sub-contractor of the interest on that excess which would accrue while the dispute lasted, but it might have most damaging effects on the sub-contractor's business'.

sums are forfeited upon breach of a primary obligation, they are straightforwardly secondary obligations. Does the fact that an obligation is *extinguished* rather than *created* suffice to take this clause outside the penalty jurisdiction?[89]

I. Pre-*Makdessi* Authorities

That a clause which purports to withhold payment falls within the penalty jurisdiction is supported by several pre-*Makdessi* authorities. The first of these is *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*,[90] which concerned a clause that allowed a contractor to 'suspend or withhold payment of any moneys due'. Although the issue was conceded by counsel, some of their Lordships saw fit to comment on whether this clause could be a penalty.[91] Lord Reid indicated that, read literally, this clause 'entitle[s] the contractor to withhold sums far in excess of any fair estimate of the value of his claims', and would therefore 'impose a penalty for refusing to admit his claims'.[92] The second relevant pre-*Makdessi* authority is *Firma C-Trade SA v Newcastle Protection*

[89] It is worth keeping in mind that the discussion in this section focuses only on clauses which purport to allow the innocent party to withhold a payment already owed; a payment which has not yet come due is not 'withheld' by the innocent party since it was never owed in the first place.

[90] *Gilbert-Ash* (n 86). This decision is cited with approval by Lord Mance in *Makdessi* (n 1) [155]; see also the discussion by Lords Neuberger and Sumption: [70].

[91] These *obiter* comments were applied by Hunter J in *Hsin Chong Construction Co Ltd v Hong Kong and Kowloon Wharf and Godown Co Ltd* [1984] HKCFI 212, [22]–[23].

[92] *Gilbert-Ash* (n 86) 698 (Lord Reid). This view was shared, in principle, by Lord Morris (at 703), Viscount Dilhorne (at 711) and Lord Salmon (at 723).

and Indemnity Association (The 'Padre Island') (No2).[93] This case concerned a retrospective cesser clause that purported to forfeit an accrued right to indemnity upon non-payment of a release call.[94] O'Connor and Stuart-Smith LJJ[95] were prepared to hold, as an alternative ground for dismissing the appeal, that the retrospective cesser clause was an unenforceable penalty.

II. Treatment in *Makdessi*

Lord Hodge in *Makdessi* was prepared to follow these earlier authorities, commenting that there is 'no reason in principle' why the 'forfeiture of sums otherwise due' should not be subjected to the rule against penalties.[96]

However, Lords Neuberger and Sumption were less convinced.[97] Their Lordships' scepticism was partially founded on the strength (or lack thereof) of the pre-*Makdessi* authorities,[98] the reasoning of which they challenged:

> [I]t has been held that a clause which renders instalments irrecoverable by a defaulting purchaser is a forfeiture but

[93] [1989] 1 Lloyd's Rep 239; overruled on a different point: [1991] 2 AC 1.

[94] As Lords Neuberger and Sumption recognised, '[c]lauses of this kind are potentially harsher than those which operate simply as a security': *Makdessi* (n 1) [73].

[95] Bingham LJ dissenting.

[96] *Makdessi* (n 1) [227] (Lord Hodge). Lord Hodge went on to state more conclusively that he 'conclude[s] that clauses that authorise the withholding of sums otherwise due to the contract-breaker may fall within the scope of the rule against penalties': *Makdessi* (n 1) [228].

[97] Lords Neuberger and Sumption were only prepared to go so far as to say that they were 'prepared to assume, without deciding' that such a clause could be a penalty: *Makdessi* (n 1) [73].

[98] Discussion of the penalty clause issue was *obiter* in both *Gilbert-Ash* (n 86) and *The Padre Island* (n 91).

> not a penalty. If that is so, then there is a powerful argument for saying that a clause which renders instalments of payment irrecoverable by a defaulting vendor should, by the same token, not be a penalty, but at best a forfeiture.[99]

This line of reasoning is based on the decision in *Else (1982) Ltd v Parkland Holdings Ltd*,[100] in which Hoffmann LJ remarked that the 'retention of instalments which have been paid under contract so as to become the absolute property of the vendor does not fall within the penalty rule'.[101] By analogy, Lords Neuberger and Sumption suggest that the retention of payments owed would fall outside the penalty jurisdiction.

III. Forfeiting a Personal Claim

With respect, it is suggested that the reasoning of Lords Neuberger and Sumption is unsatisfactory. As was demonstrated above, whether a clause forfeiting instalment payments falls within the penalty jurisdiction depends on whether the clause causes the payor to lose a valuable personal claim against the payee. Applying this reasoning to a clause which purports to allow the innocent party to withhold payment makes apparent that such a clause does fall within the penalty jurisdiction.

But for the relevant clause, the breaching party would have a personal claim for the payments owed at the time of breach. Therefore, by causing the breaching party to lose a valuable personal right, the clause causes detriment to the breaching party. Since the clause is also triggered upon breach, it is a secondary obligation and falls within the penalty jurisdiction.

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[99] ibid [72] (authorities omitted).
[100] *Else (1982)* (n 76).
[101] ibid 144.

To summarise, contrary to the *obiter* remark of Lords Neuberger and Sumption, the preferred view is that withholding of payment clauses do fall within the penalty jurisdiction. Not only does this position better align with the pre-*Makdessi* authorities of *Gilbert-Ash* and *The Padre Island*, but it can also be reconciled with Hoffmann LJ's comments in *Else (1982)* that the retention of instalments is not caught by the courts' jurisdiction.

D. Forfeiting a Personal Claim

A take-or-pay clause obligates the buyer to *buy and take* a minimum pre-agreed amount of product or *pay* the price of that minimum amount regardless. As such, the payment is an option fee: A pays for the right to buy B's product at a certain pre-agreed price. A benefits from the certainty of supply and potentially from a below-market price; B benefits from a minimum fixed income stream independent of A's particular demand.[102] Can the penalty jurisdiction be invoked to strike down a take-or-pay clause?

I. Pre-*Makdessi* Authorities

In *M & J Polymers Ltd v Imerys Minerals Ltd*,[103] Burton J held that 'as a matter of principle', a take-or-pay clause could fall within the penalty jurisdiction.[104] Burton J affirmed his own decision on this point in *E-Nik Ltd v Department for Communities and Local*

[102] This is why take-or-pay clauses are frequently found in the energy sector, where demand fluctuates and guarantee of supply is essential.
[103] [2008] EWHC 344 (Comm).
[104] ibid [44]. Although Burton J noted that a take-or-pay clause was 'certainly not the ordinary candidate for such rule'.

Government.[105] In both cases, however, it was concluded that, on the facts, the clause was not a penalty.[106]

II. Treatment in *Makdessi*

The Supreme Court did not explicitly engage with the question of whether a take-or-pay clause fell within the scope of the rule against penalties. However, in rejecting the suggestion adopted by the High Court of Australia that the rule against penalty can apply even where the clause was not triggered by breach,[107] Lords Neuberger and Sumption made the following reference to take-and-pay clauses:

> Modern contracts contain a very great variety of contingent obligations. Many of them are contingent on the way that the parties choose to perform the contract. There are … contractual payments due on the exercise of an option to terminate … *and 'take or pay' provisions in long-term oil and gas purchase contracts*, to take only some of the more familiar types of clause. The potential assimilation of all of these to clauses imposing penal remedies for breach of contract would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries …[108]

Here, their Lordships included take-and-pay in a list of clauses generally accepted to fall outside the scope of the rule against penalties. Bringing all of these clauses—including take-or-pay clauses—within the penalty jurisdiction would, Lords

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[105] [2012] EWHC 3027 (Comm).
[106] *M & J Polymers* (n 101) was cited with apparent approval in *Patersons of Greenoakhill Limited v Biffa Waste Services Limited* [2013] CSOH 18 [101].
[107] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.
[108] *Makdessi* (n 1) [42].

Neuberger and Sumption reasoned, be an undesirable expansion of the courts' supervisory powers. Although no reference was made to Burton J's judgments in *M & J Polymers* and *E-Nik Ltd*, these *obiter* remarks cast doubt on the suggestion that take-or-pay clauses engage the penalty jurisdiction.

III. Secondary Obligations versus Alternative Primary Obligations

With respect to Burton J, it is hard to see how A's obligation to pay a minimum pre-agreed sum is a secondary obligation. A's obligation to pay does not arise from any breach of a primary obligation in the contract. Rather, A's failure to buy or pay *is itself* a breach of a primary obligation. This was the analysis adopted in *Associated British Ports v Ferryways NV*[109] in the context of a 'minimum through-put' clause.[110] Since the failure to send the minimum agreed quantity was not a breach of a primary obligation, Field J recognised that Ferryways' obligation to pay was 'therefore not a secondary obligation that is triggered by a breach'. Instead, it was 'a primary obligation given in exchange for [Associated British Ports'] promise to provide a new linkspan, and as such cannot be a penalty'.[111]

It may be argued that the obligation to pay is merely a secondary obligation disguised as a primary one.[112] Indeed, the same practical effect of a take-or-pay clause can be straightforwardly achieved by providing for a fine to be paid upon failure to buy. For example, the contract may provide that A is

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[109] [2008] EWHC 1265 (Comm).

[110] A 'minimum throughput' clause, like a take-or-pay clause, mandates that a minimum amount of a commodity be shipped.

[111] *Ferryways* (n 107) [50].

[112] It is noteworthy, however, that this is not the analysis put forward by Burton J in either *M & J Polymers* (n 101) or *E-Nik Ltd* (n 103).

obligated to buy a minimum quantity of product (a primary obligation), with failure to do so triggering a fine to pay the equivalent of that minimum quantity regardless (a secondary obligation). The ease with which a take-or-pay clause can be rewritten to change the nature of the obligation to pay from primary to secondary may explain the judicial hesitance to exclude standard take-or-pay clauses from the penalty jurisdiction.

However, while this position correctly emphasises the substance over form approach taken in *Makdessi*, it overlooks Lord Neuberger and Sumption's equally important statement that 'the application of the penalty rule may depend on how the relevant obligation is framed in the instrument'.[113] Taken at face value, Burton J's conclusion in *M & J Polymers* and *E-Nik Ltd* would destroy the utility of alternative primary obligations altogether. Although take-or-pay clauses may, in rare cases, fall within the penalty jurisdiction where the court is convinced that the alternative primary obligations are no more than a 'disguised punishment',[114] this should not be the norm.[115]

IV. Take-and-Pay Clauses

A more difficult question arises when the buyer is *obligated* to order a certain amount of product—known as a take-*and*-pay clause.[116] Since the failure to buy *and* take is—unlike with take-*or*-

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[113] *Makdessi* (n 1) [14] (Lords Neuberger and Sumption).
[114] ibid [77].
[115] As Marcus Smith J correctly noted in *Signia Wealth*, since the penalty doctrine 'is an interference with freedom of contract', the court should be hesitant to find that a clause is a disguised secondary obligation: *Signia Wealth* (n 10) [653].
[116] Indeed, although Burton J in *M & J Polymers* (n 101) and *E-Nik* (n 103) refers to the obligations as 'take-*or*-pay' clauses, they were in fact 'take-*and*-pay' clauses in the sense put forward here: Ben Holland and

pay clauses[117]—itself a breach of the contract, does the obligation to pay for the agreed minimum order constitute a secondary obligation falling within the penalty jurisdiction?

This distinction appears to have been adopted by *Treitel on The Law of Contract*, in which the learned authors argue that a clause is 'subject to the rule against penalties if the buyer is *obliged* to order a minimum quantity and fails to do so', but that the penalty jurisdiction does not encompass an 'obligation to pay for a minimum quantity without imposing an obligation to order that quantity'.[118] However, this approach is, with respect, misguided. The relevant question is always whether the obligation to pay is a primary or secondary obligation. Where there is no obligation to buy, the obligation to pay is, as noted above, a primary obligation, since it is not contingent on any breach. The status of the obligation to pay as primary is unaffected by the introduction of a second (cumulative) primary obligation to order the goods. Breach of that additional primary obligation cannot transform the parallel primary obligation to pay into a secondary obligation.[119]

Phillip Spencer Ashley, 'Enforceability of Take-or-Pay Provisions in English Law Contracts' (2008) 26 Journal of Energy & Natural Resources Law 205.

[117] Where the obligation to buy and take is only one of two alternative primary obligations.

[118] *Treitel* (n 43) [20-140] (emphasis added).

[119] Holland and Ashley (n 114) 215: discuss this point by reference to the 'specified obligation' on the part of the non-breaching party to make the goods available. This helpfully demonstrates that both the obligation to order and the obligation to pay are 'payment' for this 'specified obligation' of the other party, not a secondary obligation which only arises as a consequence of breach. A second, more preferable, interpretation of the approach adopted in *Treitel on The Law of Contract* is that a take-or-pay clause is subject to the rule against penalties where a separate fine is payable as a consequence of the breach of an obligation

To summarise, take-or-pay clauses will not generally fall within the penalty jurisdiction since the obligation to pay merely forms part of an alternative primary obligation. Only in those rare cases where the obligation to pay can be construed as a disguised secondary obligation is the penalty jurisdiction triggered. Take-and-pay clauses, where an additional (rather than alternative) primary obligation to 'take' is imposed, should be treated no differently; the introduction of a further primary obligation does not affect the status of the obligation to pay as primary and therefore is outside the scope of the penalty jurisdiction.

Conclusion

This article has not attempted to evaluate all clauses that may fall within the penalty jurisdiction. Instead, it has sought to illustrate the application of the current law on penalties for four particularly contentious clauses. While the case law surrounding these clauses largely conforms with the principles restated in *Makdessi*, several areas require further judicial clarification and re-evaluation. Hopefully, the discussion herein is of some value to courts and practitioners tasked with applying this rule to those clauses that have caused courts and commentators the most difficulty in the past.

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to order the previously agreed minimum amount. Since this separate fine arises from the breach and does not form part of the primary obligation, it can straightforwardly be classified as a secondary obligation falling within the penalty jurisdiction.

Beyond Physical Integration: Distinguishing 'Other Property' from the 'Thing Itself'

William Kitchen*

Abstract— This article considers the distinction in negligence between the 'thing itself' and 'other property'. It argues that a rights-based justification best explains the distinction, and that this approach requires no transmissible warranties of quality to be imposed by the courts. It then applies this methodology to the two established categories. In the case of originally installed components, this approach implies that the test should revolve around interdependence, rather than the permanence of physical attachment. For subsequently installed components, there should be no distinction between components installed prior and subsequent to purchase.

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Introduction

It is trite law that when a product or structure causes damage, generally only damages for personal injury or damage to 'other property' are recoverable in tort. Losses resulting from damage to the 'thing itself' are not ordinarily recoverable. After a period of doubt, the House of Lords in *Murphy v Brentwood*[1] famously affirmed this doctrine. It was held that losses from damage to the 'thing itself' are 'pure economic loss'. Since no duty of care is generally owed in respect of pure economic loss ('the exclusionary rule'), the claimant could not recover. However, 30 years after this landmark case, the distinction between the 'thing itself' and 'other property' remains 'an undeveloped area of the law',[2] with it 'well accepted that in cases of this type ... the jurisprudence is still developing'.[3]

This article considers whether the law in this area can be set on a firm footing. It is submitted that there are two main problems in doing so. First, it remains unclear whether the drawing of the distinction reflects the underlying justifications for the exclusionary rule. The law is potentially unprincipled and arbitrary.[4] Second, academic commentary has not paid sufficient attention to a string of cases post-*Murphy*. The reasoning in these cases does not easily correspond to the idea that, in the case of originally installed parts, the distinction lies in the degree of physical integration as is commonly supposed.[5]

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[1] [1991] 1 AC 398 (HL).
[2] *Bellefield v Turner & Sons* [2000] BLR 97 (CA) 106 (Wall J).
[3] *Kagan v Harris* [2019] EWHC 2567 (TCC) [31] (Edwards-Stuart J).
[4] *Murphy* (n 1) 483 (Lord Oliver).
[5] This formulation appears to originate with A Tettenborn, 'Components and product liability: damage to "other property"' (2000)

Three main arguments are made. In Section II, I begin by considering how the leading justifications for the exclusionary rule might explain why damage to the 'thing itself' is non-recoverable. I argue that a rights-based approach is most persuasive, and that a duty of care should only be recognised where it does not create a transmissible warranty of quality. This approach will then be used in Section III to draw the distinction for structures and analogously for products.[6] It will be shown that in the case of original components, interdependence, rather than physical integration, is the guiding concept. I then go on to suggest that components installed subsequent to original production should always be treated as 'other property'.

1. Proposed Justifications for the Exclusionary Rule

A. Inapplicable Justifications

Irrespective of their merits generally, not all of the leading justifications for the exclusionary rule are persuasive in rationalising the distinction between 'other property' and the 'thing itself'.

LMCLQ 338. For similar statements, see: R Stevens, *Torts and Rights* (OUP, 2007) 28; J Goudkamp and D Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) paras 11-012, 10-049; *Clerk & Lindsell on Torts* (23rd edn, 2020), para 10-24.

[6] *Murphy* (n 1) 470 (Lord Keith), 477-478 (Lord Bridge), 486-487 (Lord Oliver), 497 (Lord Jauncey).

First, the supposedly leading justification, variants[7] of Cardozo CJ's 'floodgates' argument,[8] can be dealt with in short order. 'The absence of floodgates problems in those cases is so self-evident that the Law Lords do not even bother to mention them in *D&F Estates* and *Murphy*.'[9] The amount, time and class are as determinate as damage to 'other property': liability is limited to the full value of the item of property;[10] liability is only owed to the succession of property owners; the indeterminacy in time is equivalent to that faced under *Donoghue v Stevenson*[11] liability.

The second inapplicable justification is the idea that economic loss is a less important kind of interest than other forms of loss. This has some explicit judicial support,[12] albeit outside of the context of pure economic loss, but has been applied in this context by Professor Weir.[13] The argument supposes that there is a hierarchy of interests which are protected by law. Bodily safety is the most important interest because the value we ascribe to all other interests is contingent upon it. Beneath it, additional value is placed on physical property, over and above mere economic value, because the security of tangible property is relatively more important.

Such reasoning does seem to underlie other circumstances where the courts have denied the existence of a

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[7] *Hedley Byrne v Heller* [1964] AC 465 (HL) 537 (Lord Pearce); *Junior Books v Veitchi* [1983] 1 AC 520 (HL) 551-552 (Lord Brandon); *Smith v Bush* [1990] 1 AC 831 (HL) 865 (Lord Griffiths).

[8] *Ultramares v Touche* 225 NY 170, 179 (1931) (Cardozo CJ).

[9] J Stapleton, 'Duty of Care and Economic Loss' (1991) 107 LQR 249, 267.

[10] R Stevens, *Torts and Rights* (OUP 2007) 20.

[11] [1932] AC 562 (HL).

[12] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] QB 266, 284 (Hale LJ).

[13] T Weir, *Casebook on Torts* (10th edn, Sweet & Maxwell 2004) 146.

duty of care.[14] However, applying this argument to defective structures and products rests on the mistaken assumption that all cases of pure economic loss do not involve physical change. Undoubtedly, *some* cases involve no physical change. The loss of profits suffered by a travelling salesman while stuck in congestion from a traffic accident and the loss of market value suffered by a homeowner who discovers a pre-existing defect in his newly purchased properly are both of this kind. Yet, this is not true for all cases of pure economic loss. When there is damage to the 'thing itself', the loss results from a physical change which is a 'manifestation' of a pre-existing defect.[15] One part of the property damages another. Thus, in *Murphy v Brentwood*, the defective laying of the foundations (the pre-existing defect) resulted in both the foundations cracking and extensive damage to the walls and pipes (the physical change). Even if Professor Weir's premise concerning the relative value of tangible property is accepted, the appropriate conclusion to draw is that there should be liability for damage to the 'thing itself'. To hold otherwise would appear to place an unwarranted emphasis on how the damage was caused.

B. Remaining Justifications

The remaining justifications for the exclusionary rule are clearly applicable in this context. However, it is submitted that only a rights-based approach, in conjunction with a version of Lord Brandon's warranty argument from *Junior Books v Veitchi*,[16] is helpful in drawing the distinction.

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[14] J Stapleton, 'Duty of Care Factors: a Selection from Judicial Menus' in P Cane & J Stapleton, *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998) 67.
[15] *Murphy* (n 1) 484 (Lord Oliver).
[16] [1983] 1 AC 520 (HL).

First, it has been contended that Parliamentary intervention in this area has already comprehensively provided a mechanism for compensating those suffering loss, making further extensions of the common law inappropriate.[17] The House of Lords in *Murphy* applied this reasoning to the case of structures, citing section 1 of the Defective Premises Act 1972.[18] The section imposes a duty on a person undertaking work in connection with the provision of a 'dwelling' to see that the work is done in a 'workmanlike' or 'professional' manner so that it is 'fit for habitation'. While there is no direct statutory equivalent for goods, the implied warranties under section 9 of the Consumer Rights Act 2015 and section 14 of the Sale of Goods Act 1979 might be thought to serve a similar compensatory function through contract.

At first glance, this approach seems promising. If the creation of a statutory compensation scheme precludes the recognition of a duty of care ('the principle of non-interference'), then 'other property' and the 'thing itself' should be distinguished by identifying the statutory definitions for goods and dwellings. Whatever is defined in statute as part of a single good or dwelling should be classified as the 'thing itself'.

There are two reasons why this approach is doubtful. First, in the statutes under consideration, the given definitions of goods and dwellings are uninformative. In the Consumer Rights Act, 'goods' are defined as 'any tangible moveable items'[19] and the Defective Premises Act does not contain a definition of what constitutes a 'dwelling'. Both do not tell a judge how to distinguish dwellings or items from each other: a dwelling might be defined as a whole tower block or a single flat within it, and

[17] *Murphy* (n 1) 472 (Lord Keith), 491 (Lord Oliver), 498 (Lord Jauncey).
[18] ibid.
[19] Consumer Rights Act 2015, s 2(8); cf Sale of Goods Act 1969, s 61.

both a whole car and its engine could naturally be termed an item. Second, persistent extensions to negligence liability into areas covered by statutory regimes cast doubt on how coherently the principle of non-interference can be applied. For products, the House of Lords in *Donoghue v Stevenson* did not consider that the warranties contained in the Sale of Goods Act 1893 covered commercially sold goods.[20] The common law was extended to remedy the fact that the regime required Mrs Donoghue to be in contractual privity with the vendor. Similarly, the Defective Premises Act 1972 extends to both the structure of a dwelling and installations (such as electrical wiring) within it,[21] whereas in *Murphy* it was suggested that installations could be 'other property'.[22] The common law rule was clarified in a way which overlapped with the existing statutory regime. Each case is incompatible with a strict rule of non-interference, and illustrates how the systematic application of this rule to the present law can be incoherent.

A rights-based approach offers a better explanation. The matter is resolved by the idea that 'the common law's starting position is that the infliction of economic loss does not *per se* infringe any right of the claimant.'[23] When an item damages itself, there is no infringement of property rights, only a potential complaint that the goods were of a lower quality than expected. On a weak level, the refusal to recognise a right to quality goods can be thought to embody a preference in English law for property rights. Perhaps there is a hierarchy of potential rights analogous to those Weir proposes for interests. There are traces of this in *Murphy*.[24] It can also be justified on a stronger basis. It

[20] Stapleton (n 14) 68.
[21] Defective Premises Act 1972, s 1(4).
[22] *Murphy* (n 1) 478 (Lord Bridge), 497 (Lord Jauncey).
[23] Stevens (n 10) 21.
[24] *Murphy* (n 1) 487 B-C (Lord Oliver).

has been recently suggested that a right not to suffer *loss*, including pure economic loss from defective goods, is a conceptual impossibility.[25] If this is correct, the common law *cannot* recognise a right not to suffer loss. A rights-based approach fits and justifies the distinction.

How to distinguish the infringement of a property right from a quality complaint may appear obscure. Professor Stevens states that how the distinction is to be drawn is 'not always an easy question to answer' and, accordingly, only discusses the case law's treatment of it rather than attempting a justification in principle.[26] However, identifying whether the imposition of liability would involve a transmissible warranty of quality serves as a useful way of bringing out this distinction.[27] If, in a given case, the imposition of liability entails such a warranty, then imposing liability would wrongly involve recognising a right not to suffer loss. It would be remedying a quality complaint.

How this warranty can arise is best illustrated by example. Suppose I have bought a car and, after driving 50,000 miles, one of the engine valves suffers severe problems, thereby wrecking the whole engine. Now suppose each individual part of the engine were classified as a separate piece of property. Applying *Donoghue v Stevenson*, the court should ask whether the manufacturer took reasonable care to avoid damage to the rest of the engine. However, answering this question involves inquiring into whether the manufacturer had taken reasonable care in designing and building the engine to a sufficient quality, effectively transforming the duty into a warranty of quality.

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[25] D Nolan, 'Rights, Damage and Loss' (2017) 37 OJLS 255.
[26] Stevens (n 10) 26-30.
[27] *Junior Books v Veitchi* (n 16) 551 (Lord Brandon); *D&F Estates v Church Commissioners* [1989] AC 177 (HL) 204-206 (Lord Bridge), 212 (Lord Oliver); *Murphy* (n 1) 469 (Lord Keith), 480 (Lord Bridge).

Classifying each part of the engine as separate would thus violate the rights-based approach because it would result in compensation despite no infringement of property rights. Importantly, this kind of reasoning is in line with judicial thought: a refusal to recognise such a warranty has been the key justificatory reason relied upon in these cases since *Murphy*.[28]

It has not been contended that the recognition of such a warranty is in itself objectionable. Yet, it is worth considering whether the problems created by such a warranty could give rise to a free-standing justification for excluding liability, as Lord Brandon himself argued. His argument has sometimes been misunderstood as solely resting on the inappropriateness of imposing a quasi-contractual duty as a matter of policy;[29] however, the main focus of Lord Brandon's argument was his contention that there is no principled basis to determine the standard of the warranty.[30] He assumed that it would have to be determined in light of the earlier warranties previously stipulated in respect of the property by other parties. Thus, he considered that a judge might use the sub-contractor's warranty to his contractor or a supplier's warranty to his retailer. The problem with this is clear. As Lord Brandon recognised, this solution arbitrarily selects and imposes one of a set of standards agreed by other parties and for quite separate purposes onto the claimant.

The difficulty for Lord Brandon's argument is his further assertion that 'it follows that the question by what standard or standards alleged defects in a product complained of by its ultimate user or consumer are to be judged remains entirely at

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[28] *Bellefield v Turner & Sons* (n 2) 105 (Tuckey LJ); *Linklaters Business Services v Sir Robert McAlpine* [2010] EWHC 2931, [2010] BLR 537 (TCC) 544, 547; *Payne v John Setchell* [2002] BLR 489 (TCC) [22], [30].
[29] cf Stapleton (n 10) 268; *Junior Books v Veitchi* (n 16) 551 F.
[30] *Junior Books v Veitchi* (n 16) 552.

large and cannot be given any just or satisfactory answer.'[31] This assertion does not follow. The courts already answer questions of reasonableness in two closely analogous contexts without recourse to warranties that have been previously stipulated. First, in commercial contracts, it is common for a party to warrant that they will take reasonable care and skill in the provision of a good, service or structure. The courts already administer a negligence quality standard in evaluating contracts. Second, the warranties of satisfactory quality provided for by section 9 of the Consumer Rights Act 2015 and section 14 of the Sale of Goods Act 1979 are both judged in terms of what a reasonable person would view as satisfactory. The courts administer a fairly extensive statutory regime of quality control. Accordingly, the warranty argument is not a free-standing justification; it only serves to bring out what a rights-based approach requires.

The remainder of this article draws out the consequences of this analysis. The distinction between 'other property' and the 'thing itself' is drawn by determining whether, in a given case, the imposition of liability would create a transmissible warranty of quality. It is argued that the resulting distinction is faithful to *Murphy* and assists in understanding the reasoning in subsequent case law.

2. A Theory of the Distinction

There are two identifiable cases which have emerged: a) cases where the component of the product or structure was fitted by the original manufacturer or builder of the product or structure

[31] ibid.

and b) cases where the component was subsequently installed prior or subsequent to acquisition.

A. Original Components

I. The Methodology for a Test

Cases concerning original components have created the greatest difficulty for the courts. Thus far, academic attempts to formulate the core of the distinction have focussed on whether a component is an integral part of the structure or product. However, there is less agreement on what 'being integral' constitutes. Is it determined by whether something is integral as a matter of 'common sense'?[32] Is it determined by the degree and permanence of physical attachment or incorporation?[33]

Both approaches share the same flaw: they are unprincipled. Unsatisfactorily, the tests fail to be derived from the underlying rationale for the distinction. First, this is explicit on the common-sense view since on that view the distinction is to be drawn on common semantic use. It reduces the determination of persons' rights to rules derived from analysing the meaning of terms rather than normatively justified legal principles. Second, while the permanence of attachment view does not reduce the question to common semantic use *simpliciter*, it is also unprincipled. It takes an aspect of what is ordinarily meant by integral and elevates this into a legal distinction without reference to a normative principle which justifies doing so. There is no

[32] *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020), para 10-24.

[33] A Tettenborn, 'Components and product liability: damage to "other property"' (2000) LMCLQ 338; J Goudkamp and D Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) paras 10-049, 11-012.

apparent logical connection with any of the justifications offered in Section II.

II. From Transmissible Warranties to Interdependence

It is submitted that a principled approach to the law needs a focus on interdependence. The proper test in this case is as follows:

> X is integral to Y if and only if it is *sufficiently interdependent* with Y.

The concern around transmissible warranties suggests two senses of interdependence are relevant: structural and functional.

To begin with structural interdependence, a structure is composed of several interdependent structural parts. To illustrate how recognising one of these parts as 'other property' gives rise to a transmissible warranty of quality, let us suppose that the 'complex structure' theory of *D&F Estates v Church Commissioners*[34] were good law. Each internal part of a structure (the walls, floors, foundations and so on) would be 'other property' despite their structural connection to each other. This theory enabled *Anns v Merton LBC*[35] to be read as preserving the no-recovery rule for the 'thing itself', since the walls were classified as separate property from the foundations. However, the problem is that it inevitably involves a transmissible warranty over the whole structure, because of the structural interdependence of the parts. Thus, in *Anns*, the damages would include the cost of repairs to the walls. However, in order to make them structurally sound and restore the claimant to *status quo ante* with respect to the walls, it

[34] [1989] AC 177 (HL) 206-207 (Lord Bridge), 214 (Lord Oliver).
[35] [1978] AC 728 (HL).

would be necessary to repair the foundations. Accordingly, it would be necessary to compensate the claimant for damage to the 'thing itself'. Separating structurally interdependent parts results in a warranty over the whole.

Cases involving products commonly raise the notion of functional interdependence. This can be illustrated on the facts of *The Rebecca Elaine*.[36] A fishing vessel's engines seized up and were damaged as a result of defectively designed pistons. Suppose a 'complex product' theory were good law. To hold that the engine could be divided into different parts would allow recovery for the damage to the remainder of the engine and vitally the consequential cost of being towed. The claimant would be compensated for the loss of engine function. The problem with this is that the piston was a necessary and subsidiary part of the engine. It was required for it to function properly. Compensation for the loss of engine function would thus effectively involve compensation for the loss of piston function. The courts would be indirectly imposing a warranty that the piston would function properly.

III. *Murphy* and its Aftermath

This idea of interdependence is supported by authority. As a general idea, it can be traced to the speeches of Lords Bridge and Jauncey in *Murphy*. The concept is introduced as the explanation for why a house is a single piece of property:

> A builder who builds a house from foundations upwards is creating a single integrated unit of which the *individual components are interdependent*.[37]

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[36] [1999] 2 Lloyd's Rep 1 (CA).

[37] *Murphy* (n 1) 478 (Lord Bridge) (emphasis added), cf 497 (Lord Jauncey).

Interdependence is then highlighted when Lord Bridge contrasts installations (like central heating boilers or electrical installations) from structural parts:

> A critical distinction must be drawn here between some part of a complex structure which is said to be a 'danger' only because it does not perform its proper function in *sustaining* the other parts and some *distinct item* incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated.[38]

Lord Bridge again relies upon interdependence when he elaborates on this idea:

> The position … is entirely different where, by reason of the inadequacy of the foundations of the building *to support the weight of the superstructure*, differential settlement and consequent cracking occurs. [39]

Interdependence is an important part of the exposition of the distinction in *Murphy*.

A string of cases since *Murphy* show specific support for both functional and structural interdependence. To begin with functional interdependence, consider *Linklaters Business Services v Sir Robert McAlpine*.[40] As part of a wider set of refurbishment works, pipework was installed for the claimant's air-conditioning system. It was then discovered that the pipes were suffering from widespread corrosion. The issue for the court was whether the pipes and the insulation installed around it were one thing for the

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[38] ibid 478 (Lord Bridge) (emphasis added).
[39] *Murphy* (n 1) 478 (Lord Bridge) (emphasis added), cf 497 (Lord Jauncey).
[40] [2010] EWHC 2931 (TCC).

purposes of tort. While initially coming to a different conclusion in an earlier application,[41] after reviewing the facts and law Akenhead J held that:

> The insulated chilled water pipework was essentially one 'thing' for the purposes of tort. *One would simply never have chilled water pipework without insulation* because the chilled water would not remain chilled and it would corrode. The insulation is a key component but a component nonetheless.[42]

The reason why they were one thing for the purposes of tort was neither their physical attachment, which was intended to be permanent, nor their structural interdependence, which was absent, but because of how their functions related to each other. They were functionally interdependent parts of one whole.

This notion of functional interdependence is also present in discussions of whole structures. It is a powerful concern when considering buildings constructed as a single unit, such as in *Bellefield v Turner & Sons*. The defendant had carelessly left a gap in a compartment wall between a storage area and the rest of the dairy, leading to a subsequent fire in the storage area which spread throughout the building. While there was some unease expressed about the guidance,[43] the judgment of Wall J is telling:

> Most buildings are divided up in one way or another to enable individual rooms or spaces to perform different functions without the structure losing its identity as a single building. In any event the question here seems to me a straightforward issue of fact, and the judge, in my

[41] [2010] EWHC 1145 (TCC) [30].
[42] *Linklaters Business Services* (n 39) [119] (emphasis added).
[43] *Bellefield v Turner & Sons* (n 2) 104 (Schiemann LJ).

> judgment, was plainly right to find that the Dairy was one building in which the various functions of a dairy were combined under one roof.[44]

Finally, the most powerful illustration of this idea is cases where there is no structural connection at all. Packaging cases are the best illustration of this. In *The Orjula,*[45] the claimant contracted with the defendant for the supply and delivery of drums of hydrochloric acid. These were stored on pallets by the defendant, but they were stowed carelessly, leading to the barrels leaking. The claimant argued that the barrels should be distinguished from the rest of the stow, in order to recover for the damage to them from the leaked chemicals, but this was emphatically rejected by Mance J:

> I do not however accept the plaintiff's further submission that the individual drums and/or the allegedly negligent stow should be differentiated from each other and treated as separate for present purposes. The *plaintiff's basic complaint concerns the poor quality of the stow* and its consequences for the drums which were poorly stowed.[46]

It is helpful to contrast this reasoning with that of prevailing accounts. First, the permanence of physical attachment is not necessary because the barrels and rest of the stow were only temporarily attached to each other for the purpose of moving them from one place to another. The stow as a whole had a common function to transport the goods properly. Second, the subsidiary principle suggested of whether the items of property

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[44] ibid 106 (Wall J).
[45] [1995] 2 Lloyd's Law Reports 395 (QBD).
[46] ibid 401 (emphasis added).

'may ordinarily be used independently of each other'[47] does not seem to make full sense of it. The barrels and the stow may well ordinarily be used separately from each other, but it is the specific function for which they were provided that matters. If the stow materials were not being used to transport the barrels but were merely adjacent, it is submitted the outcome would have been quite different. In this sense, 'individual idiosyncrasy'[48] matters.

However, it is important to address the pre-*Murphy* case *MS Aswan Engineering v Lupdine*[49] which, at least at first glance, seems to undermine this explanation of the courts' reasoning in terms of interdependence. The claimant bought liquid waterproofing compound in plastic pails which were alleged to be defective, leading to the pails melting in the Middle Eastern sun, leaking all their contents. Though his Lordship's earlier discussion has at times been conflated with his conclusion,[50] the better view is that Lloyd LJ, with whom Fox LJ concurred, took the 'provisional view' that the damage to the pails was damage to 'other property'.[51] Other examples Lloyd LJ gave were of a tyre being separate property from a car or a cork from a bottle of wine.

While this argument has gained some credence,[52] there are two reasons for doubt, as indeed Mance J did in *The Orjula*.[53] First, it was decided when *Anns* was unquestionably good law, and before the rejection of the 'complex structure' theory in

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[47] A Tettenborn, 'Components and product liability: damage to "other property"' (2000) Lloyd's Maritime and Commercial Law Quarterly 338, 344-345.
[48] ibid.
[49] [1987] 1 WLR 1 (CA).
[50] *Clerk & Lindsell on Torts* (n 32) para 10-24.
[51] *Aswan Engineering* (n 48) 21 (Lloyd LJ); Stevens (n 10) 29.
[52] J Goudkamp and D Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020), para 11-012.
[53] (n 44) 401.

Murphy.[54] The example of separating parts of a bottle of wine given by Lloyd LJ is telling, particularly as Lord Jauncey seems to have argued against such a view in *Murphy*.[55] Second, there is now contrary authority. Lloyd LJ suggested that if in *Muirhead*, the motors in the pumps had overheated and damaged the pumps, then recovery could have been made for this as well as the damaged contents.[56] However, this is hard to reconcile with the subsequent ruling in *The Rebecca Elaine*. Relying on *Murphy*, the Court of Appeal held that, without an assumption of responsibility, a claimant could not recover for losses which were caused by a defective piston damaging the rest of an engine.[57] The reasoning of *The Orjula* is thus to be preferred.

Moving to consider structural interdependence, the case law has been dominated by construction cases. This body of authority indicates that, even where the parts are functionally distinct, a common structural feature will nevertheless suffice. Two cases illustrate this best. In *Payne v John Setchell*[58] a pair of semi-detached houses shared a reinforced concrete foundation. The key reasoning in that case can be summarised as follows per HHJ Humphrey Lloyd QC:

> The two cottages share a common foundation which serves both halves. The building was built as a single entity. In my judgment it would be artificial to regard the other half as 'other property.'[59]

Thus, a common *structural* feature meant that they could not be treated as two items of property for the purposes of tort.

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[54] Stevens (n 10) 29.
[55] (n 1) 498 (Lord Jauncey).
[56] *Awan Engineering* (n 49) 21-22 (Lloyd LJ).
[57] *The Rebecca Elaine* (n 36) [17]-[18] (Tuckey LJ).
[58] [2002] BLR 489.
[59] ibid [36].

This must be the essential feature rather than sale, marketing and use as one unit, since in this case the houses were in two functionally separate parts.

This reasoning was reiterated in *Broster v Galliard Docklands.*[60] The defendant had built six terraced houses with a common roof. Due to their carelessness, the roof was such that high winds lifted it one metre off the property before it fell back and caused damage. The court found that each roof segment was not separate from every other roof segment. Since there was a common structural part (the common roof), the buildings formed one structure. That each house was built to be used as separate dwellings did not suffice.

> It is clear from the pleadings that the houses, albeit intended for multiple occupation (by six sets of occupiers), were … built as one construction; they were physically linked to and homogenous with each other and they shared, at least, a common roof … it would be surprising, for instance, if there was not some interlinking of foundations at least between immediately neighbouring units.[61]

As with functional interdependence, this analysis reveals that prevailing accounts sit awkwardly with recent authority. Again, consider the idea that it is the degree of permanent physical attachment which matters. This does not highlight the specifically structural nature of the relation, nor can it be justified on the lines suggested above. Most importantly however, it also fails to explain the reasoning behind the aforementioned *dicta* in *Murphy*, suggesting that boilers or electrical installations might be separate

[60] [2011] BLR 569 (TCC).
[61] ibid [15].

property.[62] In these cases, structural interdependence is clearly distinguishable from physical attachment.

Alternative explanations of these *dicta* turn out to be unsatisfactory. One approach has been simply to reject them as red herrings incompatible with *Murphy*.[63] However, the issue recently resurfaced in *Kagan v Harris*. A kitchen was installed but pipework placed under the floor leaked, damaging it. In a strikeout application, Edwards-Stuart J found himself unable to judge without further facts whether the pipes were separate property to the floor because it was unclear if the pipes were encased in concrete or within their own cavity.[64] Whether the pipes and floor were structurally interdependent was thus a vital consideration even though in both possible scenarios they were quite permanently attached.

Other accounts have accepted these *dicta*, but ultimately find difficulty distinguishing them properly. Professor Tettenborn's account embodies this.[65] His example of a roof-rack not being other property from a car appears logically indistinguishable from all kinds of installations. It is hard to see why, on his account, some installations may be separate property. While there is much to be said for the view that the notion of functional interdependence from *Linklaters* might be applied to most installations, the concept of structural interdependence sketched above at least explains the suggestions in *Murphy* and *Kagan v Harris*.

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[62] *Murphy* (n 1) 478 (Lord Bridge), 497 (Lord Jauncey).
[63] Stevens (n 10) 29-30.
[64] *Kagan v Harris* (n 3) [31] (Edwards-Stuart J).
[65] Tettenborn (n 47) 343-344.

B. Non-Original Components

I. Subsequent Components Installed After Acquisition by the Claimant

The rule to be applied in this case is relatively simple. It is widely accepted by commentators[66] that such components should always be treated as 'other property'. The warranty analysis affirms this.[67] Suppose a motorist were to install a replacement engine, and that this engine then exploded and severely damaged the vehicle to which it was installed. If the concern of the law is to avoid granting a warranty of quality, then it would make no sense to restrict recovery. The 'warranty' that would be imposed would be in respect of anything to which the engine might be attached. This is open-ended: the maximum loss of the manufacturer is unlimited. In this respect, the liability is the same as when a product damages some wholly unrelated other property (where property rights are infringed). Conversely, the liability is different from when one part of a structure damages another (which only concerns quality): the maximum loss to the builder is limited to the value of the structure (and any consequential losses).

The only significant authority illustrating this rule is *Nitrigin Eireann Teoranta v Inco Alloys*.[68] The claimants were owners of a chemical plant whose structure and installations had been damaged because of cracking in replacement pipework provided by the defendants. Since the pipework was subsequently acquired, the claimant could recover for damage to every other part of the factory.

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[66] Tettenborn (n 47) 345; *Clerk & Lindsell on Torts* (n 32) para 10-23.
[67] cf Tettenborn (n 47) 346.
[68] [1992] 1 WLR 498 (QBD).

However, it is to be admitted that *Bacardi-Martini Beverages v Thomas Hardy Packaging Ltd*[69] casts doubt on this rule. The claimant had incorporated the defendant's contaminated carbon dioxide into its fizzy drinks, which were thus unsaleable. The claim failed because the sales contract excluded liability for 'direct physical damage to property' which was said to replicate the 'other property' limitation in tort.[70] Rather than analysing it as 'damage' to the pre-existing ingredients, it was deemed a 'more natural' analysis that the ingredients had 'ceased'[71] to exist since 'by mixing all these elements … [the claimant had created] a new product'.[72] Thus, the claimant could not recover since the carbon dioxide had not damaged the other ingredients, all that occurred was that a finished product was 'defective from the moment of its creation'.[73]

Unfortunately, *Nitrigin* was not distinguished in *Bacardi*. The distinction appears to be as follows. *Bacardi* involved the *addition* of a wholly new ingredient to *create* a *new* 'finished product', whilst *Nitrigin* involved the *replacement* of something to *maintain* a *pre-existing* product. It is submitted that this is not a workable distinction in practice, and that it does not track anything which ought to be legally significant. Let us consider these contentions in turn.

First, to consider how this distinction might be applied to other factual contexts, take the example of a bathroom renovation. On strict assumptions, the application of this distinction is simple. If the existing parts (e.g. the bath, shower, toilet etc.) were replaced with the exact same models as were

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[69] [2002] EWCA Civ 549, [2002] 2 Lloyd's Rep. 379.
[70] ibid [12].
[71] ibid [10].
[72] ibid [18].
[73] ibid.

previously installed, this would presumably be a *Nitrigin* replacement case. However, with more realistic assumptions, the matter becomes significantly more ambiguous. For example, suppose that the homeowner decides to install parts of a different style, or goes further and substantially changes the layout or functionality of the bathroom (e.g. transforming it into a wet room). In each case, the facts could be naturally described either on the lines of *Nitrigin* or *Bacardi*. Per *Nitrigin*, the pre-existing bathroom has had maintenance done to it and had its old parts replaced. Per *Bacardi*, *new* parts, meaningfully distinct from the old, have been installed to create a *new kind of bathroom* with a different style, function or layout. The common-sense distinction offered in *Bacardi* does not provide an effective way to resolve ambiguities of this kind.

Second, not only would such difficulties be avoided if the distinction in *Bacardi* were abandoned, but there is no apparent principled reason to distinguish maintenance and product creation cases. While on the facts of *Bacardi* it would admittedly have been semantically unnatural to say that the carbon dioxide 'damaged' the other components, this should not have distracted the court from an application of *Nitrigin*. As previously explained, the rule in *Nitrigin* makes sense insofar as the concern of the courts is to avoid imposing transmissible warranties of quality. *Bacardi* should simply serve to illustrate the hazards of deviating from this and embracing a common-sense approach.

II. Subsequent Components Installed Prior to Acquisition by the Claimant

By contrast with claimant installation cases, there remains no English authority on this question.[74] The obvious case where it

[74] *Clerk & Lindsell on Torts* (n 32) para 10-25.

might arise is where a previous owner of a product or structure has undertaken routine maintenance, such as when a previous owner of a car has replaced a tyre. If such a product or structure is sold, should the replaced component be considered part of the overall product or structure, or other property?

The first approach, exemplified by Professor Tettenborn, is to treat such components in the same way as originally installed components.[75] He provides two arguments for this: i) it would better accord with section 5(2) of the Consumer Protection Act 1987; and ii) the complaint of the claimant in the subsequent installation case is the same as that in the original installation case – he has bought useless goods.

Both suggestions are ultimately unconvincing. First, the common law and statute do not dovetail in the case of original components, such that at best only a partial reconciliation would be possible. More importantly, negligence law has differing underlying general principles from comparable statutory regimes and so it is unsurprising that it comes to different results. Different rules of actionability are a consequence of a principled application of differing systems of law. The second argument initially seems persuasive. However, when the matter is analysed from the perspective of the manufacturer's duty, its force is considerably weakened. Prior to sale, a manufacturer would be liable for the damage their part caused to the product to which it was installed but, after sale, this liability would disappear. This is unsatisfactory. The sale of goods does not change whether the manufacturer would be providing a *transmissible* warranty of quality. The maximum liability of the manufacturer (at least in theory) remains unlimited. All that changes is the way that the

[75] Tettenborn (n 47) 347.

component and product were or were not bundled together at the point of exchange (not when they were produced).

More generally, it would be striking, and conceptually unsatisfactory, if the extent of product liability in negligence were to depend on how and when products were exchanged. Unlike contractual liability, this kind of liability generally concerns the breach of obligations (and the correlative infringement of rights) owed to all the world irrespective of any prior relationship. Part of what is striking about *Donoghue v Stevenson* liability is precisely this: it survives repeated exchanges of goods between different parties. It would be anomalous to depart from this general approach.

This reasoning points towards the alternative approach[76] that such cases are on all fours with components installed by the claimant himself. This approach chimes with domestic and international authority. While there is no binding authority on this question in England and Wales, the *dictum* of Lord Oliver in *D&F Estates v Church Commissioners* seems to have been overlooked:[77]

> If I buy a second hand car to which there has been fitted a pneumatic tyre which, as a result of carelessness in manufacture, is dangerously defective and which bursts, causing injury to me or to the car, no doubt the negligent manufacturer is liable in tort on the ordinary application of *Donoghue v Stevenson*.[78]

[76] *Clerk & Lindsell on Torts* (n 32) para 10-25.
[77] cf Tettenborn (n 47) 346-347; *Clerk & Lindsell on Torts* (n 32) para 10-25.
[78] (n 34) 211 (Lord Oliver).

This view accords with the finding of the US Supreme Court in *Saratoga Fishing Co v Martinac,*[79] who criticised the idea that the fact property changes hands should change liability in tort:

> Why should a series of resales, after replacement and additions of ever more physical items, progressively immunize a manufacturer to an ever greater extent from the liability for foreseeable physical damage that would otherwise fall upon it?[80]

Overall, authority and principle indicate that it should not matter whether the components were installed prior to or after acquisition by the claimant.

Conclusion

While this area of law is still developing, this article has argued that the case law is beginning to provide considerable guidance concerning how to distinguish the 'thing itself' from other property. For originally installed components, judicial reasoning embodies the idea of interdependence. For subsequently installed components, although there is a relatively limited and somewhat conflicting body of authority, there is some support for (ordinarily) treating such components as other property.

Beyond deducing the relevant rules, it has been argued that the distinction is best explained as reflecting a rights-based conception of tort. The key difference lies in the distinction between quality complaints and the infringement of property

[79] 520 U.S. 875 (1997).
[80] ibid 881.

rights. The courts have largely adhered to this approach, and it is to be hoped that they will continue to do so as they develop this relatively overlooked field of law.

The Meaning of 'right to possession' after *Bruton*: The More Things Seem to Change, The More they Stay the Same

Oliver Clement & Jake Emerson*

Abstract— This article hopes to make a useful and clarificatory contribution to the academic discussion following the decision in *Bruton v London & Quadrant Housing Trust*. First, it discusses the meaning of the 'right to possession', arguing that this definition remains unchanged in the wake of *Bruton* as 'the right to exclude all those without superior relative title'. It then focuses on two prominent interpretations of *Bruton*. It will demonstrate that whether Bruton is taken to be a case about contractualisation of leases, or relativity of title, the definition of the right to possession remains unchanged. It concludes by noting that any suggestion that there now exists a third 'quasi-proprietary' interest cannot stand and should be roundly rejected.

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Introduction

The decision of the House of Lords in *Bruton v London and Quadrant Housing Trust*[1] has generated a flurry of academic discussion.[2] Despite, or perhaps because of, this spirited discussion there is little consensus as to the effect of the decision, even over twenty years later. This article will seek to provide a fresh perspective on this issue through a focus on the meaning of the 'right to possession', asking how that term is properly defined, and whether its definition has been altered by the decision in *Bruton*. The meaning of the 'right to possession' is particularly important to define accurately, as it is 'a key part of what it means to own property'.[3]

Two interpretations of *Bruton* are most prominent within academic discussion. The first views the decision in *Bruton* as generating a purely personal, contractual interest (the 'contractual lease theory'). The second sees *Bruton* as a decision based on relativity of title (the 'academic reconceptualization theory'). This article will demonstrate the following four propositions:

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[1] [2000] 1 AC 406 (HL).

[2] Michael Harwood, 'Leases: Are They Still Not Really Real?' (2000) 20 LS 503; S Murdoch, 'Of Carts and Horses' [1999] EG 9930, 90; Jan Luba, 'The House of Lords and Landlord and Tenant' [1999] L&T Rev 115; Susan Pascoe, '*Street v Mountford* Gone Too Far' [1999] JHL 87; Susan Bright, 'Leases, Exclusive Possession and Estates' (2000) 116 LQR 7; Martin Dixon, 'The Non-contractual Lease: the Rise of the Feudal Phoenix' (2000) 59 CLJ 25.

[3] Kevin Gray, 'Property in Thin Air' (1991) 50 CLJ 252; JW Harris, *Property and Justice* (OUP 1996) 68-75; Thomas W. Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska LR 730.

1) The 'right to possession', despite some contentions to the contrary, is properly defined as the 'right to exclude all those without superior relative title'.

2) If the interpretation of *Bruton* which we call the 'contractual lease theory' is accepted: (i) the definition of the 'right to possession' remains unchanged, but (ii) the definition of the word 'lease' must be modified in light of *Bruton*.

3) If, alternatively, the 'academic reconceptualization theory' is accepted: (i) the definition of the 'right to possession' remains unchanged, and (ii) the definition of the word 'lease' remains unchanged.

4) There is no support in the case law for an intermediary interpretation between the two laid out above.

First, the meaning of 'right to possession' will be considered as it stood before the decision in *Bruton*. The common idea that the 'right to possession' is the 'right to exclude all others' will be shown to be untenable, as it cannot be squared with the fundamental doctrine of relativity of title. Next, it will be shown that this definition of 'the right to possession' remains unchanged after *Bruton*. We will consider two possible interpretations of the decision, showing both interpretations to be compatible with our definition. The final contention will be that any suggestion that *Bruton* created an intermediary category (i.e. an interest which could bind some third parties but not others) is not supported by the case law. We thus conclude that there is nothing in *Bruton* or later cases to suggest that the 'right to possession' means anything other than the 'right to exclude all those without superior relative title'. A summary of our argument can be found in tabular form in the Appendices.

1. The Meaning of the 'Right to Possession' before *Bruton*

A. The Distinction between Leaseholds and Licences

This section will seek to show that the 'right to possession' is properly defined as 'the right to exclude all those without superior relative title'. Attempts to define the 'right to possession' along the lines of the 'right to exclude the whole world' are misplaced. This is because they are inconsistent with the doctrine of relativity of title, a concept at the core of English land law. Establishing the position before *Bruton* with precision is important, as it will affect the later analysis of whether the decision in *Bruton* has moved away from any previous position.

The 'right to possession' is a key distinguishing feature between legal estates and merely personal interests. The difference between these two classes of interest is that a legal estate is proprietary, meaning it binds at least some strangers, i.e. people other than the parties to the agreement, whereas a personal interest binds only the parties to the agreement.[4] After 1925[5], the only estates which can subsist at law are the fee simple absolute in possession (colloquially called a fee simple or a freehold) and

[4] *Thomas v Sorrell* (1673) 124 ER 1098 (CP) 1109 (Vaughan CJ), 'a dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful'. See also *Muskett v Hill* (1839) 5 Bing NC 694 (CP) 707; *Heap v Hartley* (1889) 42 Ch D 461 (CA) 468.
[5] Law of Property Act 1925, s 1(1).

the term of years absolute (colloquially called a leasehold[6]). Although the precise incidents of the fee simple are debated,[7] it is beyond doubt that, as the interest is an estate, it is fully alienable, and one of its characteristics is that it entails a 'right to possession'. The meaning of the 'right to possession' in the context of fees simple has not led to controversy.[8]

Where a line does have to be drawn is between the proprietary leasehold estate and the personal licence. It is here that the meaning of the 'right to possession' is key.[9] The landmark case on the difference between these two interests is *Street v Mountford*.[10] Mr Street granted Mrs Mountford permission to stay in two rooms in exchange for £37 per week. The agreement purported to be a licence and it was expressly stated that Mr Street did not intend to grant a leasehold estate. Lord Templeman, giving the sole judgment of the House of Lords, held that the

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[6] Also colloquially called a 'lease', but we refrain from using this language. In *Bruton*, Lord Hoffmann, at least on one interpretation of His Lordship's judgment, introduced a previously unknown distinction between a leasehold and a lease, so to use them interchangeably would now be unwise.

[7] Simon Douglas, 'The Content of a Freehold' in Nicholas Hopkins (ed), *Modern Studies in Property Law, Volume 7* (Hart 2013).

[8] This is because, although the 'right to possession' is a result of recognising an interest as being in a fee simple, it is not a condition for that interest arising. Fees simple can either be transferred from another or originally generated. Transfer from another is easy to recognize, and, although the circumstances which must be present to generate an original fee simple are hotly debated, this debate relates to the question of whether the person claiming the interest has met the requirements to be in possession, not whether they have the 'right to possession'.

[9] The 'right to possession' can also distinguish between a lease and an easement, though the same rules as here would apply. See Stuart Bridge, Elizabeth Cooke and Martin Dixon (eds), *Megarry and Wade: The Law of Real Property* (9th ed, Sweet & Maxwell 2019) para 16-033.

[10] [1985] AC 809 (HL).

agreement nevertheless did result in the grant of a leasehold estate. His Lordship stressed the importance of the substance of the agreement in determining the type of interest it created, and the irrelevance of the label which the parties attached to it. His Lordship stated that to:

> 'constitute a tenancy[11] the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.'[12]

Strictly speaking, Lord Templeman talks of the grant of 'exclusive possession', rather than the grant of the 'right to possession'. There are two reasons why we think the 'right to possession' is a simpler and more reflective phrase to use. First, possession is necessarily an exclusive concept.[13] Two persons can only be in possession if their possession is joint and several.[14] Any reference to a concept of 'exclusive possession' is thus

[11] Again, because the distinction between 'lease/tenancy' and 'leasehold estate' was only introduced by Lord Hoffmann in *Bruton* in 2000, Lord Templeman does refer to a 'tenancy' here, but more specifically he is referring to a leasehold estate.

[12] *Street* (n 10) 818E (emphasis added). Despite there being three requirements stated here, the definition of the 'right to possession' is of primary importance, as payment of rent is no longer a requirement of tenancy (*Ashburn Anstalt v Arnold* [1988] Ch 1 (CA)) and the courts are clearly not content with the requirement of certain term (*Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 (HL) 396-397 (Lord Browne-Wilkinson).

[13] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 [70] (Lord Hope): 'Exclusivity is of the essence of possession'.

[14] ibid [38] (Lord Browne-Wilkinson). For the difference between joint and several possession, and possession by an individual, see, for example, *Antoniades v Villiers* [1990] 1 AC 417 (HL).

redundant,[15] so simply 'possession' will suffice. Second, although Lord Templeman speaks of the 'grant of possession', it is safe to assume what His Lordship means is the 'right to possession'.[16] This is because, when construing an agreement to determine whether it is a lease or a licence, it only makes sense to analyse the contents of the agreement, i.e. the rights conferred under it. 'Possession' *simpliciter* can only relate to a relationship one has with land as a matter of fact, irrespective of any legal entitlement. 'Possession' thus cannot be the focus of one's construction of a legal agreement. Rather than referring to 'exclusive possession', then, we will refer to the 'right to possession' throughout this article. This is simply to avoid confusion and should not affect the substance of the argument.

What is necessary is thus the grant of the 'right to possession'. Lord Templeman defined this right in the following terms:

> 'a tenant armed with exclusive possession ['the right to possession'] can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair.'[17]

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[15] This was recognized in the Australian case of *Western Australia v Ward* (2002) 213 CLR 1 [503] (McHugh J). See also Jonathan Hill, 'The Proprietary Character of Possession' in Elizabeth Cooke (ed), *Modern Studies in Property Law Volume 1* (Hart 2001) 27.

[16] We are bolstered in this conclusion by His Lordship's reference at 824E to the previous case of *Shell-Mex v Manchester Garages* [1971] 1 WLR 612 (CA), where His Lordship comments that the key issue was whether the agreement conferred 'the right to exclusive possession'.

[17] *Street* (n 10) 816C (Lord Templeman). Lord Templeman makes clear that the agreement must 'confer the right to exclusive possession … No

The following diagram represents a hypothetical hierarchy of interests in the same piece of land. The concept of a 'superior relative title holder' will be explained in more detail in the next section. The 'landlord' and 'tenant' are represented on the same level, as a leasehold consists of carving a derivative interest from the landlord's fee simple, meaning the landlord's and tenant's interests will always be of the same relative strength.

<table>
<tr><td colspan="2">(i) The supreme owner/registered proprietor</td></tr>
<tr><td colspan="2">(ii) A superior relative title holder</td></tr>
<tr><td>(iiia) The 'landlord'</td><td>(iiib) The 'tenant'</td></tr>
<tr><td colspan="2">(iv) Strangers/the world at large</td></tr>
</table>

In determining whether the 'right to possession' has been conferred, according to Lord Templeman, the grantee must be able to '*keep out strangers and keep out the landlord*'. This means the right to exclude (iiia) the landlord and (iv) strangers. It does not include the ability to keep out (i) the legal owner, or (ii) a superior relative title holder.

Another definition of the 'right to possession', which is different in a subtle but important manner, appears in cases, articles and textbooks. These definitions do require the 'right to

other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable'.

exclude all others', which we say is inconsistent with Lord Templeman's definition in *Street*. In *Watts v Stewart* Sir, Terence Etherton MR said:

> legal exclusive possession entitles the occupier to exclude *all others*, including the legal owner, from the property.[18]

This formulation would require significantly more than Lord Templeman's definition. It would require the right to exclude not only (iiia) the landlord, and (iv) strangers, but also (i) the legal owner and (ii) a superior relative title holder. Which of these conflicting approaches is correct? We say that only Lord Templeman's definition can be right. Those based on a requirement of the 'right to exclude all others' must be mistaken, due to their inconsistency with the fundamental principle of relativity of title which underlies English land law.

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[18] [2016] EWCA Civ 1247, [2018] Ch 423 [31] (Sir Terence Etherton MR). This may have been an oversight on His Lordship's part, but it is repeated so often in textbooks and commentary that we think it merits discussion. Instances of definitions along these lines can be found at: *Megarry and Wade* (n 9) para 16-013 'the right to exclude all other persons'; Mark Pawlowski, 'Occupational Rights in Leasehold Law: Time for Rationalisation?' [2002] Conv 550 'the right to exclude the world (including the landlord)'; Simon Gardner and Emily Mackenzie, *An Introduction to Land Law* (4th edn, Hart 2014) 237 '[you have] exclusive possession… if your right entitles you to occupy the house on your own: that is, to *exclude everyone else* if you wish'; *Woodfall: Landlord and Tenant* (Sweet & Maxwell 2017) para 1.023; Susan Bright, *Landlord and Tenant Law in Context* (Hart 2007) 71; Susan Bright, '*Street v Mountford* Revisited' in Susan Bright (ed), *Landlord and Tenant Law: Past, Present and Future* (Hart 2006) 32; *Aldridge Leasehold Law* (Sweet & Maxwell 2022) para 1.001A.

B. Relativity of Title in English Land Law

To explain why only Lord Templeman's definition (the right to exclude the landlord and strangers) can be right, and the alternative definition (the right to exclude all others) may be misplaced, we must consider the doctrine of relativity of title, which forms the 'bedrock' of English land law.[19] A summary of the following argument can be found in Appendix A.

Given that, according to the Land Registry,[20] over 87% of land in England has a registered proprietor,[21] it is tempting to think of land as being 'owned' by the one registered proprietor, whose 'fee simple' title, except in exceptional circumstances,[22] is indefeasible. This, however, tells only half of the story. In fact, many fees simple can exist in the same land, even if one of them is registered.

This is because possession in itself is a source of title in English law.[23] The discussion in this article will proceed from the premise that possession, i.e. exclusive factual control over land coupled with an intention for the possessor to possess on their

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[19] *Wells v Pilling Parish Council* [2009] EWHC 556 (Ch), [2008] 2 EGLR 29 [7].

[20] HM Land Registry, Performance Report (15 July 2021) <www.gov.uk/government/publications/hm-land-registry-annual-report-and-accounts-2020-to-2021/performance-report> accessed 29 May 2022.

[21] The 'registered proprietor' is the sole fee simple holder, or joint and several holders, whose interest is recorded and protected by the Land Register.

[22] For example, rectification of the Register for mistake. See *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602.

[23] *Asher v Whitlock* (1865-66) LR 1 QB 1 (QB); *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894 (HL) 898 (Lord Hoffmann).

own behalf,[24] generates an original fee simple title. This may sound surprising, but it is commonly accepted in the context of adverse possession,[25] and the rule is no different for consensual possession.[26] Dr Luke Rostill has convincingly and thoroughly shown that this proposition is correct as a matter of authority.[27] It is, moreover, also generally desirable as a means of having some form of structured regulation of interests which exist below the paramount title,[28] with no prejudice to that paramount title holder/registered proprietor.

If we accept that the doctrine of relativity of title is defensible, this raises the question of how it operates in practice. Specifically, how can multiple fees simple exist in the same land, if each entails a 'right to possession', and possession is necessarily single and exclusive?[29] The answer is that, although possession itself must be exclusive, i.e. only one person can be in possession at any one time, the *right* to possession need not be exclusive.

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[24] *JA Pye* (n 13) [40] (Lord Browne-Wilkinson).

[25] This is so even after the Land Registration Act 2002. See Schedule 6 Para 5(4)(c), 9(1) and 11(2), which recognize the adverse possessor as still having an interest before registration.

[26] This is widely accepted academically, see Ben McFarlane, *The Structure of Property Law* (Hart 2008) 154–156; Nicholas Roberts, 'The Bruton Tenancy: a Matter of Relativity' [2012] Conv 87; Amy Goymour, '*Bruton v London & Quadrant Housing Trust* [2000]: Relativity of Title, and the Regulation of the "Proprietary Underworld"' in Simon Douglas, Robin Hickey and Emma Earing (eds), *Landmark Cases in Property Law* (Bloomsbury 2015); cf. Adam Baker, 'Bruton, Licensees in Possession and a Fiction of Title' [2014] Conv 495.

[27] Luke Rostill, '*Possession, Relative Title and Ownership in English Law*' (OUP 2021). See also Robin Hickey, *Possession and the Rights of Finders* (Hart 2010) ch 5.

[28] In what Goymour has termed the 'proprietary underworld'; see Goymour (n 28).

[29] *JA Pye* (n 13) [70] (Lord Hope) 'Exclusivity is of the essence of possession'.

Multiple people can have rights to possession in the same land; these rights exist in a hierarchy determined through application of the priority rules. The concept of 'relativity of title' is the idea that, when faced with two parties claiming entitlement to land, the court simply asks which party has the *better* claim,[30] rather than saying one party has the *best* claim, and all other interests or entitlements are invalid.

This is demonstrated in the following example:

> Example 1: Atticus purchases and is transferred a fee simple estate in Blueacre, and is registered as proprietor. When Atticus goes on holiday, Belinda enters into possession of Blueacre, changing the locks. When Belinda goes to the shops, Charles enters into possession, again changing the locks and barricading himself in.

Atticus has a fee simple by virtue of a transfer to him, and its protection by registration means it takes priority over all other interests.[31] Belinda will have a fee simple by virtue of her possession,[32] as will Charles by virtue of his later possession. Atticus is the registered proprietor, meaning his claim will be stronger than both Belinda's and Charles'. When considering who has a stronger claim between Belinda and Charles, we must use the priority rules for unregistered title, as both their titles are

[30] *Ocean Estates v Pinder* [1969] 2 AC 19 (HL) 24-25 (Lord Diplock).
[31] Law of Property Act 1925, s 29.
[32] Being dispossessed will not deprive Belinda of her fee simple, as these interests are not dependent on continued possession. See Rostill (n 29) 55.

unregistered.[33] This is a simple 'first in time' rule,[34] so Belinda has the stronger title.

From Belinda's perspective, then, the arrangement can be represented by the following table, representing her right to exclude others from Blueacre.

Belinda's rights to exclude	
No right to exclude	Right to exclude
Superior title holder/ registered proprietor (Atticus)	Inferior title holder (Charles)
	Strangers

Belinda has a right to exclude Charles and strangers, as she has a stronger title than them. She has no right to exclude Atticus, as Atticus has a stronger title than her. She was at one point in possession, hence her interest is a fee simple and she does have a 'right to possession' of Blueacre.

The key message is that, in order to have a 'right to possession', one need not necessarily have the right to exclude all others. One need only be able to exclude all those without stronger relative title. Importantly, there cannot be a different definition of the 'right to possession' for paramount estates and

[33] This is so even though Atticus' title is registered. Strictly speaking, a more accurate characterisation is that it is not the *land* that is registered, but titles to the land, and here Atticus's registered title is not relevant when assessing a dispute between Belinda and Charles.

[34] *Mercer v Liverpool, St Helen's and South Lancashire Railway Co* [1903] 1 KB 652 (CA) 662 (Sterling LJ).

for inferior or 'relative' estates. To hold that 'paramount' estates could have different requirements to 'relative' estates would be to create four estates which would subsist at law: the paramount fee simple, 'relative' fee simple, paramount leasehold, and 'relative' leasehold. This is not possible, however, as Section 1(1) of the Law of Property Act 1925 tells us that only two estates can subsist at law: the fee simple and the leasehold.

As such, we can see that only Lord Templeman's definition in *Street* of the 'right to possession' is correct. The alternative definition is inconsistent with the fundamental doctrine of relativity of title. To show this, let us see what would happen if we accepted, as a requirement for leasehold estates, the more stringent alternative definition of the 'right to possession' as the 'right to exclude all others'. The same stringent definition would have to be used as one of the incidents of a fee simple.[35] This is because leasehold estates are always derived from fees simple, and the principle of *nemo dat quod non habet* means those with an interest in a fee simple cannot grant a leasehold interest consisting of a more stringently defined right, which they do not have.

Accepting the stringent alternative definition of the 'right to possession' as the 'right to exclude all others' would, however, mean that no two fees simple could exist in the same land. Logically, only one interest can consist of the right to exclude all others. Due to Section 1(1) LPA, all other 'fees simple' which did

[35] Technically, the 'right to possession' as a requirement for leasehold estates may be more limited than the grantor freeholder's 'right to possession', as that grantor may reserve limited access rights for maintenance and the like. This has no bearing on the argument above, which relies on the fact that the leaseholder's 'right to possession' cannot be more extensive than the freeholder's.

not meet this more stringent definition, such as the originally acquired interest of a possessor, could not subsist at law.

The conclusion that only one fee simple can subsist at law in one piece of land would, however, be fundamentally inconsistent with the doctrine of relativity of title. It would be to ask which fee simple is the *best*, and to hold all others invalid at law. Relativity of title, however, demands asking, as between the parties who happen to be before the court, whose fee simple is *better*. The 'loser', i.e. the party who was found to have the inferior interest, would not have their interest condemned as invalid. It would still bind some third parties, but would simply not bind the other party before the court with a superior interest.

The criticism that a definition of the 'right to possession' as the 'right to exclude all others' is inconsistent with the doctrine of relativity of title proceeds from the assumption that this doctrine is worth retaining as a feature of English land law. Although space precludes a full defence of this premise, it should suffice to make two points. First, there is the argument from history. Relativity of title has underpinned English land law for centuries,[36] and it would thus require serious thought to dispense with, and this is so even in a system dominated by registration.[37] Secondly, relativity of title is normatively attractive, as it ensures there is a system of regulation in the 'proprietary underworld', i.e. for interests which exist below the registered title, where to

[36] See Rostill (n 29).

[37] Indeed, it is telling that in the 2nd edition of *Land Law* (OUP 2012), 243, Elizabeth Cooke made the claim that relativity of title 'used to be an important concept but it is no longer'. Professor Cooke tellingly took one step back from this position, changing the wording for the 3rd edition (OUP 2020) to 'used to be an important concept, but is now rather less important than it was'.

dispense with relativity of title would leave these interests entirely unregulated.[38]

An interpretation of Lord Templeman's definition of the 'right to possession' as the 'right to exclude all those without superior relative title' is thus the only tenable one in the current system of relativity of title. Any interpretation along the lines of the 'right to exclude all others' is misplaced, unless relativity of title is to be done away with, and there are strong historical and normative reasons for not doing so.

2. The Meaning of the 'Right to Possession' after *Bruton*

It has thus been shown that the proper definition of the 'right to possession' in the context of leases is the 'right to exclude all those without stronger relative title'. The next section will consider the case of *Bruton*, and ask whether this decision affects this definition of the 'right to possession'. There are two possible interpretations of this decision, namely the 'contractual lease theory' and the 'academic reconceptualization theory'. It will be shown that, regardless of which of these two interpretations of the decision one accepts, the meaning of the 'right to possession' has remained the same as Lord Templeman's definition from *Street*, elaborated above. It will then be shown that these are the only two tenable interpretations of the case law. As such, there is no room for an argument that the meaning of the 'right to possession' has

[38] An argument made in much more detail by Goymour (n 28).

changed after *Bruton* by reliance on any other interpretation of that decision.

A. The Facts and the Judgments

The facts of *Bruton* are as follows. Lambeth Borough Council ('the Council') was the freeholder of a block of flats. The Council granted the London & Quadrant Housing Trust ('the Trust') a licence to use the building as short-term housing for the homeless. The Trust then entered into an agreement with Mr Bruton for sole occupation of a flat on a weekly basis, in exchange for nominal rent. The agreement was specifically labelled a 'weekly licence'. Nevertheless, Mr Bruton brought an action against the Trust for breach of an implied covenant to repair under Section 11 of the Landlord and Tenant Act 1985. This would require the existence of a 'lease' between Mr Bruton and the Trust. The Trust argued that there was no such lease; they were, as stated in the agreement, a licensor and not a landlord, and so were not subject to the duty.

The majority of the Court of Appeal,[39] in a judgment delivered by Millett LJ, applied an orthodox approach. His Lordship drew no distinction between a 'lease' and a 'leasehold estate', and thus required the successful grant of the 'right to possession'. Finding that Mr Bruton had a merely personal right against the Trust, that he had no right to exclude any strangers, and thus no 'right to exclusive possession'.[40] Given this was a requirement for a leasehold estate, and there was no indication that a 'lease' and a 'leasehold estate' were different, Mr Bruton did not have a 'lease', and so was not entitled to statutory protection.

[39] *Bruton v London & Quadrant Housing Trust* [1998] QB 834 (CA).
[40] ibid 845F.

The House of Lords reached the opposite conclusion, namely that Mr Bruton did have a 'lease'. Lord Hoffmann, whose speech garnered the support of all of Their Lordships, rightly rooted his discussion in the criteria laid down in *Street*. His Lordship's conclusion on those criteria was as follows:

> The decision of this House in *Street v Mountford* is authority for the proposition that a 'lease' or 'tenancy' is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land.[41]
>
> In this case, it seems to me that the agreement, construed against the relevant background, plainly gave Mr. Bruton a right to exclusive possession. There is nothing to suggest that he was to share possession with the Trust, the council or anyone else. The Trust did not retain such control over the premises as was inconsistent with Mr. Bruton having exclusive possession.[42]

B. The Problem

The issue with this reasoning is that Lord Hoffmann seems to have held that Mr Bruton was successfully granted the 'right to possession', as defined in *Street*. As discussed above, however, this would require a successful grant of the 'right to exclude all those without superior relative title'. But here there was no suggestion that Mr Bruton had the right to exclude strangers. Indeed, he could not have successfully been granted such a right, as he derived his interest from the Trust, which had a mere licence. The Trust did not have the right to exclude strangers, so they could

[41] *Bruton* (HL) (n 1) 413E.
[42] ibid 413H.

not have given one to Mr Bruton - *nemo dat quod non habet*. Given the conclusion in *Bruton* seems on the face of it to be inconsistent with the orthodox landmark case on the requirements for a lease (*Street*), yet Lord Hoffmann expressly sought to follow that decision, the interesting questions which follow are: firstly, how did Lord Hoffmann reach this unorthodox conclusion, and secondly, what are the ramifications of His Lordship's reasoning? We must consider two incompatible interpretations of the decision.

C. Interpretation One: The 'Contractual Lease Theory'

This section will set out the first possible interpretation of *Bruton*, namely that it recognized a purely contractual lease.[43] It will then be explained that, if this interpretation is followed, the inconsistency between *Street* and *Bruton* is resolved by recognising *Bruton* as giving a new meaning to the word 'lease'. This would require no modification of the definition of the 'right to possession', as has been suggested academically. A summary of this argument can be found in Appendix B.

The key to understanding this interpretation of *Bruton* is to closely analyse this section of Lord Hoffmann's judgment:

> First, the term 'lease' or 'tenancy' describes a relationship between two parties who are designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties. A lease

[43] An interpretation of His Lordship's words supported by Lower 'The *Bruton* tenancy' [2010] Conv 38, Dixon (n 2), and Pawlowski and Brown, 'Bruton: a new species of tenancy?' (2000) 4 L&TR 119. See also *Hill and Redman's Law of Landlord and Tenant* (LexisNexis 2021) [47].

> may, and usually does, create a proprietary interest called a leasehold estate or, technically, a 'term of years absolute.' This will depend upon whether the landlord had an interest out of which he could grant it. *Nemo dat quod non habet*. But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest.[44]

This passage introduced a hitherto unknown distinction between a 'lease' and a 'leasehold' estate. Lord Hoffmann proposes that the word 'lease' describes neither a proprietary interest nor an estate, but a *relationship* between two parties. The 'lease' *usually* creates a leasehold estate, but it need not.[45]

The question remains, however, of what the incidents of this relationship are. A common academic view is that this relationship is constituted by the successful grant of the 'right to possession', where this concept refers not to the traditional definition from *Street* but a new, modified, definition. This position can be seen in the following two excerpts from academic commentary:

1. The orthodox meaning of exclusive possession [the 'right to possession'] falls to be modified so as to mean exclusive possession [the 'right to possession'] as *between grantor and grantee*, a term hitherto unknown to property lawyers.[46]

[44] *Bruton* (HL) (n 1) 413B.
[45] ibid.
[46] Pawlowski (n 20) (emphasis added).

2. Lord Hoffmann's analysis fails to address the question of whether there can truly be said to be a grant of exclusive possession [the 'right to possession'] where the grantor had no ['right to possession'] to give.[47]

This approach would say that, because the grantee has by contract gained the right to exclude the grantor, they have the 'right to possession', but only as against the grantee. This would indeed be an entirely new definition of the 'right to possession', which, as explained above, has required the 'right to exclude all those without superior relative title', not simply the right to exclude the grantee.

Lord Hoffmann did not purport to change the definition of the 'right to possession' from *Street*. Given His Lordship's eminence as a judge, it would be preferable to avoid the conclusion that His Lordship either i) inadvertently made an oversight by applying a definition His Lordship though was satisfied but was not, or ii) surreptitiously changed the definition. Fortunately, such an explanation is forthcoming. His Lordship did not change the definition of 'the right to possession', but changed the meaning of the word 'lease', by divorcing it from the 'leasehold estate' and giving it its own meaning.

A lease was traditionally seen as indistinguishable from a leasehold estate, both of which referred to a successful grant of the 'right to possession', i.e. the successful conferral of a proprietary interest. Leases have, however slowly been 'contractualised', such that some precepts of contract law apply to their operation. One can trace this development chronologically:

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[47] Jill Morgan, 'Exclusive Possession and the Tenancy by Estoppel' [1999] Conv 493.

1977: Terms can be implied into leases in a similar manner as terms are implied into contracts.[48]

1978: Rent is a contractual payment rather than a service issuing out of the land.[49]

1981: It is possible for a lease to be frustrated.[50]

1992: There can be a repudiatory breach of a lease which excuses the other party from performance.[51]

1992: A notice to terminate by one joint tenant is sufficient (the contractual view trumping the traditional view that joint tenants are treated as one).[52]

We can thus see an increasing readiness to draw parallels between leases and contracts. *Bruton* can be seen as the ultimate culmination[53] of this movement towards the contractualisation of the lease, recognizing that the word 'lease' could simply refer to

[48] *Liverpool v Irwin CC* [1977] AC 239 (HL). See also *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348 (CA) 356.
[49] *United Scientific Holdings v Burnley BC* [1978] AC 904 (HL).
[50] *National Carriers v Panalpina* [1981] AC 675 (HL).
[51] *Hussain v Mehlman* [1992] 2 EGLR 87 (HC). The Law Commission proposed giving this statutory effect for residential tenancies, *Renting Homes* LC 297 para 4.14.
[52] *Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478 (HL) 483 (Lord Bridge), 'As a matter of principle I see no reason why this question should receive any different answer in the context of the contractual relationship of landlord and tenant than that it would receive in any other contractual context'.
[53] Or the '*reductio ad absurdum*', if one prefers. See Stuart Bridge in Louise Tee (ed.), *Land Law: Issues, Debates, Policy* (Willian 2002) 116-120.

the obligation to grant the 'right to possession', rather than the successful grant of the right itself. Lord Hoffmann recognized that every leasehold estate starts with a contract by which A promises to grant B a leasehold estate. The promise to grant 'the right to possession' will include rights to exclude the grantor, and thus could take effect as a personal licence. The novelty of His Lordship's approach is to see the obligation to grant the 'right to possession' as a 'lease', rather than only as a personal licence against the grantor, coupled with an unperformed obligation to grant the further right to exclude all those without superior relative title.

The meaning of the word 'lease'	
Before *Bruton*	After *Bruton*
Indistinguishable from a 'leasehold estate'.	Different to a 'leasehold estate'.
Requires a successful grant of the 'right to possession'.	Requires only a promise to grant a leasehold estate, i.e. a promise to grant the 'right to possession'.

This shows that the effect of Lord Hoffmann's judgment is to define 'lease' as a contract under which A promises to grant B the 'right to possession', whether or not A actually does so or can do so at the time of the promise. The meaning of the 'right to possession' thus remains unchanged. The grant of this right is simply promised for a 'lease' and successfully granted for a

'leasehold estate'. Professor Pawlowski's contention that *Bruton* must have changed the meaning of the 'right to possession' is thus misplaced.

This explains how Lord Hoffmann was able to find a 'lease' without there being a successful grant of the 'right to possession'. Was this approach justified? The important realisation from this analysis is that Lord Hoffmann i) did not change the definition of the 'right to possession', and ii) the third-party effect of the *Bruton* lease is indistinguishable from a contractual licence. This means the only effect of the decision was to broaden the scope of statutory lease protection.[54] This was indeed a departure from orthodoxy,[55] but whether this extension was justified is a highly politically charged question. The question is essentially the extent to which the state should intervene to curtail freedom of contract and thereby regulate the free market

[54] This interpretation of *Bruton* means terming the contract a 'lease' rather than simply a licence coupled with a promise to grant a leasehold estate does not affect the applicability of formalities, recognition as an overriding interest or assignability. The *Bruton* 'lease' i) does not require formalities for creation (e.g. under the Law of Property (Miscellaneous Provisions) Act 1989, s. 2 or the Law of Property Act 1925, ss. 52 and 54, which apply only to 'interests in land'), ii) would not qualify as an overriding interest, as these also must be interests in the land (*National Provincial Bank v Ainsworth* [1965] AC 1175 (HL)), iii) would not be assignable, as the alienability of the lease flows from its proprietary status (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL)), see generally Susan Bright (n 2) 9.

[55] The finding of a contractual lease was arguably inconsistent with previous authority from lower courts. See *Milmo v Carreras* [1946] KB 306 (CA) 310 (Lord Greene MR) 'You cannot have a purely contractual tenancy'; *Re Friends Provident Life Office* [1999] 1 All ER 28 (Comm) 36 (Neuberger J).

to protect otherwise vulnerable consumers.[56] The impact on charity housing providers also cannot be overlooked.[57] The thrust of this article is not concerned with these questions, and so we will leave the question open of whether Lord Hoffmann's redefinition of the word 'lease' was justified. It suffices to highlight that this is not a question for those land lawyers interested in the classification of interests and their effects on third parties, but rather for those interested in Landlord and Tenant law, specifically the apt level of state intervention in the housing market.

D. Interpretation Two: 'The Academic Reconceptualisation Theory'

The 'contractual lease theory' is not, however, the only interpretation of *Bruton*. A prevalent academic view[58] is that the

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[56] See, for example, the factors mentioned by the Law Commission in its 1996 Report (*Landlord and Tenant: Responsibility for State and Condition of Property*, LC 238). The policy context here has been described as 'raising complex issues' Susan Bright 'Exclusive Possession, True Agreement and Tenancy by Estoppel' (1999) 114 LQR 345, 350.

[57] The decision has been seen as particularly harsh on charity housing providers, who are not seeking to circumvent the protection of the statutes by granting such interests: see Deborah Rook 'Whether a Licence Agreement Is a Lease: The Irrelevance of the Grantor's Lack of Title' [1999] Conv 517; Warren Barr 'Charitable Lettings and their Legal Pitfalls' in Elizabeth Cooke (ed), *Modern Studies in Property Law, Volume 1* (Hart 2001) 239. This adverse effect was also noted by Sir Brian Neill in the Court of Appeal (n 41) 841.

[58] See Roberts (n 27); Goymour (n 28); Roger Smith, 'The Jurisprudence of Lord Hoffmann in Property Law' in Davies and Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015); John-Paul Hinojosa, 'On Property, Leases, Licences, Horses and Carts: Revisiting *Bruton v London & Quadrant Housing Trust*' [2005] Conv 114; Kim Lewison, 'Megarry & Wade: The Law of Real Property (Publication Review)' [2009] Conv 433.

decision in *Bruton* can be rationalised in a different way, namely by reliance on the doctrine of relativity of title.[59] It should be noted that the proponents of this view do not argue this to be consistent with the words used by Lord Hoffmann himself.[60]

The argument is as follows:[61]

i) Even though the Trust merely had a licence from Lambeth Council, they did go into possession of the premises.

ii) This possession allowed them to generate an original fee simple interest, relatively weaker than the fee simple interest of Lambeth Council.

iii) The interest they granted to Mr Bruton was an orthodox leasehold estate, carved from their original fee simple.[62]

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[59] We should note that the 'academic reconceptualization' theory of *Bruton*, although placing reliance on the doctrine of relativity of title, is entirely distinct from it. The 'academic reconceptualization thesis' could be rejected, for example by saying it simply does not square with Lord Hoffmann's words, without prejudicing the validity of relativity of title as a whole, and its weight when considering the orthodox definition of 'the right to possession'.

[60] Roberts (n 27). Interestingly, Smith (n 60) notes that in personal discussions with Lord Hoffmann after the case, His Lordship was a proponent of the 'relativity of title' theory. It will be left to the reader to decide whether this is in fact consistent with the words His Lordship used.

[61] See also Appendix C for a summary.

[62] A variation on this argument is advanced by Goymour (n 28). She argues that even if the Trust did not go into possession, Mr Bruton did, and his possession would be ascribed to the Trust, giving them the necessary original fee simple to grant him a leasehold estate. Goymour

As such, we can immediately see that the 'relativity of title' theory concludes that Mr Bruton had an orthodox leasehold estate. This conclusion is entirely consistent with the analysis of the meaning of the 'right to possession' above. Although Mr Bruton had no right to exclude the Council, the Council was a superior relative title holder compared to him, so he need not have a right to exclude them to have the 'right to possession'. If reconceptualised in this way, the definition of the 'right to possession' in *Bruton* was in fact no different to that advanced by Lord Templeman in *Street*.

E. A Third Interpretation : A New Definition of the 'Right to Possession'?

It has thus been shown that, if one adopts either i) the 'contractual lease' theory or ii) the 'academic reconceptualisation theory' of *Bruton*, this requires no modification of the meaning of the 'right to possession' as elucidated above. There remains the possibility, however, that there may be a third interpretation of the decision, which would necessitate a modification of the meaning of the 'right to possession', a view advanced by Dr Natalie Mrockova. We conclude that this interpretation is neither supported by the decision in *Bruton* itself nor its treatment in later cases, and as such the proposition that the 'right to possession' remains unchanged after *Bruton* still stands. A summary of this argument can be found in Appendix D. We will begin by considering the only two major later cases which have commented on the decision in *Bruton*.

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reaches this conclusion by a tentative analogy with the doctrine of tenancy by estoppel, though whether this is convincing is beyond the scope of this article. We should note that this argument leads to the same conclusion as above, namely that Mr Bruton had an orthodox leasehold estate.

I. *Kay v Lambeth Borough Council*[63]

The precise facts and wider issues at stake in *Kay* need not trouble us here. What is relevant to our discussion are Lord Scott's comments on whether if the grantor of the '*Bruton* lease' surrenders the lease, then the lease becomes binding on the paramount owner (the Council). This point turned on whether the '*Bruton* tenant' derived their interest from the Council, which can also be phrased in terms of whether the Council is bound by the '*Bruton* lease'. Lord Scott rejected this view, saying:

> But these rights never were enforceable against Lambeth.[64]

His Lordship also said:

> They [Mr Bruton] never were *sub*-tenants holding, via a grant from the Trust, an interest created by Lambeth [the Council]. They were tenants of the Trust holding an interest created by the Trust.[65]

This shows that *Bruton* leases are not binding on the paramount owner. This is not particularly illuminating, as this holding is entirely consistent with both theories of *Bruton*.[66] This is entirely what one would expect of the 'purely contractual lease' theory, as that theory recognizes Mr Bruton as having a merely personal right against the Trust, with no rights against anyone

[63] [2006] UKHL 10, [2006] 2 AC 465.
[64] ibid [143].
[65] ibid [145].
[66] Though His Lordship did at one point describe Mr Bruton's interest as a 'non-estate tenancy' (ibid [144]), seeming to lend support to the 'contractual lease theory'. This was interpreted by David Hughes and Martin Davis, 'Human Rights and the Triumph of Property' [2006] Conv 522, 536 as an 'embarrassment over the very notion of a *Bruton* tenancy, and attempt to reassert basic property principles'.

else, and so none against the Council. Equally, it is entirely consistent with the 'academic reconceptualization' theory, as the orthodox leasehold estate this theory recognizes does include a right to exclude superior relative title holders,[67] so the *Bruton* tenant would have no right to exclude the paramount owner.

II. *Berrisford v Mexfield*[68]

The facts of *Berrisford* are also not in issue. We are entirely concerned with one passage from Lord Neuberger's judgment:

> It has been suggested (although not in argument before us) that the notion that the agreement could give rise to a contractual licence if it cannot be a tenancy is somehow inconsistent with the reasoning of the House of Lords in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406. In that case, Lord Hoffmann said that an agreement can give rise to a tenancy even if it does not create an estate or other proprietary interest which may be binding upon third parties: p 415 … The point being made by Lord Hoffmann was that the fact that the trust was only a licensee, and therefore could not grant a tenancy binding on its licensor, did not prevent the agreement with Mr Bruton amounting to a tenancy as between him and the trust. The tenancy would thus have been binding as such not only on Mr Bruton and the Trust, but also on any assignee of Mr Bruton or the Trust. The *Bruton* case was about relativity of title which is the traditional bedrock of English land law.[69]

[67] As explained in Section 2.B above.
[68] [2011] UKSC 52, [2012] 1 AC 955.
[69] ibid [65].

Lord Neuberger thus suggests that *Bruton* tenants have rights against not only the parties to the agreement, but also their assignees. Are any other third parties bound? Lord Neuberger's choice not to elaborate has rightly been described as 'tantalising'.[70] We must latch onto His Lordship's proposition that 'the *Bruton* case was about relativity of title'. Lord Neuberger can here be seen as giving support to the 'academic reconceptualization theory' of *Bruton*, as elaborated above. Indeed, it is difficult to see how Lord Neuberger could argue that assignees of the parties[71] are bound without endorsing the full 'academic reconceptualization theory'. Reaching this conclusion without recognising that the Trust had an estate would be in contravention of *nemo dat quod non habet*. As already explained, however, this thesis does not lead to the conclusion that only assignees are bound. It also holds that all those without superior relative title are bound, as the interest recognized is an orthodox leasehold estate. Lord Neuberger can thus be seen to be implicitly adopting the 'academic reconceptualization' theory of *Bruton*.[72]

III. Dr Mrockova's Thesis

Dr Natalie Mrockova has advocated for the view that, contrary to our main thesis, the meaning of the 'right to possession' must have been different in *Bruton* as compared with *Street*.[73] Her first reason is that Mr Bruton had no right to exclude third parties, so

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[70] Judith-Anne MacKenzie and Aruna Nair, *Textbook on Land Law* (18th ed, OUP 2020) 220.

[71] Especially the Trust if it were to assign its licence with the Council to a third party.

[72] Rostill (n 29) has noted Lord Neuberger could only maintain that *Bruton* was 'about relativity of title' if the rule that adverse possessors generate an original fee simple also applied to consensual possessors.

[73] Natalie Mrockova, 'The Meaning of Exclusive Possession after *Bruton*' [2021] Conv 183.

could not have had the 'right to possession' as properly defined.[74] Our reason for disagreeing with this conclusion was set out in full when considering the 'contractual lease' theory. In short, Lord Hoffmann's reasoning was that to have a 'lease' one need not be successfully granted the 'right to possession'. It suffices that one is in a relationship with another party who is obligated to give this right to you, which was the case on the facts of *Bruton*.

Mrockova does, however, reach a further conclusion which is inconsistent with our thesis, namely that the '*Bruton* lease' is 'quasi-proprietary'.[75] She takes this to mean that it binds a different subset of third parties to either i) a leasehold estate, or ii) a contractual licence. She thus recommended that a new term be introduced, namely 'relative exclusive possession',[76] which would denote the right to exclude the other party to the agreement, as well as their assignees. If this conclusion were correct, this would be contrary to our view that *Bruton* can either be explained as i) a licence coupled with a promise to grant a leasehold estate, or ii) a successfully granted leasehold estate, with reliance on relativity of title.

The authority Mrockova cites in support of the proposition that there is an intermediary interpretation of *Bruton* is Lord Neuberger's judgment in *Berrisford*.[77] As we have already sought to show, however, that passage from Lord Neuberger's judgment is not only authority for the proposition that assignees of the parties are bound. If taken to its logical conclusion, the passage supports the view that all those without superior relative title are bound. As such, *Berrisford* is an endorsement of the 'academic reconceptualization theory', and thus a recognition of

[74] ibid 192.
[75] ibid 194.
[76] ibid 196.
[77] ibid 195.

an orthodox leasehold estate. In light of this, and, for want of any other authority, there is nothing to support the view that the *Bruton* lease is 'quasi-proprietary' in the way Mrockova suggests. Given the two interpretations laid out above do not support the view that *Bruton* changed the definition of the 'right to possession', and there is no intermediary interpretation supported by the case law, we must conclude that *Bruton* did not change the meaning of the 'right to possession'.

Conclusion

This article has sought to show that the correct definition of the 'right to possession' is the 'right to exclude all those without superior relative title'. It cannot be defined, as has sometimes been suggested, as the 'right to exclude all others', as this would be inconsistent with the fundamental doctrine of relativity of title.

This proposed definition was, contrary to some academic opinion, not altered by the decision of the House of Lords in *Bruton*. We proposed two possible interpretations of the decision. The 'contractual lease theory' is consistent with the definition of the 'right to possession' laid out above. On this view, the only change required is that a 'lease' has been separated from a *successful* grant of a leasehold estate. A 'lease' will now be a relationship in which A promises to grant B a leasehold estate. The 'academic reconceptualization theory' of the decision as one to do with relativity of title adheres to the meaning of the 'right to possession', as it conceived of *Bruton* simply as recognising a perfectly orthodox leasehold estate. On this view a 'lease' remains the successful grant of a leasehold estate.

Finally, any suggestion that there can be an intermediary category, where the *Bruton* lease binds some but not all third parties, is misplaced. This interpretation does not accord with the

definition of the 'right to possession', and thus cannot be seen to have been the impact of *Bruton*.

Appendices

A. Appendix A

This is a summary of the argument for proposition 1), namely: 'the proper definition of 'the right to possession' is 'the right to exclude all those without superior relative title'.

1. People in possession generate for themselves an original fee simple interest.

2. This fee simple interest must entail a 'right to possession'.

3. The fee simple generated by possession does not entail the right to exclude those with superior relative title.

A1. *The 'right to possession' for a fee simple generated by possession must be defined as 'the right to exclude all those without superior relative title'.*

1. Only two estates can subsist at law, the fee simple and the term of years.

2. The incidents of all fees simple must thus be the same.

A2. *The 'right to possession' for a fee simple generated by possession must have the same definition as the 'right to possession' for all other fees simple.*

C1. *Taking A1. and A2. together, the 'right to possession' for all fees simple must be defined as the 'right to exclude all those without superior relative title'.*[78]

[78] There is no indication the same definition does not also apply to 'the right to possession' as a requirement for leasehold estates.

B. Appendix B

This is a summary of the argument for proposition 2), namely: 'if the 'contractual lease theory' of *Bruton* is accepted, the decision did not alter the definition of 'the right to possession'.

1. Mr Bruton was not successfully granted the 'right to possession', as his personal right against the Trust meant he had no right to exclude strangers.

2. Lord Hoffmann severed the word 'lease' from 'leasehold estate'. His Lordship defined 'lease' as a relationship in which A promises to grant B a leasehold estate.

3. The Trust had promised Mr Bruton a leasehold estate/ promised him the 'right to possession'.

4. Mr Bruton thus had a 'lease' by virtue of this promise, despite the fact the Trust had no current means to fulfil the promise.

5. The 'right to possession' need not be modified to explain *Bruton*, as the decision is explained by modifying the definition of 'lease'.

C2. *Accepting the 'contractual lease theory', the decision in Bruton did not change the definition of 'the right to possession' from C1.*

C. Appendix C

This is a summary of the argument for proposition 3), namely: 'if the 'academic reconceptualization theory' of *Bruton* is accepted, the decision did not alter the definition of 'the right to possession'.

1. Possession generates a fee simple interest.

2. The Trust went into possession, thus generating a fee simple interest.

3. Mr Bruton's lease was carved from this fee simple interest, making it an orthodox leasehold estate.

4. Mr Bruton was thus successfully granted the right to exclude all those except the Council.

5. Mr Bruton was successfully granted the right to exclude all those without superior relative title.

6. Mr Bruton was granted the 'right to possession' as defined in C1.

C3. *Accepting the 'academic reconceptualization theory', did not alter the definition of 'the right to possession' from C1.*

D. Appendix D

This is a summary of the argument for proposition 3), namely: 'if the 'academic reconceptualization theory' of *Bruton* is accepted, the decision did not alter the definition of 'the right to possession'.

1. Dr Mrockova suggested *Bruton* recognized a 'quasi-proprietary' interest. This interest supposedly bound both the parties to the contract and their assignees. The interest was thus neither a leasehold estate nor a licence, demanding a redefinition of the 'right to possession'.

2. Mrockova relied on Paragraph 65 of *Berrisford* for this

proposition.

3. Paragraph 65 of *Berrisford* actually supports the 'academic reconceptualization theory', rather than any intermediary interpretation.

C4. *There is no tenable intermediary interpretation of* Bruton, *meaning, given the validity of C2 and C3, the definition of 'the 'right to possession' from C1 remains valid after* Bruton.

To Hope or Hurt? Clarifying Remedial Objectives in Proprietary Estoppel

Henry Fahrenkamp & Sushrut Royyuru[*]

Abstract—This article examines how domestic case law up to and including that decision has characterised the doctrine of proprietary estoppel and, in particular, how close it has come to identifying a remedial objective. It further analyses the positions adopted in foreign jurisdictions as well as those advanced by academic commentators, with particular emphasis on the relevance of (i) expectation, (ii) detrimental reliance, and (iii) proportionality to the exercise of the courts' remedial discretion. Comparing and contrasting the merits of each approach, it is argued that the objective of fulfilling an aggrieved claimant's expectations should, in principle, be the presumptive starting point in giving effect to proprietary estoppel claims. Subject to proportionality review according to the clarity of assurances made and severity of detriment suffered, it would be desirable for the Supreme Court to clearly endorse this objective in its upcoming judgment.

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Introduction

On December 2nd, the Court of Appeal's 2020 decision on the proprietary estoppel claim in *Guest v Guest*[1] was challenged in oral argument before the Supreme Court. The case is one of several classic 'farming cases' that the courts have dealt with in the field of proprietary estoppel, and yet the core contentious issue – namely, what the courts' aim and approach in fashioning a remedy for an aggrieved claimant ought to be – has not been adequately resolved to date. *Guest v Guest* is but one example of how the lack of a clear remedial objective in the English law of proprietary estoppel can complicate litigation and render the underlying equitable doctrine less transparent than it could otherwise be. Despite having had several chances to adopt clear remedial approaches based on a claimant's expectations or their detrimental reliance, the courts have so far refrained from committing themselves to any particular guiding principle.

The following discussion will analyse the current state of the law on proprietary estoppel remedies in three parts: firstly, the decision in *Guest v Guest*, and, in particular, the questions it leaves unanswered, will be contextualised within the broader domestic position; secondly, that position will be contrasted with foreign jurisprudence on the relevance of expectation, detriment and proportionality in remedial approaches to proprietary estoppel claims; and thirdly, the relative merits of a detriment-focused and an expectation-based remedy will be compared in light of the Supreme Court's present opportunity to review them. This article will demonstrate that the remedial framework for proprietary estoppel claims ought to be clearly reorganised around a rebuttable presumption of expectation-based relief. This

[1] [2020] EWCA Civ 387.

presumption should be tempered by a proportionality review of varying strength and intensity, scaling with the certainty of the expectation at hand and the general severity of the potential detriment, which will determine where it should not apply.

A. Proprietary Estoppel and *Guest v Guest*

I. Facts and Appellate History

The factual circumstances surrounding the dispute in *Guest v Guest* highlight some of the difficulties which courts have experienced at the remedial stage of a proprietary estoppel claim. In brief, they can be summarised as follows:[2]

The claimant (Andrew) is the defendants' eldest son. He left school at 16 to work, full time and for little reward, on his parents' dairy farm expecting that he would inherit part of it upon their deaths. However, his parents later altered their wills after a falling out with Andrew, excluding any entitlement on his part to any part of the farm or its dairy business. Andrew then left the farm after having worked there for a total of around 33 years, before bringing a claim founded on proprietary estoppel for a declaration that he was entitled to a beneficial interest in the farm.

At first instance, the trial judge found that during the 33-year period Andrew had repeatedly been assured that he would inherit a 'substantial share' of the farm, and ordered that a lump sum payment be made to Andrew of 50% of the market value of the farming business and 40% of the farm's market value. It appeared that the defendants would have to sell the farm entirely

[2] ibid [8]-[46] (Floyd LJ).

in order to satisfy Andrew's claim.[3] On appeal, the defendants contended that the trial judge's order placed too much emphasis on the claimant's subjective expectations,[4] that it went beyond the extent of relief which proprietary estoppel requires, and that it would suffice to compensate Andrew for the detriment he incurred in relying on the assurances. According to the defendants, no particular interest had ever been agreed upon between the parties, such that the trial judge ought to have found that Andrew was only entitled to compensation for detriment incurred in consequence of his reasonable reliance.

Despite these submissions, Floyd LJ dismissed the appeal. His Lordship found that the doctrine of proprietary estoppel afforded the court 'broad judgmental discretion' when it came to determining an appropriate remedy.[5] While both the claimant's expectation and their detrimental reliance thereupon would be relevant considerations in exercising this discretion, the overarching remedial objective in proprietary estoppel cases is simply to do 'what is necessary to avoid an unconscionable result'.[6] On the facts, the trial judge had not exceeded his discretionary powers in furtherance of this objective, and the Court of Appeal upheld his original order.

II. Legal Context and Background

The Court of Appeal's support for a broad judgmental discretion to take necessary steps for avoiding unconscionability frames the remedial objectives of the doctrine of proprietary estoppel in very

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[3] Supreme Court, Case details - Guest and another v Guest <https://www.supremecourt.uk/cases/uksc-2020-0107.html> accessed 28 December 2021.
[4] *Guest* (n 1) [65] (Floyd LJ).
[5] *Guest* (n 1) [74] (Floyd LJ).
[6] ibid [74].

general and opaque terms. Of course, one may have to concede that an equitable doctrine which finds application in highly fact-sensitive and individualistic circumstances naturally lends itself more to practicality and discretion than it does to rigidity and doctrinal elegance. Nonetheless, if the requirements of 'avoiding an unconscionable result' are not linked to some principled point of reference common to all proprietary estoppel cases, the objective of the doctrine itself is obscured: after all, the courts acknowledge that no 'yardstick' for the assessment of unconscionability is inherent in that concept itself.[7] Importantly, this issue is not merely of academic concern, nor are its practical implications limited to rule of law concerns.[8] As Mee points out, the absence of a clear remedial objective in the courts' treatment of proprietary estoppel claims may encourage lengthy litigation and thereby exacerbate intra-familial disputes.[9] Viewed against this background, the fact that the decision in *Guest v Guest* has now been appealed to the Supreme Court indicates a pressing need for authoritative guidance on the proper remedial framework to proprietary estoppel claims.

Of course, the issue is not a novel one in the context of appellate litigation: for example, the Court of Appeal's seminal judgment in *Jennings v Rice*[10] considered the matter at some length. Specifically, two factors underlying the concept of unconscionability were examined as potential guiding principles for remedial discretion, those being (i) the claimant's expectation, as induced by assurances relating to their future rights regarding

[7] *Taylor Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 151-152.
[8] S Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438, 461-462.
[9] J Mee, 'The Limits of Proprietary Estoppel: Thorner v Major' (2009) 21 Child and Family Law Quarterly 367, 383.
[10] [2002] EWCA Civ 152.

specific property; and (ii) the claimant's detrimental reliance upon said assurances. In other words, where the court is called upon to 'avoid an unconscionable result', it could (i) fulfil the claimant's expectation as far as possible because it would be unconscionable to allow the promisor to renege on their assurance, or (ii) compensate the claimant for detriment incurred that would make such reneging unconscionable. Both the expectation-based remedial approach and the detriment-focused approach identify a purpose, albeit opposing ones, underlying the remedial approach to proprietary estoppel claims – and yet the Court in *Jennings v Rice* did not firmly or unanimously adopt either one. Instead, Aldous LJ did not state the remedial objective any higher than 'to do justice' in light of a given case's circumstances, which would require having regard to both expectation and detriment, but not give either factor determinative weight.[11]

Subsequent decisions have not attempted to go much further, and reluctance on the courts' part to identify the remedial objective in proprietary estoppel cases as either fulfilling expectations or compensating detrimental reliance has become a feature of recent jurisprudence. When this dichotomy was raised again in *Davies v Davies*,[12] the Court of Appeal refused to resolve it despite acknowledging the conceptual merits of the detriment-focused approach.[13] Similarly, in cases which appeared to lean towards the opposite remedial approach, members of the Court only offered tentative support for it rather than firmly rooting their analysis in an expectation-based measure. For example, although Robert Walker LJ in *Jennings v Rice* seemed to suggest that he considered fulfilment of expectations a 'natural response' to proprietary estoppel claims arising in so-called 'bargain cases',

[11] ibid [36].
[12] [2016] EWCA Civ 463.
[13] ibid [39].

his judgment emphasises that the proper remedial approach still involved a wide judgmental discretion to which several, non-exhaustive factors might be relevant.[14]

Turning back to the decision in *Davies*, which is exemplary of this ambivalence, Lewison LJ treated expectation and detriment as relevant considerations in much the same way as Aldous LJ's judgment in *Jennings v Rice* had. His Lordship merely added that, if sustained for lengthy periods of time or relied upon with great detriment, a claimant's expectations might be weighted more heavily at the remedial stage.[15] Again, however, the lack of commitment *ab initio* to either expectation or detriment obscures the purposes served by affording the claimant with a remedy. Further, as HHJ Paul Matthews' comments on the *Davies* decision in *James v James*[16] demonstrate, the additional fluidity introduced by his Lordship's 'sliding scale' method of weighting expectations even casts doubt upon the centrality of disappointed expectations and detriment in establishing unconscionability. In any case, such evaluative flexibility at the remedial stage does not clarify the purposes of a subsequent remedy at all.

Taking the authorities on proprietary estoppel at face value, then, their remedial approach to alleviating unconscionability appears to be couched in discretion rather than being clearly committed to either expectation or detriment as a guiding principle. What *is* unequivocally borne out by the authorities, by contrast, is that even a remedy constructed on the basis of expectation must not be disproportionate to the detriment incurred in reliance upon it.[17] The Court of Appeal's judgment in *Jennings v Rice*, as well as decisions in both earlier and

[14] *Jennings* (n 10) [50]-[52].
[15] *Davies* (n 13) [41].
[16] [2018] EWHC 43 (Ch) [52].
[17] *Jennings* (n 10) [36] and [38].

later cases, have emphasised that the prevention of unconscionability does not require giving effect to disproportionate expectations of proprietary interests – going further, authority suggests the court *cannot* give effect to a disproportionate expectation, as this would go beyond the prevention of an unconscionable result.[18] However, the stringency with which this proportionality-based limitation ought to be applied is not obvious – attempts by the courts to establish a standard do not offer much more than a restatement of the core principle of proportionality. Again, it seems as though this too is attributable to the lack of commitment to a particular remedial objective which might have shed light on the proper role of the proportionality inquiry: whereas the aim of compensating detriment inherently produces a proportionate remedy, the aim of fulfilling expectations does not. Indeed, as regards the latter aim, proportionality may contribute little more than a 'safety check' mechanism, which is reflected in the Court of Appeal's *Suggitt v Suggitt* decision: in her judgment, Arden LJ suggested that this limitation would only respond to situations where a claimant's expectation is 'out of all proportion' to the detriment suffered.[19] By contrast, Lewison LJ in *Habberfield v Habberfield* characterised proportionality as the basis for a flexible 'judgmental discretion' inherent in all proprietary estoppel cases, notwithstanding Arden LJ's comments.[20] In light of dicta like these, it is difficult to specify the need for and intensity of proportionality analyses under the present law.

For these reasons, there is considerable pressure on the Supreme Court in *Guest v Guest* to provide authoritative guidance on which remedial principle, detriment or expectation, ought to

[18] See *Ottey v Grundy* [2003] EWCA Civ 1176 [57], [58] and [62].
[19] [2012] EWCA Civ 1140 [44] (Arden LJ).
[20] [2019] EWCA Civ 890 [58] (Lewinson LJ).

serve as the guiding principle for proprietary estoppel claims, and how strongly a proportionality test ought to feature in the analysis. Khai Liew points out that the 'obvious non-equivalence' between the two approaches, and the distinctiveness of factors relevant to a proportionality inquiry, necessitate a decision; maintaining a split approach or not definitively selecting a starting point endangers the fundamental principle of *stare decisis*.[21] It is additionally the case that the very premise of 'starting points' invokes status quo bias[22] – wherein factfinders seek evidence sufficient to depart from, but not to retain, a given position – that would impact cases unequally if the starting point was not uniform.[23]

2. Detriment, Reliance, and Proportionality in Other Common Law Jurisdictions

In light of this pressing need for guidance, it will be helpful to view the doctrine of proprietary estoppel through a comparative lens. The directions in which the same legal sources have been

[21] Y Khai Liew, 'Proprietary Estoppel Remedies in Hong Kong: Lessons from Singapore, England and Australia' (2020) 50 Hong Kong Law Journal 109, 116.

[22] Khai Liew draws from the seminal works on the subject: Emanuel Towfigh and Niels Petersen, *Economic Methods for Lawyers* (Gloucestershire: Edward Elgar Publishing, 2015) 196 and Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47 Econometrica 263.

[23] Y Khai Liew (n 21) 116. See also Gardner (n 8).

interpreted and developed by judges of different nationalities and backgrounds can provide a useful touchstone for analysing the tensions that remain in the English variant of proprietary estoppel, and how they might be resolved.

A. Australia

The Australian position can be generally explained as one in which it is settled that equity will be satisfied through expectation rather than reliance relief.[24] The development of this view can be traced in two parts – (i) the initial engagement with reliance-based relief, and (ii) the subsequent move away from this perspective.

To explore the Australian dalliance with the reliance-based view, one might start with Brennan J in *Walton Stores (interstate) Ltd. v Maher*.[25] He argued that:

> The object of the equity is not to compel the party bound to fulfil the assessment or expectation: it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or abstain from acting thereon.[26]

This view of the equity is a negative one, wherein the relief provided by the court is premised upon the juristic need to prevent the consequences of unconscionable conduct. This scheme of reliance-based relief was considered by the High Court of Australia in the later case of *Verwayen v Commonwealth of Australia*.[27] Adjudicating once again, Brennan J explained that the unconscionability of conduct was both the factor that engaged the

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[24] *Sidhu v Van Dyke* (2014) 251 CLR 505 [83]-[85].
[25] (1988) 164 CLR 387.
[26] ibid 423 (emphasis added).
[27] (1990) 170 CLR 394.

jurisdiction of the court and the guiding principle when it came to the shaping of the equity.[28] Mason CJ added to his analysis by casting the discretionary exercise as one controlled by proportionality. He stated that the remedy provided had to be proportionate to the detriment that it is designed to mitigate, as providing a disproportionate 'making good of the relevant assumption' would be 'wholly inequitable and unjust'.[29] But even in *Verwayen,* the cracks in the edifice of the reliance-based approach to relief were beginning to show. Robertson noted that the remedy granted to Mr Verwayen had the effect of fulfilling his expectations,[30] which undermines the value of the decision as support for the reliance view.

More recent Australian cases demonstrate a shift away from the reliance-based approach. Biehler argues that the Australian courts have moved away not only from this model for shaping the equity but also from the concept of seeking to satisfy the proportional 'minimum equity'.[31] The new paradigm was expressed by the High Court of Australia in the case of *Giumelli v Giumelli*,[32] wherein a prima facie entitlement to the 'assumed state of affairs' was favoured.[33] A new approach to proportionality was also taken, with the court indicating that this prima facie entitlement could be limited where it would 'exceed what could be justified by the requirements of conscientious conduct and

[28] ibid 429-431.
[29] ibid 413.
[30] A. Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies After Verwayen' (1996) 20 Melbourne University Law Review 805, 823.
[31] H Biehler, 'Remedies in Cases of Proprietary Estoppel: Towards a More Principled Approach?' (2015) 54 Irish Jurist 79, 86.
[32] (1999) 196 CLR 101.
[33] ibid 123.

what would be unjust to the estopped party'.[34] The methodology is illustrated by the decision of *Delaforce v Simpson-Cook*.[35] The court argued that where the estopped party gave rise to an expectation that could be defined with certainty, the process of shaping the equity must take this as the starting point.[36] Biehler notes that the function of proportionality is now negative, limiting the starting point where necessary, as opposed to the position in *Walton Stores* and *Verwayen* where it positively set the terms of relief.[37] The developed principle can be seen in the case of *Sidhu v Van Dyke*, wherein the court held that:

> where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment… the relief… is usually that which reflects the value of the promise.[38]

Australian courts are yet to fully settle the law, however, per Khai Liew, it is not clear whether the prima facie entitlement provides a strong or weak starting point. He suggests that recent cases indicate a tendency by New South Wales courts to trivialise the importance of proportionality and view expectation as a 'strong default position'.[39] In contrast, judges in other states have interpreted the starting point as a weak position, giving proportionality a much more significant role.[40]

This distinction relates to English law, where proportionality analyses do not seem to be conducted in detail on

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[34] The court drew from *Verwayen* (n 26) 442.
[35] (2010) 78 NSWLR 483.
[36] ibid, at [63].
[37] H Biehler (n 32) 87.
[38] *Sidhu v Van Dyke* (2014) 251 CLR 505 [85].
[39] Y Khai Liew (n 22) 114-115.
[40] ibid.

a regular basis.[41] Conversely, significant time was spent addressing the role of proportionality during oral argument in the outstanding appeal of *Guest v Guest*, perhaps indicating a 'stronger' future position.

B. New Zealand

The position of the New Zealand legal system, which draws on that of its Australian neighbour, on the detriment-expectation divide is comprehensively addressed by the New Zealand Court of Appeal in the case of *Wilson Parking New Zealand Ltd. v Fanshawe 136 Ltd.*[42] In it, Randerson J considered the three main elements of a proprietary estoppel claim relevant to relief. These were: (i) the nature of the assurances giving rise to the expectations, (ii) the extent and nature of the detrimental reliance and (iii) the ability of the claimant to demonstrate that it would be unconscionable for the promisor to resile.[43] In identifying these factors, Biehler argues that Randerson J has given the courts the flexibility of moving between approaches to fashion the fairest outcome in a given case. Where assurances are certain and clear, the court will tend towards granting expectation-based relief. Further, where the detriment suffered by the promisee is significant, the court will tend to hold the promisor to their word rather than pursue some alternative scheme of remedy.[44] Randerson J also accounted for the role of proportionality in a distinct fashion. He accepted that awarding expectation-based relief could in some instances produce a result that was disproportionate to a promisor. However, the determination of proportionality per his judgement was not limited to "[simply comparing] in an arithmetical

[41] *Sledmore v Dalby* (1996) 72 P. & C.R. 196, 209 (Hobhouse LJ).
[42] [2014] 3 NZLR 567.
[43] ibid [114].
[44] H. Biehler (n 32) 89.

manner', but instead included a 'broad assessment of all relevant circumstances… [including those] which cannot be quantified or measured in monetary terms'.[45] Therefore, the position in New Zealand resembles that of traditional equity, placing considerable discretion in the hands of the courts.

C. Hong Kong

The courts of Hong Kong view the detriment/expectation dichotomy from yet another angle. Similarly to New Zealand, judges enjoy great flexibility in determining the appropriate remedy for an established claim of proprietary estoppel,[46] in relation to both the nature and the extent of relief.[47] Khai Liew suggests that the courts of Hong Kong seldom overtly recognise that the reliance-based and expectation-based approaches are juristic alternatives, choosing instead to hint at applications of either approach without engaging extensively with it.[48] Thus, the approach to remedy espoused in this jurisdiction is a less inherently principled discretion that accords the utmost flexibility to the courts. A seminal case on proprietary estoppel – which Khai Liew refers to - can serve as evidence for this. In *Lee Bing Cheung v Secretary for Justice*[49] the court chooses to refer in passing to Megarry & Wade and *Jennings v Rice* as support for the boundaries of its remedial framework, rather than cases detailing the critical engagement of the Hong Kong Courts.[50] This

[45] *Wilson Parking New Zealand Ltd. v Fanshawe 136 Ltd.* [2014] 3 NZLR 567 [118].
[46] Y. Khai Liew (n 22) 111.
[47] *Hui Wan Memorial Hall Ltd v Kam Pak Li Investments Ltd* [2018] HKCFI 718 [44].
[48] Y. Khai Liew (n 22) 111.
[49] HCA 1092/2010.
[50] ibid [45].

approach prevents coherent case law from developing and presents problems for consistency of practice and the rule of law.

D. Singapore

Might it be possible to employ a discretionary approach in the same vein as Hong Kong, without the corresponding issues of consistency? Khai Liew points out the cases of *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng*[51] and *Low Heng Leon Andy v Low Kian Beng Lawrence.*[52] In the former, Phillip Pillai J held that the court could adopt either the reliance-based or expectation-based approach depending upon the facts of the case at hand.[53] But in the latter, the Singapore jurisdiction employs a unique method of determining the application of each method. As a matter of 'practice', a plaintiff must decide a starting point to frame and adduce the evidence necessary to build their case,[54] which will then be used to as a metric for adjudication. Therefore, the court can in theory build separate jurisprudence for each approach and eliminate issues of inconsistency in judicial application. The issue here arises outside the courts, however, insofar as a split framework surrounding choices made by the plaintiff raises difficulties of predictability for potential defendants who seek clarity in the law as a means to guide their behaviour.

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[51] *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng (trading as IKO Precision Toolings)* [2013] 2 SLR 279.

[52] *Low Heng Leon Andy v Low Kian Beng Lawrence (Administrator of the Estate of Tan Ah Ing, Deceased)* [2018] SGCA 48.

[53] *Lim Chin San Contractors* (n 53) [33].

[54] *Low Heng Leon Andy* (n 54) [30].

3. The Choice before the Supreme Court

Against the background of these four distinct common law approaches, which range from a strong principled position (Australia) to one motivated by basic practicality (Singapore), the core question of remedial approach left unanswered in *Guest v Guest* can be addressed. It is submitted that the above examples demonstrate clearly that a choice, either in favour of detriment or expectation, must be clearly made. This article takes the position that the Supreme Court should use the opportunity of *Guest v Guest* to elucidate a clear framework for the analysis of the applicable remedy. In this section, we will justify the view that expectation-based relief should form this starting point – in the form of a rebuttable presumption - for the purposes of English law.

A. Detrimental Reliance

One approach available to the court, in line with the appellant's oral submissions, would be defining the remedial objective in proprietary estoppel cases as protecting the claimant's reliance interest.[55] In other words, the task which the Court of Appeal understood as 'preventing an unconscionable result' might be rephrased by the Supreme Court as 'providing compensation for detriment suffered in reliance on a promise'. While this would certainly be a bold assertion of principle in light of the equivocal, flexible approach taken so far, it does not wholly lack prior judicial support: notably, Lewison LJ's judgment in the *Davies* case

[55] Supreme Court, *Watch Hearing - Guest and another v Guest* <https://www.supremecourt.uk/watch/uksc-2020-0107/021221-am.html> accessed 28 December 2021.

contemplates the detriment-focused remedial approach rather favourably.[56]

As his Lordship rightly noted, there is an obvious attraction in viewing compensation for detriment as the goal of proprietary estoppel. Given that detrimental reliance on an expectation is an essential requirement for any successful claim, the removal of that detriment by means of compensation ought simultaneously to remove the basis for the claim. To adopt the Court of Appeal's phraseology, if a situation can (for the present purposes) only be unconscionable where the aggrieved party has suffered detriment in reliance upon a promise, but that detriment is remedied, there remains no possible unconscionable result which the court would otherwise have to prevent. McFarlane illustrates this principle by postulating a situation where, upon changing their mind about certain assurances relating to land, a hypothetical promisor revokes the assurances and voluntarily compensates the disappointed promisee for detriment suffered.[57] Since it seems that this should preclude any proprietary estoppel claim on the promisee's part, involuntary compensation for detriment pursuant to a court order should have the same effect.

Conceptually, the detriment-focused approach fulfils the same core function as a strong proportionality test (where the two factors between which proportionality is found are detriment and relief)[58]: particularly in cases where the detriment suffered is readily quantifiable, it leaves little scope for the court to award any remedy beyond the monetary value of detriment incurred. Incidentally, this approach would probably lend itself to supervision by appellate courts, which could be conducive to

[56] *Davies* (n 13) [39].
[57] B McFarlane, 'The Law of Proprietary Estoppel (2nd ed)' (Oxford University Press, 2020), [7.51].
[58] Gardner (n 8) 498.

creating some predictability and consistency in the shaping of equities by proprietary estoppel. Where two claims arise in similar factual circumstances as far as detriment is concerned, neither the scope of one claimant's disappointed expectation, nor the subsequent appreciation or depreciation in one property's market value,[59] would allow one claimant to receive greater protection under the doctrine of proprietary estoppel than the other. To some extent, this remedial approach seems faithful to the spirit of Scarman LJ's often-cited dictum in *Crabb v Arun DC* that the court is not required to provide any more than 'the minimum equity to do justice to the plaintiff'.[60]

Nonetheless, even proponents of the detriment-focused model acknowledge that its potential advantages may not be easily realised in practice.[61] Given that the appraisal and quantification of detriment is crucial to providing adequate compensation for it, courts applying this remedial approach are likely to face difficulties in many typical proprietary estoppel cases wherein the claimant suffered mainly non-financial detriment, or detriment which is difficult to quantify for some other reason. As is abundantly clear from Robert Walker LJ's judgment in *Gillett v Holt*,[62] however, evidence of such forms of detriment is still admissible for the purpose of establishing a claim: where this is central to the factual circumstances of a particular case, a remedial objective of compensating detriment could easily become unrealistic. This is especially true in relation to losses of opportunities which cannot be framed as traditional 'reliance losses', and Robertson lists emotional investment in a property, lost opportunity for financial gain and significant personal

[59] B McFarlane (n 59) [7.51].
[60] [1976] Ch 179, 198.
[61] B McFarlane (n 59) [7.43].
[62] [2001] Ch 210, 232.

decisions as examples of such qualitative forms of detriment.[63] Incidentally, the Court of Appeal of New South Wales held in *Delaforce v Simpson-Cook* that expectation relief, not a detriment-based approach, would allow the court to avoid forcibly converting such forms of detriment to cash and consider the case in a more holistic sense.[64]

Of course, there may be some force in McFarlane's contention that the difficulty of quantifying some forms of detriment ought not to discourage courts from trying their best to do so anyway.[65] Still, an attempt to quantify untransparent, complex detriments like lost opportunities to pursue different career paths over the course of 33 years seems almost to border on an arbitrary evaluative exercise. In fairness, McFarlane persuasively argues that this problem need not arise in so-called 'bargain cases', i.e. where the promise relied upon was part of a clear quid-pro-quo arrangement.[66] It will then likely be most appropriate to quantify the disappointed party's detriment in performing their part of the bargain by what the promisor agreed to provide in return – in other words, the expectation interest.

However, where no clear bargain can be deduced from the facts, the difficulties in quantifying detriment persist and are amplified by the passage of time (while, ironically, the detriment itself typically becomes more serious too). That the unavoidable risk of under-compensation should be placed upon the disappointed party seems contrary to the spirit of the doctrine of proprietary estoppel. In such cases, the adoption of a detriment-based remedial approach would effectively encourage promisors

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[63] A Robertson, 'The Reliance Basis of Proprietary Estoppel Remedies' [2008] *The Conveyancer and Property Lawyer* 295, 303.
[64] (2010) 78 NSWLR 483.
[65] B McFarlane (n 59) [7.48].
[66] B McFarlane (n 59) [7.55].

who stand to benefit more from the actions of a promisee than that promisee would suffer in quantifiable detriment to renege on their promises. This, too, seems contrary to the doctrine's spirit.[67]

A further practical difficulty with the detriment-focused model is that, except in the 'bargain' cases mentioned above, it appears to logically demand immediate relief by means of monetary payment.[68] Since it frames the remedial objective of proprietary estoppel as compensating a claimant for detriment, the court ought to provide such relief immediately lest the claimant should remain stuck with both the detriment and the risk of incurring ancillary losses. In practical terms, this could increase the frequency of outcomes like that faced by the defendants in *Guest v Guest*, whereby compliance with a court order pursuant to a proprietary estoppel claim is only possible if the relevant property is sold. However, alienation of the disputed property to a third party rather than one of the interested litigants hardly seems a desirable outcome, which becomes particularly apparent if one considers that proprietary estoppel claims have traditionally arisen in the context of family-run farming businesses. Essentially, a choice is forced upon the promise between selling the land and recouping monetarily or surrendering any interest in the land whatsoever. It should be noted, of course, that the appellant's submissions in the Supreme Court were sensitive to this difficulty, and that an alternative remedy was proposed;[69] however, this alone demonstrates incompatibility between a conceptually elegant, detriment-focused remedial approach and the practical requirements of an equitable doctrine.

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[67] Y Khai Liew (n 22) 113.

[68] Supreme Court, 'Watch Hearing - Guest and another v Guest' <https://www.supremecourt.uk/watch/uksc-2020-0107/021221-am.html≥ accessed 28 December 2021.

[69] ibid.

B. A Presumption of Expectation as the Ideal Starting Point

By contrast, a presumption of awarding relief based on the expectation of a promisee is submitted to be conceptually and practically the best starting point for analysing relief for proprietary estoppel claims, both for reasons of principle and on procedural justifications. Beginning with principle, Khai Liew posits that the expectation-based remedial approach better achieves justice *between the parties*,[70] since it prioritises the innocent promisee's perception over the promisor's equitably 'compromised' interest. The compromised nature of the promisor's interest can be established in two stages. By the time a proprietary estoppel claim reaches the remedial stage, the core ingredients have been successfully made out by the claimant. This is to say that a representation regarding property was definitively made and relied upon detrimentally, in circumstances which, in some way, render resiling from that representation an unconscionable act. Building on this, it is the nature of an interest in land - its enduring value as a historically recognised asset which for most people will constitute the bulk or even entirety of personal wealth in a lifetime - that a representation made regarding its acquisition will have special force. The compromised position of the promisor, therefore, arises from the unconscionability of leveraging an attractive real interest to affect the conduct of the claimant, and then seeking to resile from that act. In a similar fashion, Gardner recognises that those who induce expectations from such a position of power place themselves into a position of special responsibility,[71] although he goes on to embrace neither expectation nor reliance but advocate

[70] Y Khai Liew (n 22) 121.
[71] S Gardner (n 8) 497.

correction of unconscionability as the unifying principle:[72] an approach which falls short of making a true 'decision', as we have previously demonstrated is desirable.

On a more jurisprudential front, Khai Liew quotes Slavny's view that, where a person harms another, there is a strong reason for the law to allow the cost to fall upon the party better placed to avoid the risk.[73] This builds on the recognition that holding the interest in land places the promisor in a position of power, and that the law ought to respond to the weakened position of claimants by positioning the presumption closer to expectation (especially since proprietary estoppel claims are typically brought in the aftermath of significant detriment).[74] Furthermore, as Lewison LJ noted in *Habberfield v Habberfield*, recognition of expectation-based relief can uphold the autonomy of parties to 'decide for themselves what a proportionate reward would be'.[75] Though not strictly applicable to all forms of estoppel claim, this point strikes at the core relationship between promisor and promisee and demonstrates why expectation should form the foundational starting point for the process of determining remedies. Since reasonable expectation is derived from the conduct of *both parties,* this enables the courts to ground the eventual remedy in a proto-contractual manner.

Alongside principled justifications, there are two procedural reasons for beginning the enquiry with expectation relief. Firstly, as we have already considered, proprietary estoppel claims tend to only be brought when significant detriment has

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[72] ibid 499.

[73] A Slavny, 'Nonreciprocity and the Moral Basis of Liability to Compensate' (2014) 34 OJLS 417,435.

[74] Y Khai Liew, 'The '*Prima Facie* Expectation Relief' Approach in the Australian Law of Proprietary Estoppel' (2019) 39(1) OJLS 183, 195

[75] *Habberfield v Habberfield* [2019] EWCA Civ 890 at [68].

been incurred, which frequently leads to expectation relief being awarded by the court.[76] By way of empirical evidence for this, 19 of the 20 cases brought in Hong Kong between 2008 and 2019 in which a proprietary estoppel claim was successful saw the court make an award of expectation relief.[77] Cooke also notes that, historically across multiple legal disciplines, 'the usual measure of relief in estoppel is expectation rather than the compensation of the … reliance'.[78] Thus, in a practical sense adopting expectation as an initial presumption aligns with more general legal principles and responds practically to the application of the doctrine. The case of *Crabb v Arun DC*[79] demonstrates further that, especially in the context of land, awards made *in specie* have special value. Some rights, such as easements and occupation interests, can only reasonably be protected in such a way. Bright and McFarlane recognise that there are some cases where such enforcement would naturally be barred,[80] but it is submitted that, on a conceptual level, placing a specific remedy at the forefront adequately recognises the importance of specific interests in land – *Guest v Guest* is a clear indicator of the dissatisfaction monetary remedies can generate. Of course, it is true that the promisor likely attaches equal importance to specific interests in land – but they hold a 'compromised' equitable position after having leveraged those same proprietary interests as a 'carrot' to influence the promisee. Hence, it is justified for the counteracting 'stick' - the remedial response – to privilege the promisee in attaching importance to special interests in land over the promisor. In this

[76] ibid.
[77] Y Khai Liew (n 22) 123.
[78] E. Cooke, *The Modern Law of Estoppel* (OUP, 2000) 151.
[79] [1976] Ch. 179, 198.
[80] S. Bright and B. McFarlane, 'Proprietary Estoppel and Property Rights' (2005) 64 *Cambridge Law Journal* 449, 479.

regard, beginning with expectation is once again the most efficacious path to determining adequate relief.

C. Strong or Weak

We must now determine whether the presumption should be strong (rebuttal is only permissible in exceptional circumstances), or weak (rebuttal is more readily acceptable if circumstances suggest). There are, then, two vectors upon which we can determine the content of the expectation presumption and answer this question. These are i) the impact of the clarity and certainty with which the expectation can be defined, and ii) the impact of obvious disproportions between the expectation-based remedy and detriment, which is applied in a subsidiary common-sense form necessitated by its nature in contrast to the central role of expectation. We will argue that the presumption should be conceptualised as one of variable strength based on the influence of these vectors.

The English courts have already grappled with the issue of clarity and its relationship to the variety of contexts in which estoppel claims occur. In *Thorner v Major;*[81] the House of Lords addressed a potentially estopped interest in a farm. It was argued that both the assurance and the identity of the promised property were too uncertain for a claim of estoppel to be made out.[82] In response, Lord Walker held that the 'clear and unequivocal' test does not apply to assurances when dealing with proprietary estoppel.[83] Moreover, he quoted with approval the judgement of Lord Hoffmann in *Walton v Walton*,[84] which outlined how promises made in the family or social context are often subject to

[81] [2009] UKHL 18.
[82] ibid [30].
[83] ibid [54].
[84] [1994] CA Transcript C No 479.

'unspoken and ill-defined qualifications'.[85] Of additional note was the context in which the assurances took place:

> The deputy judge heard a lot of evidence about two countrymen leading lives that it may be difficult for many city-dwellers to imagine taciturn and undemonstrative men committed to a life of hard and unrelenting physical work, by day and sometimes by night, largely unrelieved by recreation or female company.[86]

Lord Neuberger's observations also traced similar lines. He held that it would not serve to be 'unrealistically rigorous' in seeking clarity, and that the question of certainty must be considered practically and sensibly, as well as contextually.[87] The conclusion that must be drawn from these judicial insights is that expectation-based relief as a starting point must be somewhat tempered by the practical reality of proprietary estoppel claims. The certainty of assurance, and therefore expectation as its natural consequence, waxes and wanes as a juristic requirement for establishing a claim depending upon the factual context. Therefore, it seems important to adapt the strength of expectation as the starting point. This is because in limited cases expectation will be too unclear to constitute the sole basis for remedy: indeed, as Robert Walker LJ considered in *Jennings v Rice*, expectation could be considered no more than a starting point.[88] We need to marry the benefits of the expectation-based relief starting point with the need for flexibility along the vector of clarity. A solution has already been recognised partially in English jurisprudence. In particular, the case of *Davies v Davies*[89] saw the suggestion of a

[85] ibid [19].
[86] *Thorner* (n 83) [59].
[87] *Thorner* (n 83) [85].
[88] *Jennings* (n 10) [47].
[89] [2016] EWCA Civ 463.

sliding scale in which the weight to be accorded to expectation increased, among other things, as the certainty of the expectation did.[90] Thus, we have isolated the first factor that will determine the variable strength of our starting point.

The second vector that ought to be addressed is the issue of proportionality. Hobhouse LJ (as he then was), in *Sledmore v Dalby,*[91] held that proportionality between remedy and expectation was a relevant concept in English law.[92] Biehler contrasts various English cases that engage with this proportionality analysis, arguing that there is a difference between cases following the traditional approach like *Jennings v Rice*, in which a roundly proportionate result is sought, and subsequent cases like *Suggitt v Suggitt,* in which Arden LJ held that the expectation-based remedy would be displaced if it could be said to 'out of all proportion' to the detriment incurred.[93] While Mee argues that Arden LJ's approach resulted in a disproportionate remedy compared to the detriment,[94] she had already explicitly stated her view that there does not always have to be a relationship of proportionality between remedy and detriment.[95] Her view was cited with approval by HHJ Paul Matthews in *James v James*.[96] He stated that, in some cases, 'making the remedy proportionate to the detriment suffered would be to focus more on what B has lost, rather than on what B expected to obtain', which would contrast with the 'natural impulse... to require A to

[90] ibid [41].
[91] (1996) 72 P. & C.R. 196.
[92] ibid 209.
[93] H Biehler (n 32) 85-86.
[94] J Mee, 'Proprietary Estoppel and Inheritance: Enough is Enough?' (2013) 77 Conv 280, 281.
[95] *Suggitt v Suggitt* [2012] EWCA Civ 1140 [44].
[96] [2018] EWHC 43 (Ch).

make good the expectation'.[97] Why do we permit this leeway given the potential conflict between proprietary estoppel and the traditional conceptions of estoppel in the contractual sense and the doctrine of consideration? The obvious answer lies in the special position that land has historically occupied in the accumulation of personal wealth. Proportionality still plays a role, of course, but it is clearly secondary to the importance of giving effect to expectations simply because of this centrality of real assets to wealth.

So how are we to rationalise this secondary role of proportionality in determining the applicability of this presumption? Existing law has told us that it is relevant and can operate either in a holistic role or in a more limited one if expectation is to be prioritised. The answer lies again in a variant of the sliding scale approach. Where the detriment is significant, we can align with the reasoning of Arden LJ and HHJ Paul Matthews in arguing that proportionality should play a diminished role in conditioning expectation. The relative equitable positions (adopting the 'compromised position' analysis) of the promisor and promisee are, in such a case, sufficient to justify expectation-based relief without engaging aggressive scrutiny through proportionality. Where detriment is smaller, the overpowering unconscionability that excludes proportionality in the previous case cannot be established as easily and thus proportionality can play a greater role. It should be noted that approach to proportionality is not dependent on a need to quantify detriment, but simply a common-sense assessment of its relative scale on the evidence. Lord Stephens recognised in oral argument in *Guest v Guest* that such common-sense appreciations are natural for the courts in other areas of law such as personal injury, but that these approximations ought to be limited to this secondary 'checking'

[97] ibid [51].

role rather than the primary role of determining the basis of remedy, for which expectation is more suited.[98] The benefit of employing the above 'sliding-scale-esque' approach in lieu of a bare proportionality approach is the conditioning of proportionality, so as to acknowledge the promisor's compromised position and privilege expectation accordingly. This leads to a more consistent application of relief by the courts and an overall more doctrinally coherent approach to proprietary estoppel: thus, the ideal starting point is a presumption of expectation-based relief, conditioned by certainty of promise and significance of detriment.

Conclusion

Comparing the current state of English law to other common law jurisdictions reflects that it is not alone in still operating on a more open, less strongly principled stance; but we have sought to demonstrate that failing to conclusively address the question undermines legal certainty and the equitable aims of the doctrine.

Building on this, we went on to show that if one approach is to be adopted, that of expectation is a conceptually and practically preferable starting point compared to its rival:

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[98] Supreme Court, Case details - Guest and another v Guest, <https://www.supremecourt.uk/cases/uksc-2020-0107.html> accessed 28 December 2021. , noted by McFarlane and Mee, 'Estoppel Remedies: Switching to Expectation When It Is Difficult to Quantify Detriment' (*Property Law Blog,* 15 March 2022) <https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/estoppel-remedies-switching-expectation-when> accessed 13 April 2022.

detriment is too difficult to quantify in a consistent and transparent manner, and hence is better suited to a supporting role in the process of ascertaining suitable remedies. Conversely, expectation is easier for the courts to engage with and allows for the principles of equity and responsibility to be borne out more clearly in the remedial framework.

It is not enough for the Supreme Court to select a starting point, however. It must elucidate its content and presumptive strength for the benefit of lower courts. We contend, in that regard, that a starting point of variable strength based on the clarity of assurances made and severity of detriment suffered in a given claim retains the flexibility of the open approach while providing a principled foundation for the future development of the law. To this end, the appeal in *Guest v Guest* could permanently reshape the current opaque framework while preserving the aims of proprietary estoppel – but whether the Supreme Court will realise this potential remains to be seen.

Explaining and Justifying the Present Law of Knowing Receipt

Matthew Frey*

Abstract— The language of 'constructive trusts' is out of fashion. This is particularly so in the body of principles commonly associated with the first limb of *Barnes v Addy*: 'knowing receipt'. This paper articulates a conceptual model of 'knowing receipt', conceiving of it as an equitable wrong such that knowing receipt and dishonest assistance work together as part of a coherent scheme of liability from *Barnes v Addy*. After outlining this theory, this paper goes on to consider the most significant objection to this analysis, namely, that it is inconsistent with the language of 'constructive trusteeship' in knowing receipt. The aim is to show, on the contrary, that this model 'explains' and 'justifies' the language of 'constructive trusteeship' as a general formula for equitable relief in knowing receipt.

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Introduction

Unlike natural science, 'the objects of legal knowledge are not independent of knowledge itself; law is the object of its own science in as much as it can be studied only through concepts and categories created by legal science'.[1] Consequently, any attempt to 'explain' and 'justify' the present positive law must begin with some framework.[2]

Peter Birks sought to erect a framework of the private law through an events-response model, namely, private law obligations arise out of four kinds of causative event: Consent, Wrongs, Unjust Enrichment (UE), and Miscellaneous Other.[3] This framework is controversial.[4] Nonetheless, Birks's taxonomy is arguably useful insofar as it helps to synthesise the mass of private law legal rules and principles.

The question at the heart of this paper is: where does what has come to be called 'knowing receipt' (KR) fall within Birks's taxonomy? The defendant (C) is personally liable to the claimant (B) in KR when:

(i) A holds property on trust for B;[5]

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[1] Geoffrey Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24 OJLS 335, 341.
[2] Edward Rubin, 'Law and the Methodology of Law' (1997) 3 Wisconsin Law Review 521, 542.
[3] Peter Birks, *English Private Law* (OUP 2000) xlii, 1.
[4] Samuel (n 1) 349–354; Joachim Dietrich, 'What Is "Lawyering"? The Challenge of Taxonomy' (2006) 65 CLJ 549; James Edelman, 'Taxonomic Reasoning' at Conference of Judicial College of Victoria and Melbourne Law School (14 March 2014).
[5] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 [89]. It must be noted that property legally and beneficially owned by a

(ii) A transfers B's trust property to C in breach of A's fiduciary duty;[6]

(iii) C beneficially receives B's assets from A;[7]

(iv) At the moment of C's receipt, B continues to have an equitable right ('undestroyed proprietary base') in the assets;[8]

(v) C's state of knowledge of the trust between A and B is such as to make it unconscionable for C to retain the benefit of the receipt.[9]

Part 1 of this paper argues that it is possible to 'explain' and 'justify' KR within the Birksian framework as an equitable Wrong, such that KR and DA work together as part of a coherent scheme of liability from *Barnes v Addy*.[10] Part 2 considers the

company but subject to the fiduciary duties of the directors or others is 'trust property' for the present purposes (*Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 WLR 1555 (Ch), 1574–1577), as is property held and controlled by a fiduciary agent (*Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA), 567–568) – cf *Lewin on Trusts* (20th Ed, Sweet & Maxwell 2020) [42-036]. William Swadling ('The Nature of "Knowing Receipt"' in Davies & Penner (eds) *Equity, Trusts and Commerce* (Hart 2019) 305–306) argues that *Criterion Properties Plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846 'decisively reject[s]' this line of authority such that property subject to fiduciary duties does not suffice for KR. However, *Criterion* has not been taken as authority for this proposition in subsequent cases, and is ratio authority only that the creation by contract of contractual rights does not constitute a 'receipt' of assets for the purposes of KR ([27]).

[6] *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All ER 393 (CA).

[7] *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch), 291–292.

[8] *Byers v Samba* [2021] EWHC 60 (Ch) [38],[111].

[9] *BCCI v Akindele* [2001] Ch 437 (CA) 455.

[10] (1873–74) LR 9 Ch App 244 (CA in Chancery), 251–252.

specific objection that the equitable Wrong model cannot be reconciled with the language of 'constructive trusteeship' widely used in KR. It is submitted, on the contrary, that it is possible to 'explain' and 'justify' the present positive law of KR without jettisoning this language: although the equitable Wrong theory is incompatible with 'true' constructive trusteeship (à la Mitchell & Watterson), it is consistent with the terminology of 'as a constructive trustee' (a general formula for equitable relief).[11] This formula arguably serves the modal function of tying the Wrong of KR to the institution that the law seeks to protect via KR: the original trusteeship.[12]

1. Proposed Justifications for the Exclusionary Rule

Before turning towards the question of where KR falls within the Birksian taxonomy, we must consider methodology.

Drawing on Dworkin, New Private Law scholarship tends to work within the 'interpretivist' mode.[13] Interpretivists aim to go from a large mass of legal information to a tight and

[11] 'Remedies for Knowing Receipt' in Mitchell (ed) *Constructive and Resulting Trusts* (Hart 2010) 133–136.

[12] It is submitted, in other words, that KR involving breach of trust is the core instance of KR, and the KR involving property subject to fiduciary duties is a peripheral instance sharing the same justification.

[13] Andrew Gold, 'Internal and External Perspectives' in Andrew Gold and others (eds) *The Oxford Handbook of New Private Law* (OUP 2021) 10.

coherent theory that 'best' rationalises the law.[14] Standard interpretive criteria for assessing the law are: fit, coherence, morality, and transparency.[15] Birks and Swadling, the two leading theorists on KR, implicitly adopt this interpretivist method and both of their theories prioritise coherence at the expense of doctrinal fit.[16] Consequently, the existing academic models on KR operate essentially within the realm of prescription.

This essay deliberately subverts the interpretivist method by looking at the law through the lens of 'doctrinal scholarship'. The aim of doctrinal scholarship is to 'explain' and 'justify' the 'present law'. There are two methodological claims underpinning this approach. *First*, doctrinal work is vital for understanding what the legal system does.[17] If interpretivist theories ignore the present law (and focus on prescription), it is all the more vital that others do not. *Second*, it is not necessary to resort to interpretivism to coherently explain the present positive law of KR.

The terms (i) 'present law', (ii) 'explaining', and (iii) 'justifying' must now be defined. Following Kocourek, the 'present law' is a narrow hypothesis (based on past law) of what law is about to be applied by the courts.[18] This is not an endorsement of the legal realist thesis.[19] The point is merely that

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[14] Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in Charles Rickett and Ross Grantham (eds) *Structure and Justification in Private Law* (Hart 2008) 206; Dworkin, *Law's Empire* (HUP 1986) 45–86.
[15] Stephen A. Smith, *Contract Theory* (OUP 2004) 3–38.
[16] Hedley (n 14) 211–212.
[17] Hedley (n 14) 215.
[18] Albert Kocourek, *Introduction to the Science of Law* (Little, Brown & Co 1930) 12.
[19] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 CLR 809.

law which *has been* applied is 'past law' and so 'present law' must be that which is *about to be* applied.

A doctrinal model of KR will 'explain' the present law of KR if, in such a way as to make a probable prediction of the outcome and reasoning of a future case, it: (i) provides a reason for the outcome of past cases and (ii) accords with the reasoning in those past cases.

Finally, a doctrinal model of KR will 'justify' the present law if it offers some superior moral reason for why our legal system should formulate KR in accordance with its theory. This is not a question of engagement in moral norms.[20] Justification, on this definition, is about moral norms trumping one another. The definition is deliberately vague because this essay does not seek to beg the question by excluding certain types of moral norms.

A. Consent and Miscellaneous Other

KR does not arise due to a manifestation of Consent (B, the claimant, and C, the defendant, need not have made any sort of agreement for liability in KR to arise). Furthermore, since, it shall be argued, it is possible to locate the present law of KR within the category of Wrongs, no question of whether KR comes within the residual category of Miscellaneous Other events arises.[21]

B. UE Theory of KR

The elements of UE in English law were set down in *Menelaou v Bank of Cyprus Plc*: (i) an 'enrichment' of C; (ii) 'at B's expense'; (iii) in circumstances of an 'unjust factor'; where (iv) C has no

[20] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 149–176.
[21] Birks (n 3) xlii.

available 'defence'.[22] For the present, it will be assumed that UE usefully illuminates areas of traditional equity jurisprudence, and that UE is a category which includes all causes of action that satisfy the elements of *Menelaou*.[23]

As applied to KR, Birks contended that by receiving B's assets C has been enriched at B's expense – an explanation which has been endorsed in Jersey and New Zealand.[24] This paper will, nonetheless, submit that the UE model neither explains nor justifies the present positive law of KR in England.

I. Explains

It is argued that the UE theory is deficient for three reasons.

First, as is repeated in the caselaw, KR requires C to have 'knowledge' of A's breach of fiduciary duty.[25] There is no such requirement of 'knowledge' to run a claim in UE: why should knowledge matter if the claim is simply that C has been enriched

[22] [2015] UKSC 66, [2016] AC 176 [18]–[20].

[23] Christopher Douglas Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason Neyers and others (eds) *Understanding Unjust Enrichment* (Hart 2004) 83–84.

[24] Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] LMCLQ 296; *Re Esteem Settlement* [2002] JLR 53; *Powell v Thompson* [1991] 1 NZLR 579.

[25] *El Ajou v Dollar Land Holdings* [1994] 2 All ER 685 (CA) 700; *Re Montagu's Settlement* [1987] Ch 264 (Ch) 276; *Agip (Africa)* (n 7) 291; *Relfo Ltd (In Liquidation) v Varsani* [2014] EWCA Civ 360, [2015] 1 BCLC 14 [1].

unfairly?[26] There is therefore a fundamental difference between the present law of KR and the UE framework. [27]

Speaking within the interpretivist mode, Birks contends, in response, that the modern law of KR is incorrect. In its original formulation in *Barnes v Addy*, KR did not require C to have knowledge of A's breach of fiduciary duty: Lord Selborne LC stated that it is enough for C to be liable in KR when (s)he 'receive[s] and become[s] chargeable with some part of the trust property'.[28] Thus, the requirement of knowledge (as introduced since *Carl Zeiss v Herbert Smith (No.2)*)[29] should be rejected.

The problem with this rebuttal is that, regardless of whether the modern legal position has departed from *Barnes* or whether the departure was erroneous, the UE model cannot explain the present positive requirement of knowledge for KR.[30]

The *second* objection is that UE requires an 'unjust factor'. Birks proposes that the unjust factor present in KR is 'ignorance'; that is, an enrichment is unjust by reason of B being unaware of a transfer of value from himself to C.[31] However, this factor has never been recognised by the courts.[32] Birks may reply that 'ignorance' is the unspoken animating principle behind the

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[26] *Greenwood v Bennett* [1973] QB 195.
[27] Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412, 412.
[28] *Barnes* (n 10); Birks (n 24) 331–332.
[29] [1969] 2 Ch 276 (Ch) 293.
[30] *BCCI* (n 9) 455; *Criterion Properties* (n 5) [28]–[40]; *Charter Plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313 [7]–[8]; *Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA* [2019] EWHC 472 (Comm) [175].
[31] Birks (n 24) 296–297.
[32] Swadling (n 5) 317–318; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [155].

caselaw. But the Court of Appeal emphasised in *Novoship (UK) Ltd v Mikhaylyuk* that 'receipt [rather than ignorance] of trust property is the gist of [KR]'.[33]

Third, to ground liability in UE, it must be proved that C is 'enriched' 'at B's expense'.[34] It was recognised in *Cressman v Coys of Kensington (Sales) Ltd* that C's acquisition of B's right satisfies this requirement.[35] Yet, as has been noted, C does not receive B's right in KR.[36] Rather, following A's breach of trust, C receives a *legal* right from A not an *equitable* right from B. Therefore, even if a legal right qualifies as 'enrichment', C cannot be 'enriched' 'at B's expense'.

One rebuttal is to claim that legal rights are equivalent to equitable rights in KR. This approach is taken by Lord Reed in *Investment Trust Companies v Revenue and Customs*, where he states that C has been enriched 'at B's expense' because A's property (ie legal right) 'is, in law, the equivalent of [B's] property' (i.e. equitable right).[37] This echoes the view of the Court of Appeal in *Shell UK Ltd v Total UK Ltd*, where the court found it 'legalistic' to deny Shell a right of recovery against Total on the basis that Shell had only an equitable right.[38]

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[33] *Novoship* (n 5) [89].
[34] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 400; Eli Ball, *Enrichment at the Claimant's Expense* (Hart 2016) 99.
[35] [2004] EWCA Civ 47, [2004] 1 WLR 2775 [37].
[36] Swadling (n 5) 318; Smith (n 27) 428–429; Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 250; *Sempra Metals v IRC* [2007] UKHL 34, [2008] 1 AC 561 [119].
[37] [2017] UKSC 29, [2018] AC 275 [48].
[38] [2010] EWCA Civ 180, [2011] QB 86 [132].

The response is twofold. First, it is not correct that legal and equitable property rights are equivalent. This is reflected by the fundamentally different rights/duties of trustee and beneficiary.[39] However, second, *even if* legal and equitable rights can be conceived as equivalent for this purpose, the corollary of Lord Reed's dictum in *Investment Trust Companies* is that KR is not available when B is the object of a discretionary trust because, there, B has a mere *spes* – not an equitable right.[40] This is incorrect as a matter of law: the object of a discretionary trust can claim in KR.[41] Accordingly, Lord Reed's rebuttal should be rejected.

II. Justifies

The UE framework would justify the present law of KR if it offered a moral reason for changing the elements of KR into the requirements for UE in *Menelaou*. It is not claimed here that Birks himself sought to justify the present law on this definition. Rather, it is suggested that, looking at this separate question, Birks's framework fails to provide a moral reason to reform the law. There are two specific objections.

First, the UE model imposes a broader criterion for liability by removing the requirement for knowledge or unconscionability: recipients will be liable in KR (regardless of

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[39] Maitland, *Equity: A Course of Lectures* (1st edn, CUP 1910) 112; Ben McFarlane & Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Equity 1, 3–5.

[40] *Baker (Inspector of Taxes) v Archer Shee* [1927] AC 844 (HL) 853–856 (Viscount Sumner), 872–873 (Lord Blanesborough); *Gartside v IRC* [1968] AC 55 (HL) 605–606.

[41] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 [51]; *Joel v Mills* (1857) 4 K & J 458 (Court of Chancery) 473–476; *Cosser v Radford* (1863) 1 De GJ & S 585 (Court of Chancery); *Lewin on Trusts* (n 5) [41-073], [42-033]; *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [6-04].

knowledge) unless C can demonstrate that C has changed their position in reliance on the receipt.[42] However, the UE framework does not identify why this expansion of the range of persons who may be subject to KR is justified. The absence of justification is noticeable given that KR is already a wide cause of action (extending to assets dispersed in breach of fiduciary duty).

One argument in defence of Birks might be that KR should expand because the present law of KR (with the knowledge requirement) leaves a lacuna such that there is a space where no cause of action is available between KR, dishonest assistance for breach of trust (DA), and equitable tracing. This, however, is incorrect. Even if B's trust assets have been dissipated, it is very likely that a claim in DA will be available on the same facts as KR – as was recently argued in *Byers v Samba*.[43]

Another argument in defence of Birks is that the 'change of position' defence (CPD) provides a sufficient antidote to this expansion of liability. In *Lipkin Gorman v Karpnale Ltd*, Lord Goff held that CPD would be available 'to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution'.[44] It is true that Lord Goff goes on to say that CPD is not available to anyone who has 'changed [their] position in bad faith as where [C] has paid away the money with knowledge of the facts entitling [B] to restitution'.[45] Nevertheless, since fault (knowledge or unconscionability) is not

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[42] This point is stressed by Nourse LJ in *BCCI v Akindele* (n 9) 456.
[43] *Byers* (n 8) [108]. Despite the different requirements, it is very common for both KR and DA to be run concurrently: *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189; *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129; *Novoship* (n 5).
[44] [1991] 2 AC 548 (HL) 579–80.
[45] ibid 580.

required by the UE model of KR, it is possible that CPD would be useful.[46]

Even if the defence is available, there are two further criticisms. First, the UE framework renders KR claims more arguable by shifting the weight from establishing the elements of UE to establishing a defence to UE. The consequence is that the burden moves from the claimant towards the defendant. It is not clear that this shift is justified. Birks would (presumably) say that a person who stands possessed of another's assets should have the burden of justifying their ownership of them. Yet, the counterargument is that this change would be 'commercially unworkable' because it would vastly increase commercial parties' exposure to litigation.[47]

Second, Birks's proposal can only ever be partially persuasive because it fails to engage with the social costs of reform. For example, the scope of 'inequitability *in all the circumstances*'[48] remains unclear. The result is that those advising commercial parties under the UE theory will be unable to provide certainty. Even if some elements of the present law of KR (e.g. knowledge) have not settled, it does not make sense to reform one area of legal ambiguity for another.[49]

The *second* specific objection to the UE model is that (on Birks's account) UE is based on the claim that C's enrichment at the expense of B is unjust given certain factors.[50] It was argued above that the UE theory cannot explain KR because there is no

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[46] *BCCI* (n 9) 456.
[47] ibid.
[48] *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 [39] (emphasis added).
[49] Swadling (n 5) 311–314.
[50] Peter Birks, *Unjust Enrichment* (OUP 2005) 3–5.

enrichment of C 'at B's expense' in KR; C receives a legal right from A not an equitable right from B. It follows that, together with this descriptive problem, there is no justification for applying UE to the facts of KR because there is no enrichment at B's expense. In other words, the fundamental moral basis for UE is absent in cases of KR.

Birks dismissed the absence of enrichment 'at B's expense' as a 'technicality'.[51] But in law technicality is everything. Stevens has come to Birks's aid on the basis that no defendant would raise this objection for they would be admitting liability in conversion.[52] However, there are two reasons that defendants would raise this objection. *First*, conversion requires an intentional exercise of exclusive control over the trust property, whereas the receipt in KR can be wholly passive (even on the UE model).[53] Thus C is not necessarily liable for conversion if (s)he is liable on the UE theory of KR. *Second*, even if C were liable for so conversion, C would be admitting liability to a different party since conversion only attaches to A's legal right.[54]

C. 'Wrong' Theories of KR

Birks's next category is 'Wrongs'. Birks defines a 'Wrong' as 'no more nor less than a breach of legal duty owed to a plaintiff'.[55]

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[51] Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623, 654–655.

[52] Robert Stevens, 'Three Enrichment Issues' in Andrew Burrows and Lord Rodger of Earlsferry (eds) *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 62–64.

[53] *Walgrave v Ogden* (1590) 1 Leon 224; Simon Douglas, 'The Nature of Conversion' (2009) 68 CLJ 198, 214–217; Swadling (n 5) 328.

[54] *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA).

[55] Peter Birks, 'The Concept of a Civil Wrong' in David G. Owen (ed) *The Philosophical Foundations of Tort Law* (OUP 1997) 33.

This is a necessary condition.[56] This account of concepts is contestable.[57] Nonetheless, since the controversy requires more space than this paper has, Birks's definition will be accepted on its own terms.

I. Inconsistent Dealing

Drawing on Millett J in *Agip (Africa),*[58] Swadling suggests that KR should be interpreted as an equitable Wrong called 'inconsistent dealing' (ID).[59] The elements of ID were stated in *Lee v Sankey*: C is liable for ID when C knowingly deals with money held under a trust inconsistently with that trust.[60] Interpreting the Birksian definition of a 'Wrong' through a Hohfeldian rights-based analysis, the fact of receipt thus generates a duty-right jural relation between B and C such that C comes under a primary duty to B not to deal inconsistently with the property.[61] C's duty corresponds with a claim-right in B that C does not deal inconsistently. It is the breach of this primary duty owed by C to B that constitutes an 'inconsistent dealing'. Breach of this primary duty then generates secondary entitlements, namely B's power to

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[56] John Gardner, 'Torts and Other Wrongs' 39 (2011) FSULR 1, 25.
[57] Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M Anscombe, P.M.S. Hacker and Joachim Schulte trs, Wiley-Blackwell 2009) §66; George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal about the Mind* (University of Chicago Press 1987) 16–17.
[58] *Agip (Africa)* (n 7) 291.
[59] Swadling (n 5) 304; *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 [45]. In a good illustration of the interpretivist method, whereas Millett J clearly distinguishes between ID and KR as distinct heads of liability (291), Swadling suggests that Millett J is 'best' read as saying that KR is a sub-species of ID (308–309).
[60] (1872–73) LR 15 Eq 204 (Court of Chancery) 211.
[61] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied to Judicial Reasoning' (1913) 23 YLJ 16, 30.

sue C for ID – which may result in an order for equitable accounting.[62]

Whereas Birks's UE theory of KR straddles prescription and description, Swadling's interpretation of the present law of KR is more prescriptive. Accordingly, Swadling should be read not as attempting to explain the present law of KR within the ID model but as contending that the present law of KR would be better justified if it were subsumed under the law of ID as set out in *Lee*.[63] The argument in this section is that the ID model does not justify the law of KR because it fails to offer a compelling reason to reformulate the law of KR in accordance with this theory. There are two specific objections.

First, Swadling argues that one of the benefits of analysing KR as a form of ID is that this reading removes the need for receipt to be 'beneficial'.[64] In the context of KR, 'beneficial' means that the recipient is *not* a mere conduit or passive custodian for another, such that they may justifiably be held accountable in Equity.[65] This argument has two sides.

On the one hand, Swadling states that Millett J's motivation for introducing the beneficial receipt requirement in *Agip (Africa)* was the protection of banks from KR.[66] However, he notes, since banks always give value in exchange, they would usually be Equity's darlings. The beneficial receipt requirement therefore does no work in this context. There are two replies. First, the bona fide purchaser for value without notice defence is

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[62] Stephen A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019).
[63] *Lee* (n 59).
[64] Swadling (n 5) 329.
[65] *Agip (Africa)* (n 7) 291–292.
[66] Swadling (n 5) 314.

only available when the bank does not have knowledge of breach of trust – in such a case, the bank could not be liable for KR anyway.[67] Accordingly, *pace* Swadling, the beneficial receipt requirement does have a real function insofar as it prevents banks with knowledge of breach being liable for KR.[68] Second, *even if* Swadling's criticism *did* run in the specific context of banking, the objection is too narrow because the consequence of abolishing the beneficial receipt requirement would be to overturn the global custody regime for intermediated securities, which presently depends on bare custodians not being liable.[69]

The second side of Swadling's argument against the beneficial requirement is his claim that this requirement can produce 'bizarre results'.[70] Imagine that A holds shares on trust for B. In breach of trust, A transfers those shares to C to hold on trust for D. C will not be liable for KR even if (s)he has actual knowledge of the breach because his/her receipt is not 'beneficial'. It is doubtful whether this result is as 'bizarre' as Swadling thinks it is. First, it is unclear why C should be liable for KR in circumstances where C is prevented by law from enjoying that property. Second, it is equally unclear why Swadling would want to distort the law of KR when, there are sufficient remedies for this type of situation – C may already be liable for DA, the

[67] *Tourville v Naish* (1734) 3 P Wms 307; *Snell's Equity* (34th edn, Sweet & Maxwell 2019) [4-027]–[4-039].

[68] Gleeson argues that this should still not be the case because a bank does not merely 'hold' moneys paid into a bank account with it; it uses them ('The Involuntary Launderer: The Banker's Liability for Deposits of the Proceeds of Crime', in Peter Birks (ed) *Laundering and Tracing* (OUP 1995) 126–127).

[69] Ben McFarlane, 'Intermediated securities: taking stock' (2016) 31 JIBFL 359.

[70] Swadling (n 5) 314–315.

trust assets may be traceable, and B would have a claim against D in KR if D knew of A's breach of trust.[71]

The *second* specific objection against Swadling is that the corollary of claiming that KR is a species of ID is that the 'gist' of the action is no longer receipt but C's breach of duty to deal with the property consistently with the trust.[72] It follows that the ID theory narrows the scope of liability such that C is only liable for a breach of a duty to deal – not for receiving the assets.

Swadling claims that this contraction of liability has the advantage of removing a claim for KR when rights are lost without fault on C's part.[73] Consider the example of the individual C who innocently received assets they subsequently discovered were trust assets. C takes steps to prevent the assets being dispersed but the assets are stolen.[74] For Swadling it would not be just to hold C liable for KR in such circumstances. There are two responses. First, hard facts make bad law: adopting the ID model is more undesirable than finding C liable in such a case because it would allow C to escape liability on facts such as *Relfo Limited (In Liquidation) v Varsani*.[75] Second, it would be possible to create a

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[71] *Bracken Partners Ltd v Gutteridge* [2003] EWCA Civ 1875, [2004] 1 BCLC 377 [12]–[16].

[72] *Novoship* (n 5) [89]. It is also worth noting, in this regard, the ocean of judicial dicta to the effect that the liability is to return assets as soon as they are received: *Independent Trustee Services v GP Noble Trustees* [2012] EWCA Civ 195, [2013] Ch 91 [81]–[82]; *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30, [37]; *Williams (n 43)* [31].

[73] Swadling (n 5) 329.

[74] *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 228–229.

[75] *Relfo* (n 25).

specific defence for such particular circumstances without altering the requirements of KR.[76]

II. Equitable Wrong

This section contends that KR is best analysed as a *sui generis* equitable Wrong such that KR and DA work together as part of a coherent scheme of liability from *Barnes v Addy*. The specific worry that the equitable Wrong theory is inconsistent with the language of 'constructive trusteeship' in KR is handled in Part B of this paper.

On the Birksian definition of a Wrong, the equitable Wrong analysis is as follows: the fact of knowing receipt generates a duty-right jural relation between B and C such that C comes under an immediate and primary duty to B either to return the trust property *in specie* or to pay its current value. C's duty corresponds with a claim-right in B that C does either return the trust property *in specie* or to pay its current value. C is liable for the equitable Wrong of KR when C breaches this primary legal duty. Breach of this primary duty then generates secondary entitlements, namely B's power to sue C.[77]

(1) Explains

The equitable Wrong model explains the present law of KR (in such a way as to make a probable prediction of the way a future case would be decided) because it accords with the reasoning of past cases about KR and provides a reason for outcomes in those cases. There are four points to note.

First, treating KR as its own *sui generis* equitable Wrong allows us to respect the substantive requirements of KR: there is

[76] *National Bank of New Zealand Ltd* (n 73).
[77] Smith (n 61).

no need to deny the positive requirements of knowledge and beneficial receipt.[78]

Second, the substantive analysis of the courts (although obiter) supports the equitable Wrong analysis. In *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*, Millett J states that, in a claim of restitution for a Wrong, B relies on 'an equity … [following a] breach of fiduciary or other obligation…which may in appropriate circumstances give rise to a constructive trust'.[79] This passage was recently approved – but distinguished – as an analysis of KR in *Byers v Samba*[80] and echoed in *FM Capital Partners Ltd v Marino (No 2)*.[81] On this reading, as is stated by Fancourt J in *Byers*, C's 'obligation' to B arises because C has received B's property in the knowledge that it belongs to B.[82] Consequently, a duty-right jural relation arises between B and C such that C has a secondary duty either to restore the trust property *in specie* or to pay its current value.

Third, the formal wording of the courts' analysis accords with the equitable Wrong model. For example, in *Fiona Trust & Holding Corp v Privalov*, Andrew Smith J states that KR is a 'wrong'.[83] In *FM Capital Partners Ltd v Marino* (No 1), both counsel argued, and Cockerill J was prepared to assume, that KR 'was not a "pure unjust enrichment" claim but a claim relating to a wrong'.[84] Finally, in *OJSC Oil Co Yugraneft v Abramovich*

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[78] *Re Montagu* (n 25).
[79] [1995] 1 WLR 978 (Ch) 988–989.
[80] *Byers* (n 8) [77]-[82].
[81] *FM Capital Partners Ltd v Marino (No 2)* [2018] EWHC 2905 (Comm) [66].
[82] *Byers* (n 8) [110].
[83] [2010] EWHC 3199 (Comm) [69], [159]. Such language is also present in *Hotel Portfolio II UK Ltd (In Liquidation) v Ruhan* [2020] EWHC 233 (Comm) [2].
[84] [2018] EWHC 1768 (Comm) [455], [482].

Christopher Clarke J concluded that the *lex fori* could not be the appropriate choice of applicable law because KR is an 'equitable wrong'.[85]

Fourth, the equitable Wrong view brings symmetry to KR and DA. In *Barnes v Addy*, Lord Selborne LC held that KR and DA are the only two causes of action which, when successful, render C liable as a 'constructive trustee'.[86] Subsequent cases have rationalised KR and DA as two 'limbs' for the same test of whether liability should be imposed on a third party following breach of trust.[87] DA has been explained as an 'equitable wrong' since *Dubai Aluminium Co*.[88] However, this label has not been applied to KR at the highest level. If KR and DA are indeed two limbs of the same test, then the equitable Wrong analysis brings coherence back to the caselaw.

One objection to the equitable Wrong model of the present law of KR is that there is no ratio authority in support of this theory, nor is there authority above the High Court. There are two responses. *First*, a rough search of Westlaw indicates that few cases on KR have progressed beyond the High Court since 2000.[89] In this context, in terms of ascertaining the present law of

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[85] [2008] EWHC 2613 (Comm) [178]–[179], [262].
[86] *Barnes* (n 10) 251–252.
[87] *Williams* (n 43) [9]; *Montagu* (n 25) 271; *Farah* (n 32) [112].
[88] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 [9], [104].
[89] A search of Westlaw using the Subject/Keyword 'knowing receipt' indicates that, since 2000, 9 cases have reached the Court of Appeal and 1 to the Privy Council: *Varma v Atkinson* [2020] EWCA Civ 1602, [2021] Ch 180; *Arcadia Petroleum Ltd v Bosworth* [2016] EWCA Civ 818; *Otkritie International Investment Management Ltd v Urumov* [2015] EWCA Civ 1578; *Jemai v Otkritie International Investment Management Ltd* [2015] EWCA Civ 766; *Relfo* (n 25); *Gabriel v Little* [2013] EWCA Civ 1513; *Arthur* (n 71);

KR, the number of dicta in support of the equitable Wrong model (and the absence of contrary dicta) is significant. *Second*, it is worth pointing out that to the extent that the equitable Wrong theory is not supported by ratio authority, neither is Birks's or Swadling's interpretation of the law of KR.

(2) Justifies

The crux of the issue in relation to justifying the equitable Wrong model of KR is what makes the knowing receipt of property a 'Wrong'. Why, in other words, does the law intervene when C interferes with B's property in this way? This paper submits that the Wrong in knowing receipt is C's knowledge of A's breach of trust.[90] When C chooses to beneficially retain B's trust assets with such knowledge, a primary duty-right jural relation is generated between B and C. The moral justification for this jural relation arising is that C has chosen to intrude into the autonomy of B by interfering with B's trust assets and infringe B's rights to freedom and equality in a fundamental way.[91] C is therefore liable via the secondary duty either to restore the trust property *in specie* or to pay its current value.[92]

Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819; *City Index Ltd v Gawler* [2007] EWCA Civ 1382, [2008] Ch 313; *MT Realisations Ltd (In Liquidation) v Digital Equipment Co Ltd* [2003] EWCA Civ 494. No cases have reached the House of Lords or Supreme Court.

[90] *BCCI* (n 9) 455; *Byers* (n 8) [110]; *Williams* (n 43) [31]; Matthew Conaglen & Amy Goymour, 'Knowing Receipt and Registered Land' in Mitchell (ed) *Constructive and Resulting Trusts* (Hart 2010) 172; cf fn 5 on purely fiduciary claims for KR.

[91] David Owen, 'Philosophical Foundations of Fault in Tort Law' in David Owen (ed) *The Philosophical Foundations of Tort Law* (OUP 1995) 220–223.

[92] It must be noted that there are (at least) three cases (*Belmont Finance* (n 6) 419; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1577];

Even if it is possible to justify KR in this way, one might still wonder whether it is necessary to have a separate head of liability, given the likelihood of C being liable for DA and an equitable tracing claim. The reply is that even though claims in DA and KR often overlap, there are occasions in which neither DA nor equitable tracing are available on facts where KR would be available and where moral theory would argue for a claim.[93] A theoretical example might be where C is not liable for dishonest assistance or equitable tracing because – although C beneficially received B's assets with knowledge of A's breach of trust – C's receipt of the assets did not 'assist' the breach and the assets have subsequently been stolen such that they cannot be traced.[94] In such a situation, KR is the only means to imposing liability upon C.

2. The Constructive Trust Debate

Part 1 of this paper articulated a conceptual model of KR as an equitable Wrong. Part 2 considers the objection that this model cannot be reconciled with the language of 'constructive trusteeship' widely used in KR.[95] This paper does not suggest (à la Mitchell & Watterson) that the knowing recipient, C, is a 'true' constructive trustee. Rather, the formula of 'being liable to

Akita Holdings Ltd v Attorney General of the Turks and Caicos Islands [2017] UKPC 7 [2017] AC 590 [17], [37]) in which the language of accounting is used to describe a claim in KR. However, if the Narrow Argument (*infra*) is correct, the language of accounting cannot be right.

[93] Cf fn 43.

[94] *Brinks Ltd v Abu-Saleh (No.3)* [1996] CLC 133 149; *Twinsectra* (n 43) [107].

[95] *Montagu* (n 25) pass.

account as a constructive trustee' is defended on the basis that it ties the Wrong of KR to the original trusteeship.

A. Explains

I. The Broad Argument

The Broad Argument is so called because it is an argument against the use of the language of 'constructive trusteeship' *generally* (as opposed to specifically in relation to KR). It is necessary to rebut this argument because the general language of 'constructive trusts' is essential for the formula 'as a constructive trustee' to retain its meaning.

Swadling contends that the terminology of 'constructive trusteeship' is a 'fiction' which should be replaced with a formula for C to 'pay money'.[96] According to him:

> (i) The question is whether orders to pay money or convey particular rights are properly described as trusts.[97]
>
> (ii) To answer this question, we require an accurate definition of a trust.
>
> (iii) For this purpose, an express trust can be treated as the central instance of a trust.[98]

[96] William Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399, 405–406. NB Swadling never defines 'fiction'.
[97] ibid 405.
[98] ibid 407.

(iv) A necessary (but not invariably sufficient) condition of an express trust is that 'one person [C] hold[s] rights for another [B] or for a purpose'.[99]

(v) The constructive trusteeship of KR does not involve C holding rights for B or for a purpose.[100]

(vi) Therefore, a knowing recipient is not a trustee.

The Broad Argument hinges on identifying a core 'stick' in the bundle of 'trust' rights/duties. Swadling is not claiming that the presence of this core stick is a sufficient condition for a trust. His assertion is that this duty/right is necessarily present in the core instance of the trust. Since this duty/right is not present in the constructive trust such a trust cannot be a core instance of the trust.

There are two responses to Swadling. *First*, it is worth noting the scope of the argument. Swadling sets out to prove that a 'constructive trust' is not a trust.[101] However, this is not something the argument can establish. The most that Swadling can say is that a 'constructive trust' is not a central instance of a trust, *not* that a 'constructive trust' is not a trust at all.

The *second* objection has two parts. If, on the one hand, Swadling nominates 'holding rights for another or for a purpose' as the core stick of a trust in order to exclude 'constructive trusts', then Swadling is guilty of begging the question.

If, alternatively, Swadling was looking for a right/duty that is present in express, resulting, constructive, and bare trusts, and settled on 'holding rights for another or for a purpose'

[99] ibid.
[100] ibid.
[101] ibid 405–406.

because it was (at least) present in express, resulting, and bare trusts, then, with respect, Swadling has forgotten the primary duty to account to the beneficiary.[102] This duty has a better claim to being the core stick because it is present in constructive trusts as well as express, resulting, and bare trusts.[103] The duty to account derives from the overall duty of the trustee to give primacy to the 'performance interest' of the beneficiary under the trust.[104] It ensures performance of the trust and distinguishes the institution of the trust from torts, which impose secondary duties of compensation in lieu of performance.[105]

II. The Narrow Argument

The Narrow Argument is an objection to the language of 'constructive trusteeship' particularly in relation to KR. If the core stick in the bundle of trust rights/duties is the primary duty to account, the following paradox arises: when the law labels C (the knowing recipient) a true 'constructive trustee' it signals that C has a primary duty to account to B for which no breach of legal duty is required. Nevertheless, the equitable Wrong analysis above was that KR was a Wrong for which breach of primary duty was required. It is impossible to maintain both.

The reply is that, even if the core stick in the trust bundle is the duty to account, as a matter of positive law the knowing

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[102] *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368 [167]-[172]; *Ultraframe* (n 90) [1513].

[103] Swadling (n 94) 408; *Lewin on Trusts* (n 5) [8-011], [41-002]. This contention is supported by an abundance of judicial dicta: *Williams* (n) [9], [55]; *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) 409.

[104] Luisa Ho & Donal Nolan, 'The Performance Interest in the Law of Trusts' (2020) 136 LQR 402, 402.

[105] ibid 420–421.

recipient (C) is not labelled a true 'constructive trustee'.[106] There are cases in which this terminology is used.[107] But the weight of authority supports a different formula: namely that C is liable '*as* a constructive trustee'.[108] This has been clear since *Barnes v Addy* where Lord Selborne LC states that the knowing recipient is 'not properly [a] trustee' In other words, the Narrow Argument is a false dichotomy: the courts do not say that C is a true 'constructive trustee' and they do not, therefore, ascribe the primary duty to account to C. With the formula 'as a constructive trustee', the courts merely liken the knowing recipient, C, *to* the 'constructive trustee' such that C is liable *as* or *like* a 'constructive trustee'.

B. Justifies

With the Broad and Narrow Arguments out of the way, the question remains: why do the courts persist in saying that C must account 'as a constructive trustee'? The reason is likely historical. Though the Courts of Equity did not have a general power to make money awards, they did have the ability to make them against defaulting trustees.[109] The Courts therefore used the language of 'as a constructive trustee' as a 'formula for equitable relief'.[110]

The main argument against this formula is that if the language is a historical accident which does not refer to C's and

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[106] Mitchell & Watterson (n 11) 130–132.
[107] Cf fn 90; cf Swadling (n 94) 412.
[108] *Paragon Finance* (n 101) 409; *Williams* (n 43) [31]; *Montagu* (n 25) pass; *Byers* (n 8) [41]; *Uzinterimpex* (n 87) [37], [38], [42]; *Gawler* (n 87) [7]; *Arthur* (n 71) [34]; *Selangor* (n 5) 1582; Swadling (n 94) 412–413; *Lewin on Trusts* (n 5) [8-012].
[109] Swadling (n 94) 412.
[110] *Selangor* (n 5) 1582.

B's actual jural relation it is 'meaningless and superfluous and…apt to confuse'.[111] Consequently, the language should be replaced with a simple formula for C to 'pay money' to B.[112] This paper contends, on the contrary, that the language does more good than harm because it ties the Wrong of KR to the original trusteeship. On this view, linking back to the equitable Wrong analysis in Part 1, the label of 'as a constructive trustee' has a *modal* (rather than *substantive*) function in that it morally justifies the imposition of liability on C by the *way* in which C commits the Wrong.

There are two aspects to this modal function. *First*, the formula serves a justificatory function in that it provides a moral justification for the source of C's liability in KR, namely, C's commission of the Wrong of deliberate and knowing interference with the original trusteeship. The label therefore reflects the extent to which Equity supervises the original trust between A and B.[113] This justificatory aspect is lost with Swadling's proposed 'order to pay money' formula because that proposal makes no distinction between KR liability and, for example, an action on a debt or action for breach of contract.

Second, the formula serves a communicative function insofar as it tells C that civil wrongs do not pay. Equity likens C to A in order to convey the Court's moral opprobrium towards C's behaviour. To that extent, the formula operates like the label of 'punitive' or 'exemplary' damages.[114] This communicative aspect is lost on Swadling's suggestion because an 'order to pay money' does not convey any sense that C has committed a

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[111] Andrew Burrows, *The Law of Restitution* (OUP 2012) 418.
[112] Swadling (n 94) 405–406.
[113] *Morice v Bishop of Durham* (1805) 10 Ves Jr 522, 539–540.
[114] *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) 1073 (Lord Hailsham LC).

particular Wrong involving the breach of the original trust. Thus understood, the language of 'constructive trusteeship' is arguably apt to justify rather than 'confuse'.[115]

There are two further objections against the formula. *First*, the caselaw makes clear that a KR claim can be grounded *either* on a duty of true 'trusteeship' and receipt of trust assets *or* a dissipation of assets in breach of fiduciary duty: how can the language of 'constructive trusteeship' serve a modal function if there was no trust in the first place?[116] One response is that, even if there was properly no trust, property subject to fiduciary duties is regarded for the purposes of KR as 'trust property'.[117] In other words, the peripheral instance of KR involving property subject to fiduciary duties shares the same justification as the core instance of KR based on breach of trust.[118] Thus the label of 'as a constructive trustee' is appropriate.

Second, one might argue that we do not need the (contested) terminology of 'constructive trusteeship' to perform this modal function: the court could label the knowing recipient, C, a 'custodian' or 'steward' of the assets. The problem with this suggestion is that it no longer ties C to the original trust; the original trust was not a 'custodianship' or a 'stewardship', it was a

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[115] Burrows (n 110).

[116] Cf fn 5.

[117] ibid.

[118] As *Lewin on Trusts* (n 5) [8-018]) notes this is more than a fiction. Fiduciaries (A) with possession or control of B's property are in an analogous position to true trustees because (although property is not vested in A) they claim no personal interest in it, and are treated as if they were true trustees, including their accountability for abusing the trust and confidence reposed in them. It is also worth noting that such fiduciaries were called express trustees before 1890, and for the purposes of the Limitation Act 1980 they are in the same position as trustees duly appointed with the trust property vested in them.

'trusteeship'.[119] Hence, C can only be likened to a 'trustee'. The question then arises: why is C liable 'as a *constructive* trustee' not 'as a trustee'? One reason is that C differs from a trustee in that C has not voluntarily subjected themselves to trust duties; rather, as in a 'constructive trust', the duty to account has been imposed by law by reason of C's conduct.[120]

Conclusion

This paper makes two contributions to the existing literature. The *first* contribution is as an analysis of the law of KR through the lens of doctrinal scholarship, as opposed to interpretivism. It has been suggested – in the mode of doctrinal scholarship – that it is possible to explain and justify the present positive law of KR within the Birksian taxonomy as an equitable Wrong such that KR and DA work together as part of a coherent scheme of liability from *Barnes v Addy*.

The *second* contribution is the suggestion that it is possible to 'explain' and 'justify' the present positive law of KR without excising the language of 'constructive trusteeship': although the equitable Wrong theory is incompatible with 'true' constructive trusteeship (à la Mitchell & Watterson), it is consistent with the terminology of 'as a constructive trustee' (a general formula for equitable relief).[121] It was argued that the formula 'as a

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[119] On occasion, the courts do use the language of 'custodial duties' as a synonym for 'trust' duties: *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [39]; *Arthur* (n 71) [37].

[120] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705.

[121] Mitchell & Watterson (n 11).

constructive trustee' served the valuable modal function of tying the Wrong of KR to the institution that the law seeks to protect via KR: the original trusteeship.

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