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CONTENTS

i. Introduction
   Marius Benedikt Gass and Zi Xiang Tan (Warren), Editors-in-Chief
   6

ii. Defective Premises: Rethinking Murphy v Brentwood
    John Timothy Cheung
   8

iii. Share and Share Alike: Contributory Negligence and
     Contractual Claims
    Thomas Foxton
    Winner of the Norton Rose Fulbright Prize for the Best Article in
    Contract, Tort, Trusts and Land
   21

iv. In Defence of Ingram v Little: Understanding Collateral Offer
    and Acceptance
    Jian Jun Liew
   34

v. Procedural Fairness in Prenuptial Agreements: Inconsistent
    and Inadequate
    Kamilia Khairul Anuar
   45

vi. 'Once More Unto the Breach': The Quistclose Trust Revisited
    Nathalie Koh
   56

vii. Wither Wesley? Conceptual Confusion in the Supreme Court
     Orestis Sherman
   68
Introduction

Marius Benedikt Gass and Zi Xiang Tan (Warren), Editors-in-Chief

We are pleased to introduce the first volume of the 6th Edition of the Oxford University Undergraduate Law Journal ('the Journal'). This year, due to increasing readership and a widening pool of outstanding submissions the Journal will be publishing two volumes as part of the 6th Edition instead of just one. For this Edition, we have drawn from a large pool of quality submissions by students from law schools across the United Kingdom. This is only possible because of the conscientious efforts by our Editors, Jean and Govind, and their team of Associate Editors.

In many ways, an endeavour like ours is foolhardy.

First, while we only publish articles within the scope of Oxford’s Final Honour School of Jurisprudence (FHS), the very idea of publishing carefully thought-out essays developed over an extended period of time runs counter to the primary mode of examination in FHS, i.e. extempore 45-minute essays. Nonetheless, we believe that there is value providing a platform like the Journal for budding legal minds to hone their writing and research skills and to delve deeply into an area of law.

Second, unlike other common-law countries with a strong culture of student-edited law reviews, publications like ours in the United Kingdom are usually staffed by full-fledged academics. Fortunately, this outlier status of the Journal as a fully student-run enterprise is starting to change: from when we first joined the Editorial Board until when we step down, we have observed the rise of other undergraduate law journals in other English and Irish universities. We are very glad that others also see the value of student-run law journals.

As such, we are especially thankful to our contributors, who have put in painstaking efforts and placed their faith in us.

We open this Edition with John Cheung’s revisionist perspective on the difficult area of law that is defective premises. This is followed by this Edition’s winner of the Norton Rose Fulbright Prize for the Best Article in Contract, Tort, Trusts, and Land Law this year, Thomas Foxton’s intricate piece on the role of contributory negligence in contractual claims. Next, Jian Jun Liew revisited the oft-criticised case of Ingram v Little, mounting a brave and innovative attempt to impose order on the law on mistaken identity in contract. Kamilia Khairul Anuar then critiques the law on procedural fairness in prenuptial agreements for its failure to articulate clear legal principles. In a saturated area of academic debate, Nathalie Koh’s analysis of the Quistclose trust is an impressive undertaking. Finally, we close this Edition with Orestis Sherman’s Hohfeldian interpretation of trustees’ liability vis-à-vis AIB v Mark Redler. We are confident that the 6th Edition will be a thought-provoking read.

We are also pleased to announce our newest sponsorship developments. Norton Rose Fulbright has kindly agreed to double their sponsorship of the Norton Rose Fulbright Prize. This prize is awarded to the best private law submission to the Journal. In this respect, we would like to thank Associate Professor Luke Rostill for selecting the prize-winner.
It is our fervent hope that the Journal will continue its proud tradition of promoting scholarship and legal understanding in its future issues and we would like to reiterate our gratitude to any and all who have helped us with our endeavours thus far. Last but not least, we would like to thank you, the reader, for spending your time on reading this.
Defective Premises: Rethinking Murphy v Brentwood

John Timothy Cheung*

A. Introduction

The case of Anns v Merton LBC1, perhaps best remembered for its short-lived two-stage test of 'duty', posed the question of whether a local authority was under a duty of care with respect to inspection of foundations. The complaint centred on a defect in a building's foundations which had caused subsidence, leading to the appearance of cracks in the building's walls. The House of Lords allowed a claim for the recovery of repair costs, with Lord Wilberforce opining that the claimant had suffered 'material physical damage'. Such dicta was later cast into serious doubt in the House of Lords' decision in D & F Estates Ltd v Church Comrs for England2, before being completely rejected in Murphy v Brentwood DC3, where their Lordships felt the need to invoke the Practice Statement of 1966 only for the eighth time in its near-quarter century of existence to depart from Anns.

Much of the thinking underpinning these decisions, it will be suggested, has been tainted by an unfortunate fixation with the anterior, metaphysical question of categorisation of damages, equivocating perilously between 'physical' and 'purely economic'. In the final analysis, this vexed issue of labels is otiose, since it is patent that the cases in reality turn upon the weighing of policy considerations. For this very reason, by drawing on jurisprudence from other common law jurisdictions, it will first be contended that good policy dictates the extension of liability to embrace claims concerning dangerous premises, where the premises endanger either the physical safety of the occupant (Anns liability only goes so far), or the personal possessions of the occupant.

Having proposed what the law on defective premises should be on policy grounds, this essay will then dissect how the courts may go about achieving this desired result. Three doctrinal approaches will be put forward, each capable of achieving the same end. First, a possible pathway would be to classify Murphy-type cases as falling within the rubric of physical damage, as opposed to pure economic loss. Secondly, the courts could retain the 'other property' requirement, but instead create a sui generis form of physical damage, embodying present and imminent threats to either an occupant's health and safety, or his personal property. Thirdly and finally, even if one were to adhere to their Lordships' classification in Murphy, it will be argued that Murphy ought to have fallen within the broad exceptions to the general exclusionary rule vis-à-vis pure economic loss, namely the 'assumption of responsibility' exception. It would, alternatively, be just as open to our courts to create a further exception which deals with cases where pure economic loss is incurred in order to remedy defects that may cause actionable damage (viz. personal injury or property damage, in the matrix of dangerous defective premises).

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* Jesus College, Oxford. I am grateful to my tutors, Professor Peter Mirfield and Associate Professor Sarah Green, as well as the associate editors at OUULJ for their perceptive comments on earlier drafts. All remaining errors are, of course, my own responsibility.

2 ibid [40].
3 [1989] AC 177 (HL).
B. What the law should be: a question of policy

i) Surveying the case law

In *Anns*, Lord Wilberforce said:

'To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.'

The House of Lords, in two subsequent decisions, however, chose to move in a completely different direction. The first sign of what was to come was the decision in *D & F Estates*. The claimants were, respectively, the lessee and the occupiers of a flat in a building which was owned by the first defendants. The building had been erected in 1963-5 by the third defendants (the builders) who had engaged a sub-contractor to carry out the necessary plastering work. The builders believed the sub-contractor to be skilled and competent but in fact the sub-contractor carried out the work negligently. In 1980, the claimants found that the plaster in their flat was loose and brought an action against the builders claiming the cost of remedial work. On appeal to the House of Lords, their Lordships took the parties, and most of the legal world, by surprise when they rejected any application of the *Anns* doctrine to private defendants such as developers, designers or builders. In coming to this conclusion, the House specifically repudiated the view that a subsequent purchaser’s claim against a negligent builder for repair of defective foundations was classifiable as damage to property and reasoned that being purely economic loss, it was not compensable in tort. Damage to property meant damage to other property, not to the very product which was defective at the outset.

On the other hand, the House understandably perceived themselves as bound by *Anns* as regards the undoubted liability of public bylaw authorities which had been established by that case, and opted to leave that aspect of the decision intact – at least for the time being. But then came along the decision of *Murphy*. There, the claimant was the purchaser of one of a pair of houses, the design of which had been approved by the council on the recommendation of independent consulting engineers. Some ten or more years had passed when cracks began to appear in the walls of the house. The claimant was unable to afford remedial work, which anyway would have been uneconomical, and thus sold the house for £35,000 less than its estimated worth. What was in issue was the negligent performance of the express primary statutory duty of design control by a bylaw authority – namely to pass the plans in every application submitted which complied with the byelaws, and to reject the plans whenever they did not. It was not disputed that the council, through its processional agents had negligently passed foundation plans which were not capable of fulfilling their function. Nonetheless, the House of Lords held that

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5 *Anns* (n 1) [40]. This was criticised in *Murphy* (n 4) [45] as not proceeding ‘on any basis of principle at all, but [constituting] a remarkable example of judicial legislation’. However, Lord Wilberforce’s suggestion is not nearly as novel and far-fetched as their Lordships have portrayed it to seem. A similar classification was made some years earlier by Lord Denning MR, in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 396: ‘The damage done here was not solely economic loss. It was physical damage to the house.’

the claimant’s loss was not actionable, again mainly on the ground that it constituted pure economic loss.

**ii) A metaphysical question**

The fulcrum of the House of Lords’ reasoning in both *D & F* and *Murphy* is the notion that a ‘pure’ defective premises claim – in the sense that it involves no property other than the defective property itself being damaged – falls strictly within the scope of pure economic loss. Their Lordships held that the claimant in such cases has only suffered loss or damage represented by the actual inadequacy of the foundations, that is to say, the pecuniary cost of remedying structural defect in the property which *already existed* at the time it was acquired. The only property which could be said to have been ‘damaged’ – if that is the right description at all, on this account – is the building itself, since, as their Lordships noted, the building never existed otherwise than with its foundations in that defective state. The upshot is that, ‘[i]f the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic’. On this view, the essence of the complaint in *D & F* and *Murphy* was that the house was imperfect from the beginning. It was not ‘harmed’ or ‘damaged’ in any germane way. Rather, it was simply worth less than what the claimant had paid for it, and the loss was, properly understood, economic as opposed to physical in nature.

At first blush, this carries much force if one accepts as sacrosanct the basic premise that actionable property damage must perforce be done to other property. Such a proposition in the context of defective premises, however, did not appeal to the House of Lords in *Anns*, which chose instead to allow such claims by classifying them as physical damage. At this juncture, nothing will be said in relation to the merits of either classification. Attention, instead, will first be paid to the practical utility of this facet of the judgments, which their Lordships patently invested much analytical thought into. Put another way, did this issue of categorisation, in the last analysis, actually matter at all in determining the outcome of the case?

It is not difficult to see why their Lordships in *Murphy* would perceive this preliminary question of taxonomy to be of importance, warranting treatment of it at the very outset of their judgments. From a practical viewpoint, it is, after all, no secret that a claimant has a far better prospect of success if he is able to frame his tortious action as one falling within the umbrella of physical damage, as opposed to pure economic loss. Having said that, it is imperative not to overemphasise this particular aspect of their Lordships’ reasoning. The proneness to place undue weight on the use of such labels – useful in many other cases as they may be – serves to obscure, rather than clarify the true issues in fact determinant of these decisions. The truth is, whether the claim is properly placed within the pocket of pure economic loss or physical damage actually matters less than is commonly perceived: for the real underlying concerns controlling the ambit of liability in this field of tort in fact relate to *policy*.

The point may be tested with *Anns*. Lord Wilberforce’s choice to allow a remedy for the ‘material, physical’ damage caused was, for policy reasons elucidated below, only to

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7 *D & F* (n 3) [32].
8 See section C below.
9 Markesinis & Deakin, *Tort Law* (7th edn, OUP 2012, 109: ‘What is needed is a frank acknowledgment that policy choices are being made all the time in difficult cases which lie at the boundaries of negligence liability, and that in this area the outcome of decisions cannot be predicted in advance by the mechanical application of verbal formulae’.

OXFORD UNIVERSITY
UNDERGRADUATE LAW JOURNAL
the extent that it amounted to a present and imminent danger to the health and safety of the occupants. It did not, however, extend to cases of non-dangerous premises or defective chattels, although doctrinally speaking, those cases also fell squarely within the class of 'material, physical' harm. Equally, the classification of such actions as pure economic loss did not sound the death knell for the claimant’s case in Murphy. It was still necessary for the House to consider whether the claim before them fell within the many existing exceptions already made to the general exclusionary rule as regards pure economic loss. Consider, further, Lord Bridge’s anomalous qualification that, ‘if a building stands so close to the boundary of the building owner’s land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger’\(^\text{10}\). His Lordship provided no explanation for this exception, and some have attempted to justify it on the ground that the building would constitute a nuisance in respect of which the adjoining landowner would be able to obtain an injunction requiring repair or demolition. But this is embarrassed by two objections. First, an injunction is different insofar as it would impose the cost of repair on the acquirer of the defective property, rather than the creator of the damage. Secondly (and more importantly for our purposes), it represents an unacceptable derogation from the a priori reasoning upon which Murphy is based. All this goes to show the sizeable role played by policy in shaping their Lordships’ judgments. Clearly, purity of doctrine did not, without more, inexorably exacted the denial of remedies in this field of negligence.

\[\text{i) Policy}\]

Moving away from theoretical considerations, then, the question becomes one of whether, as a matter of policy, the court ought to have allowed the claim in Murphy, and imposed liability on negligent builders or local councils for their negligence in relation to defective premises. Their Lordships were unanimous in answering in the negative. Several factors may be gleaned from their respective judgments – none of which, with respect to their Lordships, seems to hold water.

First, there was a broader, constitutional concern that to develop liability for defective premises any further would be to ‘[go] much farther than the legislature were prepared to go in 1972\(^\text{11}\). This strikes one as specious. It is difficult to see why their Lordships should have felt hindered by the Defective Premises Act 1972, given that section 6(2) of the Act expressly provides that any duty imposed by or enforceable by dint of any provision of the Act is in addition to any duty a person may owe apart from that provision. With regard to the obligations imposed by their Draft Bill, the Law Commission expressly left any future development of the common law free to take effect\(^\text{12}\). A fortiori when one considers the short limitation period: six years from the date of completion of the dwelling or the date on which rectification work is done to correct faults in the original dwelling\(^\text{13}\). This hardly takes into account the prolonged latency of

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\(^\text{10}\) Murphy (n 4) [57].

\(^\text{11}\) ibid [36]. See also, D & F (n 3) [47]: ‘the precise extent and limits of the liabilities which in the public interest should be imposed on builders and local authorities are best left to the legislature’.

\(^\text{12}\) Law Commission, Civil Liability of Vendors and Lessors for Defective Premises (Law Com No 40, 1965) para 73.

\(^\text{13}\) Cf. the limitation period in respect of latent damage recoverable at common law: three years from the date at which the existence of a cause of action was reasonably discoverable, up to a maximum of 15 years from the date of the defendant’s negligent act (Limitation Act 1980, ss. 14A and 14B). Indeed,
structural defects. No wonder the number of reported cases dealing with s. 1 remains so meagre.

Secondly, their Lordships were disturbed by (what they feared to be) the far-reaching implications of such an extension. Lord Keith observed that holding the builder and local authority liable for defective premises would extend liability on like grounds to the manufacturer of a chattel, thereby ‘[opening] up an exceedingly wide field of claims’\(^\text{14}\). The non-sequitur of this is apparent when one highlights the sensible and perhaps overcautious limits imposed upon Ans liability. In formulating his principle, Lord Wilberforce had in mind only claims for recovery of repair costs necessary in order to avoid a ‘present or imminent danger to the health or safety of the persons occupying it’. It is submitted that one could take this further still, without causing any annoyance on the floodgates front: liability should not only cover pre-emptive claims relating to ‘dangerous’ premises that threaten the occupant’s health and safety imminently, but also those relating to their personal property. This goes to the very heart of what negligence is seeking to safeguard in our current matrix, namely the right to bodily integrity of the inhabitants of the building (as recognised by Lord Wilberforce), in conjunction with the property interests of those inhabitants. Consequently, it is indeed an ‘impossible distinction’, as Lord Denning noted earlier\(^\text{15}\), to differentiate between a situation where a contractor constructs a building negligently which causes damage to persons or property, and another where the dangerous defect is discovered in time and the owner wishes to mitigate the danger by fixing the defect and putting the building into a non-dangerous state. In both cases the duty in tort serves to shelter the same bodily and property rights and interests. Materially, the same cannot be said in relation to a case of non-dangerous defective premises, where there is no immediate danger of any personal injury or damage to personal property.

More broadly, it would be feasible, indeed necessary, to draw a line between reality and personalty\(^\text{16}\). This is traditionally done in many branches of the law. The suggestion that, if a claimant fails to abandon a chattel with a known defect and suffers injury or property damage he is the author of his own loss, is surely inapplicable vis-à-vis an owner who simply cannot afford to abandon his house\(^\text{17}\). Evidently, neither the right to bodily integrity, nor the property interests of those affected are engaged in the same manner nor to a comparable extent in the former scenario as it is in the latter. Very often, an owner of a defective premises is, by reason of commercial and practical constraints, left with no choice but to continue occupying the house in spite of awareness of the present and imminent dangers. It is quite unrealistic to demand him to stop using the premises or discard of them the way one would with a useless television or a malfunctioning laptop\(^\text{18}\).

\(^{14}\) D & F (n 3) [38].

\(^{15}\) Dutton (n 5) 396.

\(^{16}\) Although it is noteworthy that even with the latter, a claimant may in certain cases recover for expenditure which he must incur to cease using the chattel, or to obviate a threat it poses even after it ceases to be used. See Losinska Polidba v Transco Overseas (The Ojula) [1992] 2 Lloyd’s Rep. 395 at 403, where Mance J held that, ‘if property is put into circulation which remains positively dangerous unless preventive measures are taken to neutralize the danger, a person who is obliged to take such steps and does not have the option simply to abandon the property may have a claim in tort against a person who negligently put the article into circulation’.


\(^{18}\) One is not alone in expressing such sentiments: the potential harshness of a strict application of Murphy was accorded judicial buttress in Tagett v Torfaen BC (1992) 24 HLR 164, 174, in which
It follows that the floodgates concern raised by Lord Keith, whilst ostensibly appealing, is in truth quite illusory. Liability is confined within clear bounds if claims are only allowed as regards defective premises that are dangerous in nature (the word ‘dangerous’ is used here in a broad sense to cover threats to both personal injury and property damage), and if a distinction is properly drawn between reality and personality (with liability only covering the former).

It remains to dispose of one more objection. In Murphy, the point was raised that Anns introduced ‘in relation to the construction of buildings, an entirely new type of product liability, if not, indeed, an entirely novel concept of the tort of negligence’\textsuperscript{19}. This does not wash. Whenever a truly new point arises any solution of it may be termed as creation of a novel category of liability. It is apposite to remind oneself of what Lord Diplock observed, with typical candour, in the Dorset Yacht case,

‘But since ex hypothesi the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C, or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration.\textsuperscript{20} creation of a

So much for the policy considerations against the extension of liability in the context of defective premises. More constructively, can anything be said in favour of extending liability, then? La Forest J in Winnipeg provides a compelling justification:

‘In my view, [the policy reflected by D & F and Murphy] is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for claimants to mitigate potential losses and tends to encourage economically inefficient behaviour. . . . Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behaviour.\textsuperscript{21}

It is difficult to find fault with this line of analysis, which accords with common sense. Another policy consideration overlooked by the Law Lords in Murphy is the argumentation based on economic efficiency. To use their Lordships’ counterfactual, suppose a house collapses by reason of defective foundations. Under D & F and Murphy, damages for the house still would not be recoverable even if the claimant had been injured in the collapse, or his furniture had been crushed. The only recourse the claimant could

\textsuperscript{19} Murphy (n 4) [47].

\textsuperscript{20} [1970] AC 1044, 1058-1059. It is tenable that Murphy is, rather ironically, in a sense a more salient example of judicial law-making than Anns – the Lord Chancellor remarked that it was perhaps one of the most striking cases in the history of English law, inasmuch as it was the overruling of a decision taken after full consideration by a committee consisting of the most distinguished Law Lords.

\textsuperscript{21} Winnipeg (n 18) 116-117.
turn to in such a situation would be to pursue the wrongdoers in contract. Here, Laura C.H. Hoyano highlights the economic inefficiencies caused by multiple actions in tort and in contract by the claimant to recover compensation for personal injury and consequential property damage on the one hand, and for the collapsed house on the other, where both types of harm resulted from the same accident caused by the same defect created by the same builder.

This brings us neatly to the last point. Our present legal framework in respect of defective premises leaves a glaring lacuna. Two options are currently open to aggrieved property owners. The statutory route, viz. reliance on the Defective Premises Act 1972, is all well and good assuming the claim falls within the limitation period. But herein lies the problem: most claims do not fall within the Act since the short period of six years fails to take into account the prolonged latency of structural defects. A subsequent purchaser whose claim falls outwith the limitation period is thus left with no remedy. Such a claimant will find little comfort in pursuing the alternative avenue of suing under the common law of negligence. Here, Parliament has sought to improve the claimant’s position by passing the Latent Damage Act 1986, which provides for, in actions for negligence, an alternative limitation period of three years beginning from the time when the claimant could reasonably have known about the damage (subject to a ‘long-stop’ of 15 years from the last act of negligence) and specifically addresses the case where the property was acquired by a subsequent purchaser. Rather ironically, however, the decision in Murphy has rendered the application of the Act – which was undoubtedly enacted with building cases in mind – severely limited in scope by deciding that there is simply no cause of action in the first place. Contractual remedies are analogously of little use to subsequent purchasers who are excluded by reason of the doctrine of privity – indeed, even those falling within the privity rule may find themselves without recourse if the agreement has no warranty of quality, or if the contractor is untraceable or insolvent.

Thus analysed, one feels compelled to arrive at the view that Murphy represents a wrong turning: the policy factors weigh heavily in favour of extending liability to cover cases of dangerous premises.

C. Three Doctrinal Pathways

Let us take stock. The bulk of the essay thus far, has been dedicated to the exercise of balancing policy concerns, in a bid to determine what the law should be. The following section will explore the three possible routes that may allow our courts, doctrinally, to reach the position advocated above. The first two routes approach defective premises claims from the outlook of ‘physical damage’. It will be argued that the court may either do away with the ‘other property’ requirement in relation to such dangerous premises claims, or create a category of sui generis physical damage which encompasses preventive actions anticipating imminent personal injury or property damage. Notably, the word ‘physical’ is used in rather different senses in the two routes: with the first, the material,

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23 The wastefulness of requiring a separate contract action to recover damages for the collapsed house itself may be aggravated by similar contractual actions up the chain of predecessors in title to reach the builder – and that is if one assumes that each party in the chain of title took contractual warranties of quality from his predecessor, who can even be located so as to be sued, and is solvent and therefore still worth pursuing.
24 That is to say, premises that endanger the occupant’s personal safety or property. One says nothing about faulty chattel claims.
physical damage referred to is the damaged property itself (e.g. cracks on the wall), whereas with the second, it is the potential eventuality of physical damage done to other property of the defendant, or the defendant himself (viz. personal injury) which is the subject of discussion. If our courts are, for one reason or the other, uncomfortable with the idea of placing claims of defective premises under the umbrella of physical damage, a further third route would be to categorise such actions as ‘pure economic loss’ (as in Murphy), but to allow them on the basis of the exceptions made to the general bar against recovery. This would involve either the application of the trite ‘assumption of responsibility’ exception, or alternatively, the creation of a novel exception, which concerns economic loss suffered with the ultimate goal of the prevention of actionable physical harm (namely personal injury or property damage in our context).

i) **Approach 1: Abolish the ‘other property’ requirement**

As mentioned, the salient reason in Murphy for their Lordships’ reticence to accept Lord Wilberforce’s prior classification (of ‘pure’ defective premises claims as physical damage) was their inability to overcome the doctrinal hurdle that actionable damage must generally be done to property other than the defective product itself. The putative rationale for this ‘other property’ sine qua non, it seems, is rooted in the worry that if the law were to hold otherwise, ‘contract law would drown in a sea of tort’, as graphically articulated by Blackmun J in the American case of East River Steamship25.

When the basis of this principle is scrutinised it is found to be wanting. Blackmun J’s concern is grounded upon the fundamental belief that contract and tort ought to have their own respective and distinct domains. But such a proposition no longer holds in reality (if it ever did)26. Tort and contract – two heavyweight albeit-defined areas of private law – do not perforce stand for clearly differentiated compartments. There will inevitably be overlap. There is no reason, in principle, why the law should not attach to goods a non-contractual warranty of fitness which would follow the goods into whomever’s hands they came from. The logical force of this is recognised by Hoyano27, who contends that the concern is rooted in a ‘fallacious conflation of the builder’s contractual duty to the original property owner and its tortious duty to any subsequent purchaser’. The duty in contract as regards materials and workmanship, Hoyano posits, flows from the terms of the contract between the contractor and homeowner. The comparable duty in tort, in stark contradistinction, flows independently from the contractor’s duty to ensure that the building meets a reasonable and safe standard of construction. This tortious duty in truth extends only to reasonable standards of safe construction and the bounds of the duty are accordingly not defined by reference to the original contract28.

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25 *East River Steamship Corporation v Transamerica Delaval Inc* 476 US, 866. See, to similar effect, *D & F* (n 3) [36]: ‘To make him so liable would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose’ (Lord Bridge).


27 *Hoyano* (n 22) 890.

28 *ibid* 891: ‘there is no logical reason for allowing the contractor to rely upon a private contractual arrangement with the original owner to shield it from liability to innocent subsequent purchasers arising from a dangerously constructed building’. 
In the United States, by 1980 at least 35 state courts had accorded some measure of protection for purchasers of new homes by implying some form of warranty of habitability, with there being a patent growing propensity to dispense with the privity requirement. It is, moreover, a common misconception that a warranty is necessarily contractual, for legal historians tell us that until the time of Lord Holt an action for breach of warranty was in actuality grounded in tort, being treated as a species of deceit. Warranties are on that account not necessarily created by an agreement between parties but are instead imposed by law on the basis of public policy. They are said to arise by operation of law by dint of 'the relationship between the parties, the nature of the transaction, and the surrounding circumstances'.

The upshot is that a possible route in allowing claims concerning dangerous defective premises would be to dispense with the 'other property' precondition in such actions, and to treat them simply as constituting property damage (as opposed to pure economic loss). Indeed, the main hurdles militating against this suggestion are not doctrinal but stem instead from the policy front (particularly floodgate concerns). But as argued above, the better opinion is that such concerns are misconceived, provided that liability is tightly confined to cases pertaining to dangerous defective premises. Such a conclusion, incidentally, has the advantage of avoiding Murphy's rather artificial and counter-intuitive solution of classifying a situation where clear physical defects exist on a property as amounting to pure economic loss. There is also the benefit of dispelling away any need to resort to Lord Bridge's 'complex structure' theory – a hypothesis which even his Lordship himself subsequently rejected in Murphy as being 'quite artificial'.

ii) Approach 2: Pre-emptive claims

It is often said that 'damage is the gist of negligence': the tort is not complete until and unless actionable damage is completed, and only then can a remedy may be granted. There is no such thing as negligence in the air. The contention here is that an exception

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29 As observed in Redarowicz v. Ohlendorf 441 N.E.2d 324, 329, a decision of the Supreme Court of Illinois.
30 See further the perceptive analysis of American warranty law provided by Lord Cooke in (1991) LQR 46, 46-70.
33 D & F (n 3) [33]: 'However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property," and whether the argument should prevail may depend on the circumstances of the case'.
34 Murphy (n 4) [63].
36 This old maxim is taken from Sir Frederick Pollock, The Law of Torts (11th ed. 1920) 455, and was a noted favourite of American judge Benjamin Cardozo; see, for example, Palsgraf v. Long Island R.R., 162 NE 99, 102 and Martin v. Herzog, 126 NE 814, 816.
ought to be made in *Murphy*-type claims. That is to say, the law ought to allow physical damage claims that are *pre-emptive* in nature to rectify defective premises posing a present or imminent danger to life or property. A departure from the general rule is warranted on the grounds of human rights concerns. As stated above, the right to bodily integrity of the inhabitants of the building, coupled with the property interests of those inhabitants are the primary subject of protection in the matrix of dangerous premises. It therefore matters little whether the imminent personal injury or property damage, as the case may be, has actually materialised when the action is brought: in either situation, those rights and interests in question are similarly engaged. It is surely absurd to compel claimants to stand by and wait till actionable damage has actually occurred (with potentially tragic consequences, it should be added) before he can bring a recognised claim in tort.

Such a suggestion is not as unorthodox as it may seem at first sight. The emphasis on actual (as opposed to anticipated) damage as a necessary threshold for claims is not nearly as prominent in others areas of tort: one only needs to turn to *quia timet* injunctions to know this to be true. Such injunctions demonstrate the need, at certain exceptional and appropriate circumstances, to provide a tortious remedy *in anticipation of* imminent damage. Even in the context of negligence, where the granting of injunctions is admittedly rare, it has been convincingly demonstrated that the mantra 'damage is the gist of negligence' should not be seen as the *a priori* reason for its dearth:

> 'it has sometimes been thought that [an injunction] could not [be granted in a negligence case], because... the existence of damage is one of the ingredients of the claimant's cause of action and since one can never tell in advance whether the defendant's activity will cause damage, no occasion to seek the injunction can, as a matter of logic arise. Such reasoning is faulty; if accepted, one could never obtain an injunction to restrain a nuisance, a tort in which damage is equally an ingredient.'

In the case we have been discussing – *viz.* where the defective premises pose a present or imminent danger to the personal safety or property of an occupant – it is proposed that an analogy may be drawn with the granting of *quia timet* injunctions. In both the court is faced with a predicament where there is imminent danger of actionable damage bringing grave consequences, and a compelling equitable urge exists to take some preventative, *ex-ante* measure to neutralise the risk from crystallising. The same rationale thus applies in either situation; the lack of actual damage, in and of itself, ought not be an undue doctrinal obstacle to the granting of remedies. Indeed, if in the case of *quia timet* injunctions, a remedy is granted where a tortious act is yet to materialise (still less any actionable damage), a *fortiori*, claimants in *Murphy*-type actions ought to be entitled to compensation where the negligence has already occurred, and actionable damage – albeit non-existent at the moment – will inevitably and imminently come into existence.

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37 To be juxtaposed with a ‘loss’ based model of tort law. See further Robert Stevens, *Torts and Rights* (OUP 2007).

38 In the context of nuisance, for example. See *Litchfield-Speer v Queen Anne’s Gate Syndicate (No 2) Ltd* [1919] 1 Ch 407, where Lawrence J held that the claimants were entitled to an injunction to restrain the defendants from erecting a new building, which, had it been built, would have unreasonably interfered with the claimants’ right to light.

39 Lord Denning MR went so far as to say in *Miller v Jackson* [1977] QB 966, 980: ‘there is no case, so far as I know, where [an injunction] has been granted to stop a man being a negligible’.

It is, of course, recognised that the analogy drawn is not foolproof. For one, *quia timet* injunctions are by nature a different remedy altogether in that they are injunctions to prevent harm, rather than compensation for harm, and accordingly naturally pre-empt any harm being caused. But this distinction, while sound, does not dispose of the substantive point being made above. There is every reason to allow such preventive claims by placing them within a quasi-category of physical damage, where the same bodily integrity and property interests are brought into the spotlight just as much as in other cases where personal injury or property damage has already occurred. This aside, another potential source of difficulty is that mere risk of future harm is not generally actionable in tort. Whilst this is accepted, it must be emphasised that the spectrum of ‘risks’ is very broad indeed. The degree of the risk in question is of vital importance, and where that risk is so substantial that the possibility of future, actionable harm is almost an inevitable eventuality – as is the case with dangerous defective premises – one is driven to question whether the law is wise to impose a hard and fast exclusionary rule against compensation for risks of harm. The solution suggested addresses this by the creation of a *sui generis* form of physical damage which is not nearly as speculative as a pure risk of future harm (because there is actually a tangible physical defect, and the risk involved is present and imminent), but at the same time, not quite property damage (because the property has been born in that flawed state).

### iii) Approach 3: Exceptions to the exclusionary rule in pure economic loss

English courts have traditionally been quite reluctant when it comes to imposing liability for causing pure economic loss – and for good reason. It is trite that the primary policy consideration in pure economic loss claims relates to the fear of unlimited liability in amount, time and class. In the matrix of defective premises, however, liability would be delimited in regard to all three elements. One therefore questions the wisdom behind extending liability to cover a particular class of claims involved in non-dangerous premises that do not pose an immediate and impending threat.

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41 Donal Nolan, ‘Preventive Damages’, (2016) LQR 132: ‘…the better view is that the preventive damages concept should be limited to *outlays* A makes in order to protect A’s person or property, not least because recovery of “preventive costs” of this kind would give rise to obvious anomalies’. However, the ‘obvious anomalies’ Nolan has in mind seem to exclusively relate to chattels, whereas the scope of the present analysis is instead strictly confined to dangerous premises.

42 *Cf.* Lord Denning’s caution in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 ‘If claims for economic loss were allowed for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false.’

43 Much ink has already been spilled on this point. See, for example, John G. Fleming’s thesis in (1990) LQR 525, 525-30. Also see Lord Cooke’s thoughts on this matter, (n 30).

44 There is no real doctrinal obstacle preventing the courts from allowing pure economic losses; rather, the issue is, as is often the case with negligence, whether the policy factors weigh in favour of extending liability to cover a particular class of claims. An example would be Lord Denning’s caution in *Ultra ma res Corporation v Touche* (1931) 174 NE 441, 444 (Cardozo J).

45 In *Winnipeg* (n 18), La Forest J postulated that there is no risk of liability to an indeterminate class since the potential class of claimants is limited to the very persons for whom the building is constructed: the inhabitants of the building. Further, there is no concern that liability would be in an indeterminate amount since the scope of liability will always be constrained by the reasonable cost of repairing the dangerous defect in the building and restoring that building to a non-dangerous state.
peremptorily foreclosing the type of economic loss in Murphy. The exclusionary nature of Murphy is even more difficult to justify when one considers that major inroads have already been made into the general bar against pure economic loss claims. The conventional rationale for the negligent advice exception is that the duty stems from reliance on the one hand, and a special relationship of proximity on the other. The liability of a local authority for a building inspector’s negligence, however, has been based, by courts which uphold it, precisely on such grounds. There seems to be nothing against good doctrine or policy, as Lord Cooke has persuasively argued, to hold that purchasers of houses rely on the local authority that controls building in the district to exercise its powers responsibility and with reasonable care. The same applies with equal weight in relation to builder contractors. Of course it may be countered that the relationship none the less lacks sufficient proximity, but this then begs the question of what a ‘proximate’ relationship actually means: one would, again, be resorting to the use of empty labels which escape any substantial definition.

Put that point to one side. Even if the objection holds, and the ‘assumption of responsibility’ exception ought not to apply, that is not the end of the matter. For the categories of negligence are never closed, and it is hence entirely within judges’ discretion, rather than applying existing rules of law, to opt for the more adventurous step of creating a further inroad into the general exclusionary rule vis-à-vis pure economic loss. What is suggested is an exception concerning cases where pecuniary loss is sustained to prevent the occurrence of actionable damage – in our context, personal injury or property damage. Here, the economic loss in question – that is, the cost involved in remedying the defect in the dangerous premises – is entirely distinct in nature from other quintessential examples of pure economic loss (e.g. investment loss or diminution in value), where the loss incurred is eo ipso the only damage that may be suffered and thus the sole objective of recovery. In contrast, the economic loss suffered by the claimants in Murphy is, in a sense, not completely ‘pure’ insofar as it is not recovered as an end in itself (as with most other pure economic loss claims). It would make sense, on this analysis, to create a further exceptional category of pure economic loss claims, where that loss is borne not in isolation but in order to prevent future actionable damage.

D. Conclusion

The preceding discussion has sought to expose the rather unsatisfactory nature of the House of Lords’ analysis in both D & F and Murphy. What has been advocated seems straightforward enough: the courts should allow claims of dangerous defective premises by categorising them as ‘material, physical damage’, in the words of Lord Wilberforce.

(recall that Anns liability only goes so far as to cover defects that threaten the health and safety of the inhabitants. And even if one utilises the broad sense of the word ‘dangerous’, advocated for above, liability would still only extend to encompass defects that pose a threat to an occupant’s personal possessions – hardly an indeterminate number of claims). Finally, La Forest J dispelled any apprehension that liability would be for an indeterminate time, given that the contractor (or, for that matter, the local council) will only be liable for the cost of repair of dangerous defects during the useful life or the building.


49 See Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co. Ltd. [1983] NZLR 190, 196. Also see Bryan v Maloney (n 18).

50 (n 30) 51 (Lord Cooke).

Alternatively, one could embrace the ‘pre-emptive claim’ analysis: this recognises that no actual damage has occurred as of yet, but in anticipation of such damage, an action ought to be allowed. But even if our judges insist dogmatically on adopting the ‘pure economic loss’ route, there is no rational reason, whether grounded in doctrine or policy, why such claims ought to be barred. Out of the three possibilities mooted, this enjoys the unique attraction of being the path of least doctrinal resistance. The others both involve the creation of inroads into well-established principles of negligence, namely the separation of tort and contract, together with the damage prerequisite respectively. By contrast, this asks for nothing more than either the simple application of the existing *Hedley Byrne* rule, or the equally straightforward task of creating a further exception to the general bar against recovery for pure economic loss (something which should not cause excessive difficulty, given that the exclusionary rule is not nearly as inviolable as it once was). Either way, a swift change in the law is imperative.
Share and Share Alike: Contributory Negligence and Contractual Claims

Thomas Foxton

Introduction

This article considers the apportionment of contractual damages under the Law Reform (Contributory Negligence) Act 1945 ('the 1945 Act'). The first part of the article examines the operation of the 1945 Act in concurrent liability situations. At present, these are the only instances in which contractual damages will be reduced because of contributory negligence. It will be argued that the availability of a comparative fault defence in these situations is desirable, and that a 'conduct focused' interpretation of the 1945 Act provides the best means of justifying its application to contractual claims in this scenario. It will be shown that this 'conduct focused' construction of the 1945 Act is preferable to one which confines apportionment to tortious damages alone; the latter approach is contrary to the plain wording of the statute and has been criticised as leading to 'bizarre consequences' in jurisdictions where it has been adopted.1

The final section of the article advocates for the extension of apportionment powers in contract, so that damages flowing from the breach of all contractual duties will *prima facie* be apportioned on the basis of the parties' respective fault, irrespective of any corresponding liability in tort, unless they contract out of that arrangement. This approach would have three main benefits. First, it would provide a sounder justification for the apportionment of contractual damages in concurrent liability situations than the current statutory regime. Secondly, it would resolve the inconsistent treatment of damages flowing from breaches of contractual duties expressed in terms of taking care, which are at present apportioned arbitrarily depending on the presence of corresponding tortious liability. Finally, it would remedy the 'all or nothing' injustice often present in claims arising solely in contract.2

1. The Structure of the 1945 Act

The 1945 Act provides for a reduction in damages in situations where the claimant is partly responsible for their own loss. It applies both when the claimant is at fault in causing the event which gives rise to the loss, and also when the claimant exacerbates loss resulting from an event for which he is not causally responsible (a classic example being where damages otherwise payable to a passenger in a car accident are reduced because their injuries were compounded by failing to wear a seatbelt3). Apportionment is effected by section 1(1), which provides that:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason

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of the fault of the person suffering the damage, but the damages recoverable in respect thereof
shall be reduced to such extent as the court thinks just and equitable having regard to the
claimant’s share in the responsibility for the damage.\(^4\)

For the purposes of the present analysis, it is necessary to distinguish between the
application of the 1945 Act to: (a) claims in tort; (b) claims in contract arising independently of claims in tort; and (c) claims in contract arising concurrently with claims in tort.

A. Application to Claims in Tort

The 1945 Act directs the courts to apportion damages arising out of certain torts,\(^5\) in
situations where the claimant is partially at ‘fault’ for his own loss. Section 4 defines ‘fault’
for the purposes of section 1(1) as:

\[\text{negligence, breach of statutory duty or other act or omission which gives rise to a}
\text{liability in tort or would, apart from this Act, give rise to the defence of contributory}
\text{negligence.}\]

The established approach to the 1945 Act in the United Kingdom is that the
section 4 definition of fault contains two distinct 'limbs':

(1) The ‘\text{claimant limb}' of fault refers to that which is ‘partly of his [i.e. the}
\text{claimant’s] own], and is constituted by ‘negligence, breach of statutory duty,}
or other act or omission which […] would, apart from this Act, give rise to the
defence of contributory negligence.’ This has been interpreted as meaning conduct which would have given rise to the defence of contributory negligence at common law before the introduction of the Act.\(^6\)

(2) The ‘\text{defendant limb}' refers to the fault ‘of any other person or persons’, and
is constituted by ‘negligence, breach of statutory duty or other act or omission
which gives rise to a liability in tort’.

Accordingly, taking the example of the victim of a car accident who exacerbates
her injuries by failing to wear a seatbelt, any damages she would otherwise be entitled to
receive in the tort of negligence are liable to be reduced. Applying the two-limbed test, the
claimant limb is satisfied because damage is suffered ‘as the result partly of [the}
claimant’s] own fault’, and that ‘fault’ (namely failing to wear a seatbelt) would have given rise to the defence of contributory negligence at common law. Moreover, the defendant
limb is also satisfied because the accident was partly caused by the fault of the driver,
whose conduct gives rise to liability in tort.

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\(^4\) Law Reform (Contributory Negligence) Act 1945, s 1(1).
\(^5\) The 1945 Act does not apply to torts to which contributory negligence was not a defence at common
law such as assault and deceit. See, e.g., \textit{Pritchard v Co-operative Group Ltd} [2012] QB 320; \textit{Standard Chartered Bank v Pakistani National Shipping Corp} [2003] 1 AC 959 (HL(E)).
\(^6\) \textit{Reeves v Commissioner of Police of the Metropolis} [2000] 1 AC 360 (HL), 369 (Lord Hoffmann) and 382 (Lord Hope); aff'd \textit{Standard Chartered Bank v Pakistani National Shipping Corp} [2003] 1 AC 959 (Lord Hoffmann) (HL(E)).
B. Application to Claims in Contract Arising Independently of Claims in Tort

The question of the 1945 Act's applicability to contractual damages is more complex. In *Vesta v Butcher*, Hobhouse J identified three discrete categories of cases in which the question of whether the 1945 Act applies to contractual claims might arise:7

**Category (1):** where the defendant's liability arises from the breach of a contractual provision that does not depend on the defendant's negligence. These are cases involving what the Law Commission has referred to as 'strict' contractual duties.8

**Category (2):** where the defendant's liability arises from a contractual obligation expressed in terms of taking care, but which does not correspond to a duty of care in tort arising independently of the contract.

**Category (3):** where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the contract.9

The present law is that damages in category (1) and (2) cases cannot be apportioned.10 Again, applying the two-limbed test, the claimant limb of 'fault' is not satisfied because contributory negligence could not have been pleaded as a defence to breach of contract at common law. Neither is the defendant limb of 'fault' fulfilled, because the defendant's breach of contract does not by itself give rise to tortious liability.

C. Application to Claims in Contract Arising Coextensively with Claims in Tort

For Hobhouse J in *Vesta v Butcher* it was 'absurd' to suggest that contractual damages could not be apportioned in category (3) cases.11 Conversely, in *Astley v Austrust*, the High Court of Australia12 took the view that decisions which had held apportionment legislation to be applicable in concurrent liability situations displayed 'substantial flaws of reasoning' and were not consistent with a proper construction of the relevant statutes.13 That some of the most senior courts in the common law world could reach such fundamentally different conclusions in respect of near-identical legislation is an indication that this area merits further analysis. A re-evaluation of this area is especially timely given the Court of Appeal’s recent decision in *Wellesley Partners LLP v Withers LLP*, in which the shared 'foundation' of contractual and tortious liability in a concurrent liability case was heavily emphasised.14

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7 Forsikringsaktieselskapet Vesta v Butcher [1986] 2 All ER 488, 508.
11 Vesta (n 7) 511.
12 Australia's highest appellate court.
Three views as to the operation of the 1945 Act in concurrent liability situations can be readily identified. The first is the 'conduct focused' interpretation adopted by the Court of Appeal in Vesta v Butcher, so labelled because it interprets the 1945 Act as a direction to apportion damages in situations where the conduct involved possesses certain characteristics, rather than to reduce damages generated by a particular cause of action. The second is the 'cause of action specific' construction advanced by the High Court of Australia in Astley v Austrust, which confines apportionment under the 1945 Act to only those damages deriving from an action in the tort of negligence. The third is the often overlooked 'interstitial' approach taken by Hobhouse J in the first instance decision in Vesta v Butcher.

2. The Conduct Focused Interpretation

Given its status as the leading English authority on the applicability of contributory negligence to contractual claims, it is worth considering the decision of the Court of Appeal in Vesta v Butcher in greater detail.15 The defendant brokers had negligently failed to act after Vesta telephoned them requesting that an onerous condition in their reinsurance policy be renegotiated. Vesta later sought to claim under the policy. However, the underwriters refused to indemnify them, citing the breach of that condition. Vesta's primary claim was against the underwriters, but, in the alternative, it brought an action against the brokers for their failure to act on the telephone call. The brokers contended that, even if they had been negligent in forgetting about the call, Vesta's failure to follow up on it amounted to contributory negligence. As Vesta had brought their claim in contract, a key issue was whether the 1945 Act applied such that the damages could be apportioned.

O'Connor LJ16 endorsed the approach of Prichard J in Rowe v Turner Hopkins,17 a case concerning the proper construction of the equivalent apportionment legislation in New Zealand.18 On Prichard J's interpretation, section 1(1) of the 1945 Act constitutes a direction to courts to apportion damages in relation to claims deriving from particular acts and omissions, regardless of the particular cause of action in issue. On this view, in a concurrent liability case, there is nothing in the wording of the 1945 Act that prevents its application to the contractual claim. Because contractual damages in a concurrent liability case derive from the same act or omission as tortious damages, both constitute damage suffered as a result of conduct constituting ‘negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort’ on the part of another person.19 Likewise, because the claimant has done some act or omission which (had the claim been brought in tort) would have given rise to the defence of contributory negligence at common law, the effect of subsection 1(1) is to reduce damages claimed in respect of that conduct, whether sought in tort or contract:

In other words, the Act applies only when the plaintiff's cause of action is in respect of some act or omission for which the defendant is liable in tort. Conceivably, the defendant may be concurrently liable in contract — but that is immaterial [...] if the defendant's

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15 Vesta (n 10) 586.
16 Vesta (n 10) 573 (O'Connor LJ).
17 Rowe v Turner Hopkins & Partner [1980] 2 NZLR 550, 555-556. Prichard J was bound for other reasons to hold that the solicitors in that case were liable solely in contract.
18 Contributory Negligence Act 1947, s 3(1).
19 Law Reform (Contributory Negligence) Act 1945, s.4.
conduct meets that criterion, the Act can apply — whether or not the same conduct is also actionable in contract.\textsuperscript{20}

One advantage of this ‘conduct focused’ construction is that it does not stretch the definitional limits of the term ‘fault’ in order to achieve apportionment. Other interpretations of apportionment legislation derived from the 1945 Act have attempted to equate contractual breach with ‘fault’ by construing the word ‘negligence’ in a broad colloquial sense.\textsuperscript{21} These approaches have been criticised as ‘strained to say the least’,\textsuperscript{22} as completely disregarding the definition of ‘fault’ expressly provided for in section 4,\textsuperscript{23} and as ignoring the word ‘other’ qualifying the phrase ‘act or omission giving rise to liability in tort’, which on conventional rules of construction would suggest that all of the preceding expressions, including the reference to negligence, were similarly references to ‘liability in tort’.\textsuperscript{24}

However, this is not a problem for the ‘conduct focused’ account of the 1945 Act, which interprets the word ‘negligence’ as being confined to tortious negligence alone. It instead reconciles the use of the word with the Act’s application to contractual claims in concurrent liability by viewing tortious negligence as a feature of certain conduct, in respect of which any resulting damages must be apportioned. In this manner, the ‘conduct focused’ account also circumvents the problem of having to show that contributory negligence could have been pleaded as a defence to breach of contract at common law (a much criticised view for which there has been little judicial support,\textsuperscript{25} but which was notably advanced by Professor Glanville Williams).\textsuperscript{26}

Another significant benefit of the ‘conduct focused’ interpretation is that it avoids artificial distinctions being drawn between essentially similar cases. In a collision caused by the negligence of a taxi driver in which both the taxi’s passenger and the other driver are not wearing seatbelts, it scarcely seems satisfactory that the failure to wear a seatbelt will involve a substantial reduction in damages for those in the other car, but not for the taxi’s passenger who sues in contract. It also avoids attempts to ‘contractualise’ conduct in an effort to avoid the application of the Act: for example, someone engaged in a lift share, or who makes a contribution to the driver’s petrol costs. In circumstances in which the Act directs courts to apportion damages by reference to what is just and equitable, it seems counterintuitive that the issue of whether such an apportionment is permissible should depend on considerations of this kind.

\section*{3. The Cause of Action Specific Construction}

The main challenge to the orthodoxy of the ‘conduct focused’ interpretation came from the High Court of Australia’s decision in Astley v Austrust Ltd. Austrust had been negligently advised by its solicitor in relation to its appointment as trustee to a trust. When then the trust became insolvent, Austrust brought a claim against the solicitor for breach of contract and in the tort of negligence. The solicitor denied liability, but alternatively contended that Austrust has been contributorily negligent by its poor management of the trust, and therefore, any damages should be reduced under the Wrongs Act 1936(the\textsuperscript{20} Vesta (n 10) 557 (O’Connor LJ), citing Rowe (n 17) 555-556.
\textsuperscript{21} Queen’s Bridge Motors & Engineering Co Pty Ltd v Edwards [1964] Tas SR 93, 96.
\textsuperscript{22} Astley (n 13) [70].
\textsuperscript{23} ibid.
\textsuperscript{24} Burrows (n 2) 136. The ejusdem generis rule of construction.
\textsuperscript{25} Astley (n 13) [77]; Vesta (n 10) 589 (Sir Roger Omrod).
\textsuperscript{26} Glanville Williams, Joint Torts and Contributory Negligence (1\textsuperscript{st} edn, Stevens 1951).
relevant parts of which are materially identical to the United Kingdom’s 1945 Act).\textsuperscript{27} As in \textit{Vesta v Butcher}, because Astley was liable coextensively in contract and tort, the issue was whether the Wrongs Act was applicable to the contractual claim. The majority held that the 1936 Act was not applicable to contractual damages, instead adopting a construction of the apportionment legislation which confined its application solely to damages in tort. In reaching that conclusion, the reasoning in \textit{Rowe},\textsuperscript{28} and both the first instance and Court of Appeal decisions in \textit{Vesta v Butcher},\textsuperscript{29} was heavily criticised.\textsuperscript{30}

A. The Cause of Action Specific Construction Mischaracterises the Effect of the Legislation

The ‘cause of action specific’ construction of the High Court of Australia in \textit{Astley} was mistaken, and was rightly criticised as ‘regrettable’ at the time.\textsuperscript{31} The first problem with this construction is that it reduces the question of the legislation’s application to the issue of whether or not a claim for damages would have otherwise been defeated at common law. This is too binary an analysis, and misinterprets the mechanisms at work in the legislative scheme. The Court in \textit{Astley} reasoned that, because the 1945 Act was designed to aid claimants in tort, a purposive approach to the legislation would exclude its application to contractual damages.\textsuperscript{32} However, while it is true that the legislation was introduced to aid plaintiffs whose claims would previously have been defeated in their entirety owing to contributory negligence (which, prior to 1945, was a complete defence), the solution to this problem ‘not only abolished the rule that contributory negligence defeated the whole claim’, but crucially also ‘made a very wide extension of the power to apportion liability so as to permit recovery of a proportion of the damage sustained’.\textsuperscript{33}

The Court in \textit{Astley} cited the words ‘a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage’ as evidence for a legislative intention that the 1945 Act should be inoperative in cases of contract.\textsuperscript{34} However, nothing about these words is prohibitive in nature. Thus, it is not immediately clear why they should preclude the application of the provision to claims in respect of conduct fulfilling the two limbs of ‘fault’ contained in the statute, merely for the reason that the claim is framed in a manner that would not otherwise have been defeated at common law. Moreover, the text must be interpreted not only in light of its history, but also having regard to the subsequent developments in the law of tort, in particular the recognition of the possibility of concurrent liability in contract and tort.\textsuperscript{35} The reactionary interpretation adopted by the High Court of Australia turns a blind eye to these developments, in what may fairly be labelled an ‘originalist’ construction.

\textsuperscript{27} Wrongs Act 1936, s 27A.
\textsuperscript{28} Rowe (n 17).
\textsuperscript{29} Vesta (n 7); Vesta (n 10).
\textsuperscript{30} Astley (n 13) [58], [70].
\textsuperscript{31} Jane Swanton, ‘Contributory Negligence is not a Defence to Actions for Breach of Contract in Australian Law: Astley v Austrust Ltd’ (1999) 14 JCL 25 1, 260.
\textsuperscript{32} Astley (n 13) [81].
\textsuperscript{33} Vesta (n 10) 574 (O’Connor LJ).
\textsuperscript{34} Astley (n 13) [80].
\textsuperscript{35} Henderson (n 9).
The second issue with the 'cause of action specific' approach is that ignores the close relationship between tortious and contractual damages in concurrent liability situations. The Court in Astley made this error in three striking ways. Firstly, it insisted that, as contractual and tortious liability are conceptually distinct (one enforcing promises and the other compensating for loss caused by fault) it would not be correct to apportion damages in the former using legislation enacted to deal with the latter. However, this overlooks the special relationship between the two types of damages in a category (3) case, in which the claimant's primary rights in both tort and contract come into existence by the same act. That is to say, it is the act of entering into the contract which constitutes the 'assumption of responsibility' necessary to create a duty of care in tort. In addition to having their origins in an identical right-generating event, the infringement of the tortious and contractual rights takes place through the same act, namely the defendant's careless conduct.

Secondly, the Court emphasised the fact that contractual obligations are voluntarily assumed, whereas tortious duties are externally imposed. This is a somewhat artificial distinction in concurrent liability cases where, like tortious duties, contractual duties to take care are themselves often 'imposed' upon the parties by legislation. There are many other elements of contracts which are imposed involuntarily upon the parties (the prominent example being terms implied by law). In fact, there is a strong case that the trend of the development of contract law has been to move away from freedom to contract in a laissez faire manner, and toward imposition and regulation, with a liberty to opt-out of default rules which may be carefully controlled by legislation such as the Unfair Contract Terms Act 1977, the Consumer Rights Act 2015, and context-specific enactments in areas such as landlord and tenant and consumer credit. Further, particularly in the context of economic loss, many tortious duties of care can be fairly characterised as having been assumed similarly to contractual duties.

Thirdly, the Court argued that the application of apportionment legislation to contractual claims in category (3) cases was particularly erroneous given the differences between contractual and tortious remedies. It was noted, for example, that a claim in tort might still be brought when a contractual action was time barred, and that an action in contract could be maintainable in other jurisdictions where an action in tort could not. However, while procedural remedial rules may differ in each case, the substantive damages in a concurrent liability situation will often be identical for both claims, because the performance interest of contractual duties expressed in terms of taking care will usually be the avoidance of loss (which coincides with the tortious reliance measure). Moreover, the contractual and tortious remedies are conceptually similar in the sense that both are substitutive damages for the infringement of rights generated and transgressed by the same conduct. It is precisely for this reason that the Court of Appeal has now held that there should be a single test of remoteness in cases of concurrent contractual and

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36 Astley (n 13) [47]-[48].
37 Henderson (n 9), 193 (Lord Goff).
38 Astley (n 13) [84].
41 Astley (n 13) [60].
tortious liability. Even if the damages can be held to be conceptually distinct, the financial loss in each case is quantitatively and factually identical (a fact which the law recognises through prohibitions on double recovery and reflective loss).

C. The High Court of Australia’s Analysis of Policy Considerations Was Inadequate

The High Court of Australia’s ‘cause of action specific’ approach was adopted on the basis of an inadequate analysis of the relevant policy considerations. First, it failed adequately to take into account the parties’ ability to opt out of apportionment of contractual damages in category (3) cases. The Court reasoned that because commercial parties prefer the certainty provided by fixed rules, the risk should be borne by the party whose breach of contract is causally related to the damage and not on the basis of respective fault according to ‘vague’ concepts of fairness. However, under the ‘conduct focused’ interpretation, commercial parties may still opt for the certainty of ‘all or nothing’ damages if they so desire by inserting an ‘express contractual provision which defines the parties’ rights and liabilities in a different way’. The 1945 Act merely ensures that apportionment is the default arrangement for contractual damages in concurrent liability situations — its effects are not unavoidable.

Secondly, the Court mischaracterised the relationship between apportionment and consideration. It argued that plaintiffs in contract who give consideration in exchange for defendants’ promises to take care may have bargained for contractual protection precisely because they wished to protect themselves against the consequences of their own negligence. However, this overlooks the fact that an option expressly to contract out of apportionment ensures that the assignment of risk can still be ‘bargained’ for. Indeed, by explicitly drawing the question of risk assignment to the parties’ attention, they are able to make a more informed bargain, and account for the value of not bearing that risk in the consideration they provide.

Thirdly, in resolving the inconsistency between category (2) and category (3) cases, the Court paid insufficient regard to the fact that category (2) cases rarely arise. The majority reasoned that to recognise apportionment in concurrent liability cases would mean a plaintiff’s damages in contract would be reduced merely because they were also liable in tort. They considered this unacceptable, and sought to resolve the asymmetry between the remedy available to plaintiffs in purely contractual actions and concurrent actions, by holding that apportionment was not available to the contractual claim in either scenario. That said, the majority’s approach eliminated one asymmetry by creating another, namely between concurrent liability cases and cases where there is a liability in tort in circumstances which are ‘equivalent to contract’ but in which no contractual cause of action is available. In practice, relatively few cases will involve a contractual obligation to take care in the absence of a corresponding duty in tort, meaning the Court prioritised

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42 Wellesley (n 14) [80], [163] and [186].
43 Johnson v Gore Wood [2002] 2 AC 1, 35F (Lord Bingham).
44 Astley (n 13) [84].
45 ibid [85].
46 Vesta (n 7) 510.
47 Astley (n 13) [85].
48 ibid [58].
49 Lord Devlin’s description in Hedley Byrne v Heller [1964] AC 465 at 530; and used to justify tortious liability for economic loss in cases such as Smith v Eric S Bush [1990] 1 AC 831, Henderson v Merrett (n 9), and BP Plc v Aon Ltd (No. 2) [2006] EWHC 424 (Comm).
formal justice for a very small number of claimants at the expense of substantive justice for the majority. The proper solution to the inconsistency identified by the High Court of Australia is not to deprive defendants of a benefit which they had hitherto enjoyed by limiting the application of contributory negligence in concurrent liability, but rather to extend the 1945 Act to cover all situations where there has been a breach of contractual duty to take reasonable care, whether or not there is corresponding liability in tort.

4. The Interstitial Approach

A third, often overlooked, approach to the 1945 Act is that articulated by Hobhouse J in the first instance decision in *Vesta v Butcher*. This novel approach reconciles the application of apportionment to contract not through the wording of the 1945 Act itself, but by invoking the relationship between contract and the general law. Contrary to what some commentary has suggested, the reasons given by Hobhouse J for the apportionment of contractual damages were not affirmed by the Court of Appeal. Although both decisions ultimately reached the same conclusion on the question of the 1945 Act's applicability to contractual damages, they did so on markedly different bases.

Hobhouse J's view was that, in concurrent liability cases, the parties' relationship in the law of tort affects the starting point of their relationship in contract. This is because he regarded tortious liability as the *general law* out of which parties are expected to contract to the extent that they want to avoid its effects. It was therefore said that, '[i]f the contract does not on its true construction disclose an intention to redefine or vary [...] the legal incidents of the common law relationship that exists, those incidents remain'. As such, where the parties' common law relationship gives rise to tortious liability which falls to be apportioned under the 1945 Act, 'the relevant question in any given case is whether the parties have by their contract varied that position'. Thus, on Hobhouse J's approach, where a contract is silent on the question of contributory negligence, it is left to the general law to fill the gaps such that contractual damages would be liable to be apportioned in accordance with the 'legal incidents of the parties' relationship in tort. This is quite different from the Court of Appeal's 'conduct focused' approach, which emphasised the tortious element of the defendant's act or omission, and characterises the contractual damages as deriving from 'a claim in respect' thereof.

This 'interstitial' approach is fraught with problems. Indeed, its underlying premise is false. It is not generally the case that should parties fail to make some provision in their contract, the gaps in that contract are filled by the law of tort. This is so even where a party's liability in tort is coextensive with their liability in contract. The parties have entered into a new arena of law by the instrument they have used. Where a contract is silent on an issue, the question falls to be answered by reference to 'default rules' of contract law, not by the law of tort. For example, where a contract does not expressly provide the time limit within which a claim for breach may be instigated, it is not the case

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50 See, e.g., Burrows (n 2) 136; '[t]he correct approach to construing [the 1945 Act] in relation to breach of contract was first put forward judicially as late as 1989 in obiter dicta by the Court of Appeal, confirming Hobhouse J's reasoning'; and Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (1st edn, Hart 2010) 148: 'The Court of Appeal [...] expressly approved Hobhouse J's approach to contributory negligence.'

51 *Vesta* (n 7) 510.

52 ibid.

53 e.g. through implied terms, or contractual legislation such as the Consumer Rights Act 2015, Sale of Goods Act 1979, Supply of Goods and Services Act 1982, or the Law Reform (Frustrated Contracts) Act 1943.
that the tortious limit applies.\textsuperscript{54} Similarly, many elements of the law of contract, such as its test for remoteness of damages,\textsuperscript{55} have developed along separate lines from the corresponding test in tort.\textsuperscript{56} Indeed, it has recently been held that in cases of concurrent liability, it is the contractual law of remoteness which has ‘default’ application to both claims, rather than vice versa.\textsuperscript{57}

If the parties’ contract does not address the issue of apportionment of damages according to fault, then in respect of the contractual claim the position must be the same as in a category (2) case (i.e. that no apportionment is permitted); this is the default ‘legal incident’ of the parties’ contractual relationship. As such, the justification for the application of the 1945 Act to contractual damages in concurrent liability cannot be found by examining the interplay between contract and the general law. Rather, it is found by considering the suspensory effect that the provisions of the 1945 Act, when properly construed, have on the usual rules relating to contractual damages. Accordingly, the ‘conduct-focused’ approach, with its emphasis on statutory construction, is to be preferred.

5. An Expanded Role for Contributory Negligence in Contract

Notwithstanding the flaws elsewhere in its reasoning, the Court in Astley was correct to point out the inconsistency inherent in apportioning damages resulting from breaches of contractual duties to take care when those breaches arise concurrently with tortious duties, but not apportioning damages resulting from breaches of contractual duties to take care in the absence of a concurrent tortious duty. It should be noted that the majority in Astley did not make definite statements as to the desirability of the fault-based apportionment of contractual damages. Their policy considerations were listed merely to demonstrate why it was ‘by no means evident’ that their conclusion was anomalous or unfair.\textsuperscript{58} If it had been open to the Court plausibly to resolve the inconsistency by extending apportionment under the Act, rather than by limiting it, they may well have done so. The majority stated:

Perhaps the apportionment statute should be imposed on parties to a contract where damages are payable for breach of a contractual duty of care. If it should, and we express no view about it, it will have to be done by amendment to that legislation.\textsuperscript{59}

There are undeniable problems with all three identified interpretations of the 1945 Act so far as category (2) cases are concerned. If the ‘conduct focused’ (or, for that matter, ‘interstitial’) interpretation is adopted and the 1945 Act is applied to contractual claims only in concurrent liability cases, it is not immediately clear why a claimant should have their damages in contract reduced merely because they were also owed a duty in tort. Conversely, if the ‘cause of action specific’ approach is adopted, and the 1945 Act is confined to tortious damages alone, it may be difficult to justify why a claimant should be permitted to recover in full in contract law, notwithstanding that they may have substantially contributed to their own loss. It has been suggested that to permit full recovery in such situations emphasises the legal form of a relationship at the expense of its

\textsuperscript{54} Limitation Act 1980.
\textsuperscript{55} Hadley v Baxendale (1854) 9 Ex 341.
\textsuperscript{57} Wellesley (n 14).
\textsuperscript{58} Astley (n 13) [84].
\textsuperscript{59} ibid [88].
Reform in this area would resolve the problems inherent in both approaches. First, it would eliminate the inverse relationship between responsibility and liability created by the ‘conduct focused’ approach. Currently, where a claimant is only owed a duty to take reasonable care in contract, his damages will not be liable to be reduced if he carelessly, albeit unknowingly, contributes to his own loss. However, if the claimant, in addition to that duty, is also owed a duty of care in tort, his contractual damages will be liable to be so apportioned. This in turn leads to ‘an odd reversal of roles’ as defendants seek to limit their contractual liability by assuming additional responsibilities in tort.

This problem was considered by Simon Brown LJ in *Barclays v Fairclough*:

Is this contract really to be construed so that the defendant is advantaged by an assertion of its own liability in nuisance or trespass as well as in contract? Are we to have trials at which the defendant calls an expert to implicate him in tortious liability, whilst the plaintiff’s expert seeks paradoxically to exonerate him?

Secondly, reform would prevent defendants in category (2) cases from being required to compensate in full claimants who contribute significantly to their own loss, in the absence of a contractual term to that effect. At present, defendants in category (2) cases are liable to compensate claimants for 100 per cent of any damage resulting from their breach, notwithstanding that a significant amount of said damage may have been carelessly caused by the claimant themselves. Where risk is not explicitly assigned between the parties, the natural assumption ought to be that responsibility for such damage should be assigned according to fault. To some extent this is already recognised, with an allocation exercise being undertaken by the courts behind the application of rules of causation, mitigation, or scope of duty. However, these devices tend to produce an ‘all or nothing’ result, in which the claimant is permitted to recover either in full or not at all. Moreover, if apportionment is to be conducted by reference to relative fault, it is far better that this should be openly articulated and accurately labeled.

In a 1993 report, the Law Commission recommended that that the application of contributory negligence in contract be expanded to include all situations in which there is a contractual duty to take reasonable care. Nevertheless, despite resolving the inconsistent treatment of category (2) and (3) cases, the Law Commission’s proposals have been regarded as ‘largely cosmetic’ for the reason that, in practice, very few cases will involve a contractual obligation to take care in the absence of a corresponding duty in tort. Although they had contemplated such a change in their initial consultation paper, the Law Commission’s recommendations stopped short of proposing the extension of

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62 *Eley v Bed ford* [1972] 1 QB 155, 158.
63 Burrows (n 2) 141.
64 Although in relation to the question of whether to allow apportionment in those category (1) cases where some tortious, but non-coextensive, liability is also present.
66 ibid.
67 Law Com 219 (n 8) para 4.1.
68 Burrows (n 2) 143.
apportionment of damages to category (1) cases. In the following section, the principal arguments against extending apportionment to category (1) are considered and rebutted, and the reasons why the need for apportionment in those cases is just as pressing as in categories (2) and (3) are outlined.

The first argument against apportionment in category (1) cases is that the notion of ‘fault’ is immaterial where duties are ‘strict’.69 However, fault remains relevant to the calculation of damages, notwithstanding its immateriality to the breach itself, because loss resulting from the breaches of even strict duties can still be exacerbated by the claimant’s careless conduct. Although the doctrine of mitigation precludes the recovery of additional losses accrued unreasonably,70 this only applies where the claimant is aware of the loss. Moreover, while causation and remoteness are capable of accounting for the effects of a claimant’s unwitting contribution to his own loss, the application of these rules produces an ‘all or nothing’ result in these cases in precisely the same way as in cases in category (2).71

The second argument against allowing apportionment in category (1) cases is that to take account of a claimant’s carelessness would be wrong in principle where a defendant has committed himself to a strict obligation regardless of fault.72 The concern is that claimants would effectively come under a duty to supervise defendants’ performance by having to take ‘precautions against the possibility that a breach might occur’.73 In particular, the Law Commission was worried about situations involving consumers who rely on manufacturers’ strict promises.74 However, this concern is misplaced. First, as Harder notes, reliance on a warranty where the claimant is a consumer will likely not be regarded as contributorily negligence behaviour in any event;75 a fact which the Law Commission themselves acknowledged.76 Secondly, a sub-division of business-claimant and consumer-claimant strict contractual duty categories (akin to those in legislation controlling unfair terms)77 would overcome this objection in the cases with which the Law Commission was most concerned. It is apparent that such concerns do not arise in relation to commercial parties, most of whom recommended apportionment in category (1) cases in the Law Commission’s own consultation process.78 In any event, it would remain the case that parties could opt-out of the ‘default setting’ of apportionment by making their own express arrangements regarding risk allocation.79

The third argument against the inclusion of category (1) cases is that it would open the ‘floodgates’ to litigation by creating unnecessary uncertainty.80 The fear is that what would previously have been simple claims would become complex disputes over blameworthiness, requiring greater investigation into the conduct of parties and complex arguments as to quantum of damages. However, this fear is unfounded. First, the current rules on causation and mitigation already require some factual investigation into the

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69 Law Com 219 (n 8) para 3.24.
71 Burrows (n 2) 143.
72 Barclays (n 65) 233 (Simon Brown LJ): ‘The very imposition of a strict liability on the defendant is to my mind inconsistent with an apportionment of the loss.’
73 Law Com 219 (n 8) para 4.2.
74 ibid para 4.4.
75 Harder (n 50) 162.
76 Law Com 219 (n 8) para 4.3.
78 Law Com 219 (n 8) para 4.1.
79 Harder (n 50) 163.
80 Law Com 219 (n 8) para 4.6.
claimant’s conduct. As Harder notes, directly addressing the issue of contributory conduct is far more straightforward than covertly carrying out this enquiry beneath the cloak of existing doctrines. With respect to uncertainty over quantum, one solution is the system of fixed brackets of apportionment proposed by Professor Burrows, which strike a balance between the fairness of apportionment and the certainty of an ‘all or nothing’ approach: in effect a ‘75%, 50%, 25%, or nothing’ approach. In any event, the introduction of apportionment to tort cases in 1945 did not see the ‘floodgates’ open in this manner and there is no reason to think the case should be any different for apportionment in contract.

A final argument against the inclusion of category (1) cases is that to do so would exacerbate the problem of inequalities of bargaining power by giving ‘economically more powerful defendants an extra means of resisting plaintiff’s claims’. The protection for consumer-claimants (where issues of inequality of bargaining power are likely to be most acute) and fixed brackets of apportionment outlined above would go some way in preventing this issue from arising. Moreover, it is wrong to characterise the issue as being unique to category (1) cases – it is equally present in categories (2) and (3). Granted, the extension of an apportionment power to category (1) cases would not eliminate inequalities of bargaining power, but neither would it disproportionately increase the problem to the extent feared by the Law Commission.

6. Conclusion

The development of concurrent liability has led courts to approach the 1945 Act in a way which respects its spirit without straining its language. This has resulted in the legislation having an asymmetrical and arbitrary effect in a minority of cases. The appropriate response is not to adopt a regressive interpretation that goes against the purpose and plain wording of the 1945 Act, but instead to enact new legislation which takes account of progressive developments made in the common law. As Jackson LJ stated in a lecture to the Technology & Construction Bar Association in 2014, the implementation of the Law Commission’s recommendations in this area is now long overdue. Indeed, he considered there to be a case for introducing a comparative fault defence across a wider spectrum of contractual claims; a sentiment with which the author, and more prominent commentators, agree. Importantly, that statement was qualified by the reservation that any such changes should be enacted by Parliament, and not through further ‘distortion’ of the common law. While it is the development of the common law which has created the issue, it is beyond the power of the common law to fix it. The history of the defence of contributory negligence may be seen to illustrate the risks inherent in overlaying limited statutory reform on a still-developing common law. These difficulties are particularly acute in tort law where, as Professor (now Lord Justice) Beatson noted, ‘obvious issues of broad social policy as to how to distribute risks and who should bear the costs of accidents can be at odds with the apparent demands of the logic of common law doctrine’.

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81 Harder (n 50) 163.
82 Burrows (n 2) 143.
83 Law Com 219 (n 8) para 3.5.
85 Burrows (n 2) 143; Harder (n 50) 167.
In Defence of *Ingram v Little*: Understanding Collateral Offer and Acceptance

Jian Jun Liew

1. Introduction

In the line of cases on mistake as to identity in face-to-face transactions, the case of *Ingram v Little*¹ has been heavily criticised, including by a majority of the House of Lords in *Shogun Finance Ltd v Hudson*.² It is often said to have been wrongly decided. In particular, it is difficult to see how *Ingram v Little* can be reconciled with *Lewis v Averay*.³ The latter case is typically considered to be the correctly decided case, particularly given the earlier decision of *Phillips v Brooks*.⁴ However, it is possible to arrive at an interpretation of *Ingram v Little* which reconciles the trio of cases in this line.

This article seeks to argue that an appropriate framework for understanding such face-to-face transactions, and all face-to-face transactions in general, is one centred around collateral agreements. Such transactions make better legal sense under this framework. This article then relies on one such specific collateral agreement, that centred around the method of payment, to explain why *Ingram v Little* can be reconciled with the other face-to-face mistake as to identity cases.

To simplify illustrations, we would always use A as the vendor, B as the rogue, C as the person the rogue purports to be, and Z as the *bona fide* purchaser.

2. Face-to-face versus Indirect Contracts: The Art of 'Collapsing'

Collateral contracts are poorly defined across most of contract law. One would be hard pressed to find some unifying doctrine explaining collateral contracts on the whole. This section explores what will be referred to as the collateral agreement theory in face-to-face transactions.

The basic idea of a collateral contract places a promise, that is contractually binding in a contract, “collateral” to the “main” contract.⁵ A collateral contract is hence a secondary contract, its existence premised on the primary contract. The consideration of a collateral contract can be, and in practice often is, derived from the signing of a primary contract. Collateral contracts have been a flexible instrument which has allowed the courts to give effect to the intentions of parties despite hurdles such as the parol evidence rule or the doctrine of privity.

However, the courts have generally been hostile towards finding the existence of a collateral contract in most situations after the comments of Lord Moulton in *Heilbut Symons & Co v Buckleton*.⁶ In that case, Lord Moulton had, in *obiter*, recognised the existence of collateral

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¹ [1961] 1 QB 31 (CA).
² [2003] UKHL 62, [2004] 1 AC 919 [1], [22] (Lord Nicholls), [87], [110] (Lord Millett), [185] (Lord Walker).
³ [1972] 1 QB 198 (CA).
⁴ [1919] 2 KB 243 (KBD).
⁶ [1913] AC 30 (HL).
contracts, but had said that such contracts must be very rare due to their nature. More often the
terms would be part of the primary contract or agreement, and that collateral contracts would be
‘viewed with suspicion by the law’. Even so, many cases often ignore or distinguish Lord Moulton’s
comments, and proceed to find collateral contracts where appropriate. The finding of collateral
contracts in such cases are very often driven by policy considerations. A good example of this
would be the infamous case of *The Eurymedon*,8 which involved a collateral contract springing
into existence to grant stevedores the benefits of limitation clauses contained within the bill of
lading, a primary contract which they were not a party to.9

In a face-to-face transaction, collateral contracts are, and should be, much more common
than in written contracts, particularly in light of how such negotiations tend to be concluded. The
reason for this can be derived from considering offer and acceptance principles together with
policy arguments.

The distinction between a written contract and a face-to-face contract on offer and
acceptance terms exists because a written contract automatically ‘collapses’ the negotiations into a
single contract. There is hence much less of a role for collateral contracts, since the usual
inference is that if a term would be enforceable, it would have been included in that single
contract, as part of the parol evidence rule.10 The courts would hence understandably be hesitant
to find that a collateral contract gives effect to a term not included in that primary contract unless
there are facts which rebut that inference. In a face-to-face transaction there is no such
unification, because this final contract does not exist in written form.

There are three potential competing interpretations of negotiations in face-to-face
transactions, the first two operating on a ‘collapsing’ analysis, and the last on a collateral
agreement basis:

1. The negotiators are constantly making counter-offers which include as a common
understanding everything that has been part of negotiations to that point;
2. The negotiators are making invitations to treat until the final offer is made, which
“collapses” all of the earlier discussions into a single offer; or
3. The negotiators are creating collateral offers which may or may not be accepted, and the
rejection of a collateral offer does not represent a rejection of the offer as a whole.

The reason other interpretations cannot be offered is because of how offer and acceptance
works. Many of these fundamental principles sit uncomfortably with face-to-face transactions,
since these principles in practice apply more appropriately to written commercial contracts,
which are usually indirect, well-considered, and presented in a singular or small number of
documents.

Here, face-to-face transactions are influenced by two principles of contract law, one
applying more primarily to limit the forms of analyses, and the other applying in a subsidiary
fashion to dictate the shape of these analyses. The first, primary principle is that where an offer is
made, and a second offer or counter-offer is subsequently made, the initial offer would be

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7 See *Webster v Higgin* [1948] 2 All ER 127 (CA) or *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB
854 (KB).
9 See also *The Stasrin* [2003] 2 WLR 711 (HL) where the House of Lords explicitly referred to *Eurymedon*
(op. cit.) style contracts as collateral in nature, as well as examining how the collateral contract interacted with
the bill of lading.
10 See Lord Moulton’s comments in *Heilbut Symons* (n 6).
The second, subsidiary principle is that an agreement, through the contents of the offer, needs to be fully negotiated with all key terms included in order to be valid.\(^{12}\)

The problem with the ‘collapsing’ interpretations is that a face-to-face transaction differs from a more indirect transaction via a written contract. Typically, in a written contract, not everything discussed in negotiations translates into a contractual term. The interpretation of the contract further stipulates the characteristics of the clauses within the tripartite division of terms, which is vital for understanding the obligations of the parties on breach of these clauses. In a face-to-face transaction, this filter between negotiations and final contractual term rarely exists. This is particularly so because the safeguards of ratification, explored below, do not exist in face-to-face transactions, resulting in difficulties both evidential and legal.

In a written contract, ‘collapsing’ a contract works because it allows for parties to ratify some form of final contract in a clear fashion. Given that the parties are aware of what this ‘collapsed’ contract contains,\(^{13}\) this ratification would typically be an agreement as to the contract in its ‘collapsed’ form,\(^{14}\) both in terms of the express wording and the implication of the terms within the tripartite classification. Where a ‘collapsed’ contract falls outside the intention of one of the parties, who does not notice or realise the significance of the term and instead believes that his obligations or rights were different under the contract, there exists a unilateral mistake as to terms. Such a unilateral mistake as to terms generally renders a contract void.\(^{15}\)

An attempt to ‘collapse’ face-to-face transactions necessarily skips this intermediate section of ratification. To broadly read a face-to-face transaction as ‘collapsing’ into a complete contract is problematic due to the intense difficulties of interpretation, particularly since the courts would necessarily be confronted with differing evidence. The courts in such circumstances would have to make a contract for the parties through an attempt to give effect to their intentions, but this leads to problematic outcomes for certainty.

Firstly, it requires the courts to consider the intentions of the parties at the time of contracting without the benefit of sufficient evidence, since there are rarely clear records if parties had not intended to make a written contract. Secondly, the characterization of terms in such a created contract is difficult to discern without the benefit of interpretation of a written contract, since parties often enter into such contracts with differing motives which the judge has to weigh on a balance and give effect to in varying forms. Such an approach effectively structures the parties’ contracts for them, which the courts have traditionally been hostile to.\(^{16}\) Furthermore, it must be recognised that the courts are only involved because there is a dispute between the parties. This almost certainly involves a disagreement as to the contents of the contract, both in the sense of what terms are incorporated within the contract, as well as the relative classification of the terms into the tripartite categories. Such situations are already complicated enough even with a written contract to rely on for interpretation. Without such a written contract, the courts are faced with conflicting evidence provided by each party about intention and the course of negotiation. The difficulties in collapsing in complicated transactions can result in gaps of judicial logic that make it more difficult for the courts to ensure that they are staying within the bounds of certainty, and make appeals far more likely. All of this leads to a waste in resources.

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11 *Hyde v Wrench* (1840) 3 Beav 334 (Court of Chancery).
12 *May & Butcher Ltd v The King* [1934] 2 KB 17 (KBD).
13 Following the doctrine of incorporation by notice in cases such as *Interfoto v Stiletto Visual* [1988] 1 All ER 348 (CA).
14 *L'Estrange v Graucob* [1934] 2 KB 394 (CA).
15 *Staloil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm), [2009] 1 All ER (Comm) 1035.
16 See for example the general principles in *May and Butcher* (n 12) and *Scammel (G) and Nephew Ltd v Ouston* [1941] AC 251 (HL).
This difficulty of collapsing unwritten contracts is well illustrated in a very recent case of Leslie v Farrar Construction Ltd.\textsuperscript{17} This case involved a series of construction projects negotiated and performed with no written contract. The arguments in the Technology & Construction Court were largely rooted on interpretation problems,\textsuperscript{18} whether certain statements made could be counted as contractual terms or not, and whether the contract was ended by repudiatory breach or consent, which depended on a finding of a contractual term by the judge. The complex nature of the case made the number of contracts important, a factor which the judge failed to give due account to when applying legal logic in solving the myriad problems that cropped up under the unwritten contract. He ordered that damages on one project could be set off against the profits another,\textsuperscript{19} which would usually only work if both were operating on the same contract or transaction, while also holding that certain mistaken payments were irrecoverable by an unjust enrichment claim once the transaction was closed off,\textsuperscript{20} which implied that the projects were under different contracts that could be closed off from one another. As a result, the claimant appealed arguing on the basis that there was only one contract, as evidenced by the set off order, and so they were entitled to reclaim the mistaken payments in an unjust enrichment claim.

The complexities of interpretation being evidenced by that case aside, the conclusion the Court of Appeal reached was equally telling. They quickly resolved the conflict by dismissing it as a question of finding of fact.\textsuperscript{21} In practice, however, the Court of Appeal in interpreting the judge’s finding reached the conclusion that there were in fact separate agreements to close off each transaction at the end of each project, which was independent from the primary framework agreement. This necessary outcome results by reading Jackson LJ’s conclusion in line with the facts. The framework agreement was not concluded at the same time as any agreement to close off. It is almost certainly impossible to argue that parties had earlier agreed to close off in the framework agreement, such that if Leslie had asked for a detailed account for auditing purposes Farrar would have been able to reply that they were not entitled to this since they had agreed not to do so. This agreement to close off must necessarily exist as separate from the framework agreement and must almost certainly be tied to the projects individually, which means that an agreement to close off one project does not prejudice another.

Such logic draws very close parallels to the collateral agreement theory. Firstly, the Court of Appeal effectively accepted that the separate agreements followed the terms of the primary contract except for the terms that the parties chose not to enforce,\textsuperscript{22} which bears similarities to the doctrine of collateral contracts.\textsuperscript{23} Secondly, the Court of Appeal still implicitly accepted that the projects were tied to the primary contract and correspondingly, the fulfilment or otherwise of these projects would not have directly affected the primary contract unless it could have been deemed as sufficient grounds for a breach of that primary contract itself. This emphasis on the primary contract and its relative independence from the other terms that form the collateral contracts or agreements is in line with a collateral agreement theory.

\textsuperscript{17} [2016] EWCA Civ 1041.
\textsuperscript{18} [2015] EWHC 58 (TCC).
\textsuperscript{19} ibid [191]-[197].
\textsuperscript{20} ibid [254]-[255].
\textsuperscript{21} Leslie (n 17) [42]-[44].
\textsuperscript{22} ibid [44]. If the projects that were finished were different from the projects that were unfinished, this could only have been on the basis of the costs settlement term in that relevant project on completion. This implies that the project agreements would have been the same, and the only comparison that could be made here would be back to the framework agreement.
\textsuperscript{23} This is in line with the arguments adopted by the majority in The Starsin (n 9) on the question of what terms could be read into the separate collateral agreements. See also Edwin Peel, “Actual carriers and the Hague Rules” (2004) 120 LQR 11 for a detailed analysis of these arguments in The Starsin (n 9).
The reason such an analysis was favoured by the Court of Appeal is because it avoids many of the difficulties of direct collapsing. If they had directly collapsed the contract into a single written form as the parties operated on (parties had acknowledged that there was a primary ‘framework agreement’) then it would have resulted in difficulties in giving effect to the intentions of parties. Furthermore, it allowed the Court of Appeal to strip down the contract to its essential conflict, which they did by classifying the contractual matrix as a finding of fact.\textsuperscript{24} This prevented them from being bogged down in having to consider how the relatively unexplored contractual matrix operated and allowed them to jump right into the heart of the dispute on appeal. This sort of approach would definitely be of much more assistance to a trial judge examining evidence on a complicated transaction, but even here it shows the benefits of its simplicity. Nevertheless, to reach this outcome, the Court of Appeal in some sense resorted to academic evasion in responding to the argument.\textsuperscript{25}

The collateral agreement theory suggested goes further. It argues that what should have been done is to distil the primary contract down into the bare minimum amount of terms needed to sustain its existence, taking into account the factual circumstances to determine if any terms ought to fall within the primary contract, and annex the other terms to it as collateral contracts. This means that apart from a primary contract term, the courts can examine each of the other terms on the basis of their own existence, rather than worry about the difficulties of whether it would bring down the rest of the contract with it. This would be similar to the approach adopted in the Court of Appeal above, except in a much more expanded form.

Of course, some of these collateral contracts may be sufficiently integrated into the primary contract that the failure of it would substantially deprive a party of its consideration under the primary contract, entitling them to repudiate. This is, however, separate from whether the term would have constituted a condition if it was part of the primary contract, which is usually much trickier to deal with. Alternatively, a collateral contract may provide the right of termination of the primary contract, which is also separate from the same.

A dissected contract both allows the courts to construe each separate agreement within its own dimension, understanding that all terms within that internal area are effectively conditions for the purpose of that stage, while at the same time reducing the evidential difficulties faced by the courts in having to interpret the contract into the tripartite term classification system. The breach of a collateral contract would usually call for damages unless it can be shown to be intrinsically linked to the consideration of the primary contract. It would, in practice, lead more often to an outcome which is more in line with the intention of the parties than under a ‘collapsing’ approach. This is a better match with situations where consideration is promised during the course of negotiations and parties then modify details of the contract made after initial negotiations are concluded without subsequently promising any further obligations.

\textsuperscript{24} As recognised above at n 21.

\textsuperscript{25} Leslie (n 17) [42]. Jackson LJ ultimately read the issue as being one centred on the form of transactions, rather than being a number of contracts issue, the latter being how it was phrased in submissions.
3. Collateral Agreements and Manner of Payment

With the role of collateral contracts for face-to-face transactions established, its potential role for face-to-face mistake as to identity cases can now be explored.

The case of *Pharmaceutical Society of Great Britain v Boots* made it clear that in a shop, the display of goods is only an invitation to treat. C would pick up the good and offer to purchase that good to the vendor, A. A would then accept the offer, and the contract would be completed when C transfers the relevant consideration. The illustration would be:

C: I would like to purchase this good. (Offer)
A: I agree to sell you this good. (Acceptance)
C transfers money to A. (Consideration)
C takes the good. (Performance of A's obligation)

A collateral agreement will be introduced into this basic transaction: 'manner of payment'.

Parties need to come to terms on key issues in order for an agreement to have been made. Chief among these is price. However, the manner of payment is not a key term that needs to be reached as part of the primary agreement. Indeed, there are many agreements commercially where, after the contract is signed, the contracting party would direct the other party to, for example, liaise with their secretary, in order to establish how to pay. What this means is that the manner of payment has the capacity to exist as a separate agreement in and unto itself. It is difficult in practice to claim that in negotiating the manner of payment after the primary obligations have already been agreed, any negotiation as to the manner of payment made would constitute a counter-offer that would invalidate the primary offer.

However, it must be noted that there is a distinction between an agreement and a contract, a contract being an agreement supported by consideration. As long as there is no consideration, the primary agreement is not binding on either party. This does not, however, change the fact that the primary agreement exists. Hence, in a negotiation where the primary agreement is made, but parties cannot come to any consensus on the collateral agreement, then no consideration has passed. This is because C has not promised that he would give money to A, while A has not promised that he would give the goods to C. In such circumstances consideration is usually analogous with the primary obligation and the contract would only truly be locked in by the provision of the obligation i.e the transfer of property in the goods or money, following which it would also lock in a corresponding promise to transfer the other (which is different from whether that is actually transferred or not). Prior to that either party has the capacity to withdraw from the primary agreement. This would be illustrated as follows:

C: I would like to purchase this good. (Offer)
A: I agree to sell you this good. (Acceptance)
C: Am I allowed to pay by Debit Card? (Collateral Offer)
A: Unfortunately, our store does not take Debit Cards. Can you pay by cash instead? (Collateral Counter-Offe)
C: I do not have cash on me. (Collateral Rejection)
A: I am sorry, but we only accept cash. (Enquiry)
C: In that case I no longer want to purchase this good. (Rejection)

26 [1952] 2 QB 795 (QBD).
27 May & Butcher (n 12).
In this case, the primary offer and acceptance had already been established. However, no consideration passes between the parties. Hence, while a primary agreement has been arrived at, both A and C are able to resile from it.

It is, however, imperative to distinguish the above situation from one such as this:

C: I would like to purchase this good, and I would like to pay by Debit Card. (Offer)
A: I agree to sell you this good, but our store does not take Debit Cards. Can you pay by cash instead? (Counter-Offer)
C: In that case, I will not purchase the good. (Rejection)

In this situation, the ‘manner of payment’ is incorporated as a term within the primary offer. The offer is made on the premise that the manner of payment is made in a specific form. This can be seen most clearly in written contracts. If a written contract states all of its contents within, including how payment is to be made (for example, a c.i.f. letter of credit which usually states something like ‘cash on sight within 30 days on complying presentation’) it would necessarily be part of the primary agreement and, if accepted, contract. It would be a breach of the primary contract if the manner of payment differs from what was stipulated as part of the primary offer.

4. ‘Void’ v ‘Voidable’: Mistake as to Identity

By conceptualising manner of payment as a collateral contract, a distinction between ‘void’ and ‘voidable’ contracts can be envisaged in mistake as to identity cases. A ‘void’ contract exists when the primary agreement is made between A and C, rather than A and B, since offer and acceptance are made to different parties. Conversely, a ‘voidable’ contract exists when the primary agreement is made between A and B. This can coexist with a ‘void’ collateral contract which is made between A and C.

The heart of the issue hence lies with the manner of payment. Two questions are presented that need to be resolved. The first is whether the manner of payment is an agreement between A and C or A and B. If it is the latter, then there is no significance whether the collateral contract exists or not. The second is whether the manner of payment is part of a collateral agreement or whether it is incorporated into the primary agreement. In the former, the primary contract would be ‘void’, while in the latter it would be ‘voidable’, ceteris paribus.

For the first, the key underlying thread in all of the concerned cases (on face-to-face mistake as to identity) is that payment was made by cheque. This is important, because a cheque is an identity specific document. Cheque payments are essentially credit notes directed to financial institutions that allow a disbursement from the party who owns the cheque as evidenced by the chequebook registered in his name, to the party receiving payment, whose name is written on the cheque (A), for the amount specified on the cheque. The details on the chequebook and the verification of those details are hence an integral part of the manner of payment. In the cases that follow, this verification is generally achieved by checking the address to the name. The details form an important part within the offer and acceptance itself; when a cheque is made in C’s name, it is implied that the offeror of the cheque was C or otherwise authorised by C to do it. Only such a person can authorise a disbursement from C’s account via cheque.

Hence, when B makes an offer of a cheque, he is making it in the name of whoever the chequebook is registered to, since only such a person can authorise a disbursement from that account. This name can be either B or C.
If the chequebook was registered in the name of C, the manner of payment as an agreement would be made between A and the only party who could offer the cheque, C.

If the chequebook was registered in the name of B, B would be making an offer in his own name. A, on the other hand, is accepting with reference to who he believes B is if B provides information that is false for verification purposes (relating to C). The logic for this is analogous to that in *Cundy v Lindsay*, since in that case the address on the letter was B’s address, but A was intending to contract with C. Here, even if the name on the cheque was *de facto* B’s name, by putting himself out to be C in an identity specific manner of payment, A would still have accepted the cheque by an acceptance with respect to C.

For the second requirement, the question of whether the manner of payment constituted a collateral agreement requires close examination of the facts, in particular the course of negotiations that have occurred.

For example, in the transaction in *Phillips v Brooks*:

B: I would like to purchase these goods for 3000 l. (Offer to A)
A: I accept, and the price is 3000 l. (Acceptance to B)
B: I would like to pay by cheque. I am C, and this is my address. (Collateral offer to A)
A: I can confirm that C lives at that address and the cheque is in his name. (Collateral acceptance to C)
B transfers the cheque to A.
A allows B to take a gold ring.

The conclusion here is that the collateral agreement is ‘void’. However, the primary agreement is turned into an actionable contract between A and B with the transfer of the consideration. Either the cheque (as a representation of a promise for payment) is valid consideration, in which case the primary obligation of A is to give the gold ring (which he does) and the rest of the goods under the primary contract, or the gold ring is valid consideration, in which case A is obligated to fulfil the rest of the contract by providing the rest of the goods while B is under an obligation to pay A the required amount.

Because there is now an actionable contract, B receives proper ownership title of the goods, and when he transfers them to Z, Z is protected as a *bona fide* purchaser for value against a claim by A in the tort of conversion. However, because the contract between A and B was entered into by fraudulent misrepresentation, A has an equitable remedy against B to rescind the contract. The fraudulent misrepresentation link here is drawn from the collateral contract, a misrepresentation as to fact based on B’s capacity to pay under the cheque. A would not have agreed to the primary contract if A was aware that B could not, or would not, pay. Here the fraudulent misrepresentation is not based on the identity of B, but on the attributes of B; specifically, the capacity of B to pay for the primary contractual obligation.

Next in the line of cases to be considered is *Lewis v Averay*, which heavily criticised the decision of *Ingram v Little*. Oftentimes in textbooks the facts of the case are stated to be analogous. This is, however, misleading, because it fails to take into account the relative offers and acceptances made in both of these cases. In *Lewis v Averay* the transaction proceeded thus:

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28 (1878) 3 App Cas 459 (HL).
29 *Phillips* (n 4) 246 (Hordige J).
30 See *King’s Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* 14 TLR 98 (CA).
31 See for example *Davies* (n 5) 67-8.
A or B makes an offer to sell/buy the car for £450, and this is accepted by the other party. (Offer and Acceptance between A and B)
B tries to pay by cheque in C's name. (Collateral Offer to A)
A requests proof of identity.
A accepts payment by cheque in C's name. (Collateral Acceptance to C)
A gives the car, logbook, and test certificate to B.

Hence, the correct outcome is that the collateral agreement once again fails to materialize, or is 'void', because the collateral offer and acceptance were not directed at the right parties. However, the primary agreement remained. This primary agreement is 'voidable' in the sense that it is vulnerable to rescission. This primary agreement was in turn made an actionable (but 'voidable') contract once A transferred the property to B, at which point B was under a binding promise to pay A for the full amount. As a result, Z would, as in the outcome of that case, have received valid title, and the courts rightly held that the claim in the tort of conversion fails.

5. Analysing Ingram v Little

Ingram v Little, however, presents a very different story.

The plaintiffs advertised their car in a newspaper. The rogue replied to the advertisement and test drove the car. They negotiated for the price and Ingram, who was negotiating for the plaintiffs, accepted an offer of £717.32 However, the rogue pulled out a cheque book, and Ingram realised the rogue intended to pay by cheque. Very significantly, she told him that she was only willing to sell for cash and cancelled the agreement.33 The rogue then misrepresented himself as a businessman, Hutchinson, and provided an address. The plaintiffs verified that there was indeed a Hutchinson with the initials provided living there.34 The plaintiffs then agreed to sell the car to the rogue, who gave them a cheque signed with his name, and left with the car.35

The most immediately striking fact that seems glossed over in the analysis of this case in Lewis v Averay is that the primary agreement was at one point withdrawn. This meant that the subsequent offer to purchase was coloured by the 'manner of payment', which in turn went to the identity of the rogue as Hutchinson (or rather, the 'correct' Hutchinson).

If we illustrated this:

B makes an offer to purchase the car for £717. (Primary Offer to A)
A accepts the offer. (Acceptance to B)
B produces a cheque book, and A cancels the agreement. (Rejection)
B misrepresents his identity. (Invitation to Treat)
B makes an offer to purchase the car for £717 with a cheque in B's name. (Subsequent Primary Offer to A)
A accepts the offer, with the understanding that the cheque was in C’s name. (Acceptance to C)
B gives the cheque to A and takes the car.

32 Ingram (n 1) 33.
33 ibid.
34 ibid.
35 ibid.
Here there was never any valid collateral agreement that existed together with a primary agreement. This was because A had rejected the primary agreement before receiving the collateral offer (at the point where the cheque book was produced). In order to resume negotiations, it was necessary for B to include the manner of payment within a primary offer. It was particularly helpful that A stated in very clear terms a desire to cancel the agreement at the point that the cheque book was produced.

Once an agreement is cancelled, it can be in no better position than if a counter-offer was made to an offer: the initial offer by B would no longer be available for acceptance by A. This meant that the third primary offer made would contain both the manner of payment, the price, and the subject matter. This was accepted by A with respect to C, since A accepted with an understanding that the cheque was valid in C’s name. As a result of this, there was no offer and acceptance, no valid agreement, and the contract is hence ‘void’.

In *Ingram v Little*, the Court of Appeal analysed the case relying on offer and acceptance. The court, even the dissenting Devlin LJ, contended that it is important to rely on the circumstances to construct the offer and acceptance, which is undoubtedly correct. The majority concluded that A did not intend to accept the offer with respect to B, but instead to C.

The weakness of the judgment, however, was that their conclusion here was left far too open-ended. The phrasing of offer and acceptance was made in particularly broad terms, and this thereby leaving their analysis open to attack on the basis of breadth. In an identity analysis, it is necessary to draw the connection back to why the specific identity of the purchaser is an important circumstance to be taken into account. The only reason why the court could make an effective analysis on identity is because identity is a fundamental part of the manner of payment here, a cheque payment. Once they could come to such a conclusion, it makes sense that this identity specific component must be a part of the primary contract itself to make that contract void. Otherwise, their outcome could not have been reached. Taking that into account, the Court of Appeal here would have needed to ask themselves the question of when the identity specific component is or is not part of the agreement and why. This would have set a natural limit for their arguments. This was, however, not achieved by the Court of Appeal. As a result, subsequent cases were naturally able to constrain the scope of *Ingram v Little*’s dicta.

As a result, the majority of the Court of Appeal failed in their analysis on two levels. Firstly, they failed to identify why A did not intend to accept the offer with respect to B, but instead to C. Secondly, they failed to identify why this identity-specific circumstance should be taken to be a part of the agreement. The solution suggested here is a collateral agreement framework, since it squarely reconciles the cases in this field.

Despite the analytical failure of the Court of Appeal, through the analysis provided in this article, it is submitted that the outcome of *Ingram v Little* was nevertheless correctly decided. By incorporating an identity-specific term, the manner of payment, within the primary agreement or contract, it redirected the target of the offer or acceptance to that specific individual, meaning that by offer and acceptance, that primary contract would be “void” because the offer and acceptance were made to different parties.

36 *Ingram* (n 1) 48–49, 54 (Sellers LJ), 56 (Pearce LJ), 63–64 (Devlin LJ).
37 ibid 49–50 (Sellers LJ), 59–62 (Pearce LJ).
6. Conclusion

In conclusion, the article relies on the following propositions:

1. Face-to-face transactions rely on the existence of collateral agreements and contracts to give them a sensible framework in context;
2. ‘Manner of payment’, if dealing with identity-specific forms of payment like cheque payments, redirects the target of an offer or acceptance away from a more general model (offer or acceptance to either B or C) to an identity specific model (offer or acceptance to C);
3. ‘Manner of payment’ can, depending on the facts, be either part of the primary agreement or a collateral agreement; and
4. The difference between the cases dealing with unilateral mistake as to identity is best understood by deciding whether the manner of payment is incorporated within the primary agreement or a collateral agreement.

As a result, on account of these propositions, by paying attention to the specific negotiations within each case, *Ingram v Little* was not wrongly decided, and the outcome of the case can be reconciled with the other cases in this area.
Procedural Fairness in Prenuptial Agreements: Inconsistent and Inadequate

Kamilia Khairul Anuar

Introduction

In English Law, the division of matrimonial assets upon divorce is a matter of principled judicial discretion, guided by s.25 of the Matrimonial Causes Act 1973. In deciding which assets should be shared, and in what proportions, a judge must have regard to considerations such as the welfare of any child of the family, the financial needs of either party to the divorce, as well as their respective current and future income levels. In addition, a number of judicially-developed principles give further guidance. In White v White, it was clarified that ultimately a judge must seek to achieve ‘fairness’ in his or her division of the assets. In this case, Lord Nicholls specified only that this meant ‘there is no place for discrimination between husband and wife and their respective roles’. Fairness was given further shape in Miller v Miller, McFarlane v McFarlane, where the three strands of fairness were developed – the principles of ‘needs’, ‘compensation’, and ‘sharing’. However, some have argued that a fourth principle has now appeared – that of ‘autonomy’, where parties can have a more significant say in how their matrimonial assets are divided in the form of prenuptial agreements.

Until 2010, English law had always been shy about recognising, and giving effect to, prenuptial agreements. Past decisions, such as F v F, made clear that prenuptial agreements were to be frowned upon as they undermined the institution of marriage by inviting the newly-wed couple to contemplate the end of their union. This initial outright refusal gradually softened over the years. The current position is that summarised in the landmark decision of Radmacher v Granatino. Here, the Supreme Court recognised that judges should, depending on the circumstances, give weight to such agreements as part of their exercise of discretion under the Matrimonial Causes Act 1973. The Court cautioned that judges were not to blindly follow the terms set by the divorcing couple, but were to assess the substantive and procedural fairness of the terms; taking into account those that met the tests and discarding others. The current approach is best summed up as follows:

The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

2 ibid 605.
5 [1995] 2 FLR 45.
7 ibid [75].
Though much has been written about the merits of prenuptial agreements generally, there has not been as much focus on the adequacy of the standards of procedural fairness laid down in *Radmacher*. An agreement is ‘procedurally fair’ when it is voluntarily and knowingly made, with an understanding of its legal consequences, after each party was made aware of the material facts relevant to the agreement (particularly the other party’s financial resources). By analogy with contract law, this typically means prior to signing the prenuptial agreement both parties should have received independent legal advice and disclosure of each other’s assets. Neither party should have been under any duress or undue influence to consent to the agreement.

Using a selected range of judgments both pre- and post-*Radmacher*, this article will examine judicial assessments of the procedural fairness of prenuptial agreements. The focus in particular will be on the requirements for a prenuptial agreement to be valid, namely independent legal advice and financial disclosure – two factors that relate to the amount of, and accuracy of, the information that a party receives prior to signing a prenuptial agreement. This essay seeks to examine not only the results of the cases, but also how the courts have developed and interpreted these requirements of procedural fairness. It will be argued that there is some lack of consistency and nuance when it comes to judicial approaches to procedural fairness, and that this results in failures to fully account for the impact of surrounding context on parties’ decision-making processes. Though recent case law shows that judges are beginning to take a more nuanced approach to analysing the procedural fairness of an agreement, a predominantly malleable and vague approach to the exact requirements of procedural fairness leaves weaker parties vulnerable and perpetuates the questionable assumption that parties are on fully equal footing as autonomous beings when entering these agreements.

As the arguments for better regulation of procedural fairness are presented in this article, it is important to remember that, so long as the agreement does not leave either party in a ‘predicament of real need’, a party to a prenuptial agreement is theoretically able to set any terms he or she wants, and therefore contract out of any of the other important principles of fairness that were developed in case law – indeed this is exactly what happened to Mr Granatino in *Radmacher*. The agreement he had signed purported to bar him from any financial claims as against his wife. The Supreme Court only deviated from the agreement insofar as they thought was necessary to accommodate Mr Granatino’s ‘needs as a father, carer and home-maker for the children […]. There is no case for making that home and financial support his to command for the whole of his life-time.’ The fact that the couple now had children led the court to conclude that it would not be wholly fair, based on the ‘needs’ strand of fairness, to deny Mr Granatino any entitlement to his wife’s assets as the agreement had not envisioned what should happen in such circumstances. It is though crucial to note that his entitlement to financial support was limited only to what was required to fulfil his duties as a father.

Therefore, it is of utmost importance for both parties to a prenuptial agreement to recognise that the document that they are agreeing to bind themselves to is capable of curbing, or

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10 *Radmacher* (n 6) [81].
11 *Radmacher* (n 6) [130].
removing, the legal rights to which they might otherwise have been entitled to under the statutory or judicial principles. Prenuptial agreements are inevitably entangled with issues of gender and economic inequalities, because their terms are usually set by the wealthier spouse seeking to protect their assets from their more economically vulnerable spouse.\(^\text{12}\) To quote Baroness Hale:\(^\text{13}\)

Above all, perhaps, the court hearing a particular case can all too easily lose sight of the fact that, unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she—it is usually although by no means invariably she—would otherwise be entitled.

1. **Independent Legal Advice**

Prenuptial agreements are drafted in a wide variety of circumstances and though they involve lawyers, the costs of the legal service may be provided for by only one party to the prenuptial agreement, which raises questions as to the adequacy of advice received by the other party. The Law Commission’s recommendations suggest that ‘lawyers will need to ensure that they advise fully on the client’s specific situation, rather than only providing generic information about qualifying nuptial agreements.’ Complicating matters further are cases with a multi-jurisdictional aspect, involving couples who drafted their agreements elsewhere before moving to, and divorcing, in England. The following paragraphs will explore some of the difficulties that arise with regards to the adequacy of legal advice received by parties prior to signing a prenuptial agreement.

The facts of *Radmacher* do not mirror the typical circumstances under which a prenuptial agreement is made. The wife’s father insisted upon the agreement to protect the family wealth. The applicant, Mr Granatino, had been a City banker for many years before deciding to study a DPhil in Biotechnology at Oxford University. The agreement that he signed purported to exclude him from making any financial claims against his wife in the event of their divorce. Mr Granatino had not received independent legal advice prior to signing the agreement, but the Supreme Court decided that it would be fair to hold him to the agreement as his level of sophistication indicated that he had sufficient understanding of the consequences that he consented to. The insistence on a flexible approach to procedural requirements, including the need for independent legal advice, appears to cater primarily to situations where a spouse who can be assumed to know what he was doing is disallowed from arguing that procedural gaps should reduce the weight of the agreement. The lack of a hard and fast rule as to whether legal advice is needed means that the courts resort to making assumptions about the parties’ understanding of the agreement, attributing thoughts and motives behind the parties’ actions at the time the agreement was signed.

Though the presence of legal advice is often said to contribute considerably in favour of giving great weight to an agreement,\(^\text{14}\) the assumed superfluous nature of independent legal advice has become a running theme in cases following *Radmacher*. In *V v V*,\(^\text{15}\) the judge found that ‘neither of the parties had advice as to the impact in Swedish law (the jurisdiction in which the

\(^{12}\) *Brod* (n 9).

\(^{13}\) *Radmacher* (n 6) [137].

\(^{14}\) See, e.g., *Luckwell v Limata* [2014] EWHC 502 (Fam) [133]: ‘There is no doubt that very great weight indeed should be given to the agreements in this case […] They were entered into freely by a mature man after expert legal advice’.

\(^{15}\) [2011] EWHC 3230 (Fam).
agreement was concluded), or in English law, of property being marital property or not being marital property [...] they entered into the agreement on what they understood its effect to be absent advice', but that the couple 'as intelligent people, were aware of its obvious purpose, notwithstanding that the wife (and, on the evidence and findings, the husband) did not have advice concerning it, or its effect'. Similarly in Z v Z (No. 2), despite 'no formal advice given by the Notaries', the judge held that 'the Agreement was entered into by both parties freely and with full understanding of its implications'. A similar finding was made in SA v PA, where again the judge acknowledged that the wife 'had only the impartial but not strictly independent advice of the notary' but concluded that 'the wife freely entered into [the agreement] with a sufficiency of advice to enable her to appreciate its implications'.

These cases illustrate the jump in reasoning that judges typically make, where they come to conclusions about the parties' understanding of the agreements based on tangentially relevant information about their education and career backgrounds. Truly, it is difficult to argue the soundness of these decisions when consideration is given to the fact that without legal advice, a spouse is likely unaware of what his or her entitlement under the default regime is and would thus not perceive the full extent of the benefits which he or she is giving up.

Judges have often said that there is a diminished importance attached to receiving legal advice because the parties are intelligent and well-educated. Thus it is assumed that even if legal advice had been given, it would not have affected the parties' decisions to sign the prenuptial agreement. But there are numerous uncertainties surrounding this flexible approach. Firstly, there is latent ambiguity to this test. It is unclear whether legal advice should have affected the decision to sign a pre-nuptial agreement, or a particular pre-nuptial agreement. If it is the former it clearly ignores the reality that, faced with the option either to agree to a pre-nuptial agreement or to refuse and not marry a person they are emotionally attached to, most would rather sign a pre-nuptial agreement. If it is the latter, then the focus of the inquiry must shift to whether the claimant would have agreed to those specific terms had he or she received legal advice about their effect.

The courts' cavalier approach to the need for legal advice suggests that the test in use is the former version. However, this is problematic because the lack of legal advice need not necessarily affect the very decision to sign a pre-nuptial agreement before the absence of advice can be considered consequential. A better test should perhaps be to ask whether, given the complexity of the terms of the agreement, the personalities of the parties and their relationship with each other, a reasonable person would have deemed it appropriate to seek legal advice. In a relationship where one party leaves financial arrangements completely up to the other, for example, the first party should be encouraged to seek independent legal advice if she were to...

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16 ibid [49].
17 ibid [48].
18 [2011] EWHC 2878 (Fam).
19 ibid [46].
20 ibid [45].
21 [2014] EWHC 392 (Fam) [57].
22 See, e.g., V v V (n 15) [49]: 'the wife did not seek advice because she did not know that she should do so, but the whole tenor of her evidence, and of the findings made, was that if she had been given advice on the impact of the agreement in Swedish and/or English law she would have entered into it willingly'.
consider signing a pre-nuptial agreement on her partner’s terms. Though it may be more difficult in practice to employ this more complex test, it has the advantage of better reflecting the contextual realities of the situation and will function more effectively as a means of ensuring that disadvantaged parties receive adequate protection.

Secondly, there is almost no discussion in the cases of how or why judges come to conclusions about parties’ level of legal understanding based on factors such as educational background. It is not explained, for example, how the fact that ‘the Wife obtained an MA from Dauphine University in Paris’ is really relevant to the question of whether she would have understood the legal effects of a pre-nuptial agreement in England without any advice. Having a degree and understanding fully the possible legal implications of an agreement are not, after all, the same thing – the former does not necessarily entail the latter. Though it may be reasonable to assume that having a degree entails a better likelihood of legal understanding, unless an applicant has done a law degree specifically it is at best careless to assume that an applicant has an adequate understanding of the prenuptial agreement without any professional assistance.

Thirdly, the courts have not really explained or justified why having full awareness of the implications means merely having a basic understanding of the agreement. Neither have the courts really discussed the particular challenges facing cross-jurisdictional cases; involving couples who married and created their prenuptial agreement in one jurisdiction, and subsequently divorced in another. Such issues have only recently been addressed. The presence of an agreement made in a foreign jurisdiction was considered a pivotal circumstance in the cases of Y v Y, and B v S. In Y v Y, Roberts J held that the lack of independent legal advice meant that the wife had not entered the agreement with a full awareness of the implications. The agreement was drafted and signed in France, but the couple later divorced in England and the wife had not been advised as to what its effects would be in English law. Her basic understanding of the agreement was also worryingly inadequate. The wife knew only that the agreement established a ‘separation of property regime’ as opposed to the ‘community of property regime’; the default regime for married couples in civil law countries where upon marriage the couple is considered to share legal ownership of all their property. However, she had not been advised that it would have precluded any financial claims she might make on her husband’s assets upon divorce.

In B v S, Mostyn J noted that having a full appreciation of the implications does not carry with it a requirement to have received specific advice as to the operation of English law on the agreement in question. However, ‘it must mean more than having a mere understanding that the agreement would just govern in the country in which it was made […] the parties [must have] intended the agreement to have effect wherever they might be divorced and most particularly were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution’. Thus he suggested that the requirement need not go so far as to make it mandatory that parties be advised as to every possible jurisdiction they might live in, but they should at least

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23 Z v Z (n 18) [4].
24 [2014] EWHC 2920 (Fam).
25 [2012] EWHC 265 (Fam).
26 Y v Y (n 24) [5].
27 Ibid [20].
be warned that different jurisdictions might affect the impact of the agreement to ensure that they intend the agreement to have effect any way.

In Kremen v Agrest, 28 which concerned a post-nuptial agreement, the judge acknowledged that the wife had received some help from her husband’s relative with regard to the signing of the agreement. However, he concluded that she did not receive truly independent legal advice. This meant that whilst the wife ‘would have understood the literal words of the agreement she did not know what rights under English law she was foregoing by the agreement. Her agreement was therefore not an informed one.’ 29 Similarly in BN v MA, though Mostyn J repeated that legal advice was not strictly necessary, he acknowledged that ‘in the usual run of cases […] a full appreciation of the implications will normally carry with it a requirement of having at least enough legal advice to appreciate what one is giving up.’ 30

These cases offer a more substantive notion of what it means to give fully informed consent. The legal effects of pre-nuptial agreements in England mean that it is often the case that simply having a basic understanding does not usually suffice because the outcome of such agreements tempers the exercise of the court’s jurisdiction to make financial provisions, and by extension limits the reach of principles of equality that were developed in the case law. For example, the agreement in Radmacher purported to exclude all financial claims as between the spouses. In the end the court, in giving effect to the agreement, gave Mr Granatino provision based only on his needs as a father, whereas under the default regime he could have argued for an allocation based on the principles of sharing and compensation as well. Such terms are arguably a more serious consequence than opting for a separation of property regime (usually the case with pre-nuptial agreements concluded in other European jurisdictions, where the parties would simply agree that their property would remain under separate, rather than shared, ownership upon their marriage). Thus, the courts should consistently emphasise that full appreciation of the implications of an agreement means that a spouse should understand what he or she would otherwise be entitled to under the default discretionary regime in England. This is particularly important considering that there may be very stark differences between what a spouse would receive with an agreement in effect, and what would have been received under the exercise of statutory judicial discretion. 31

Finally, in the context of contractual undue influence, Auchmuty 32 questions the assumption that legal advice would have made no difference. She objects to the idea that signing an agreement in the absence of advice should be acceptable, and in effect argues for a greater appreciation of the nuances of internal pressure experienced by couples in prenuptial agreements.

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29 ibid [64].
30 [2013] EWHC 4250 (Fam) [30].
31 See, e.g., Paul Pavlou, ‘Prenuptial Agreements: Back where we were? Kremen v Agrest’ [2012] 42(8) Family L.J. 957: in Kremen v Agrest ‘had the agreement been enforced the wife would have been left with approximately £1.5m’, but because the judge here decided to give no weight to the agreement, ‘the sharing principle applied and the wife was given a total lump sum of £12.5m, of which, £8.3m was ‘maintenance’.’ In Radmacher (n 6) itself, Mr Granatino’s financial entitlements were limited to a reasonable assessment of his needs.
In her feminist rewriting of the *Royal Bank of Scotland v Etridge (No 2)* judgment,\(^{33}\) she points out, '[w]ho knows whether Mrs Etridge would really have signed the legal charge had she understood its full effect? [...] It is at the very least patronising, and may even constitute evidence of actual undue influence, to assume she would have signed the document anyway, even in full possession of the facts'.\(^{34}\) In the context of pre-nuptial agreements, this criticism highlights the importance of the courts engaging in more careful analysis of whether legal advice would have been appropriate given the circumstances, rather than simply assuming that legal advice would have made no difference, as detailed above in cases such as *V v V* and *SA v PA*.

The courts may not have wished to impose a blanket requirement of independent legal advice when they have explicitly discretionary powers under s.23 of the Matrimonial Causes Act to divide the parties’ assets. However, it is still worrying that the courts should so easily conclude that legal advice was unnecessary based on assumptions about the parties’ level of education, and, as Auchmuty has said, whether such behaviour is ‘normal’ for a married relationship. The courts have, as a result, refused to make any comment on the appropriateness of waivers to one’s rights to legal advice, or the failures of spouses to encourage their partners to seek legal advice before signing their rights away. The role of the judiciary is not merely to resolve disputes but it is also to develop the common law. These cases are an appropriate medium through which the importance of legal advice should be stressed, and best practice ought to be promoted when it comes to negotiating prenuptial agreements. The courts’ silence on this issue is even more at odds when one considers that practitioners’ guidelines will typically require that parties should receive legal advice before signing prenuptial agreements.\(^{35}\)

Perhaps it would be best if judges more frequently acknowledged, ‘it will only be in an unusual case [...] that absent independent legal advice and full disclosure, a party can be taken to have freely entered into a marital agreement with a full appreciation of its implications’.\(^{36}\)

2. **Financial Disclosure**

There is no requirement for full and frank financial disclosure – only material lack of disclosure will affect the weight to be given to an agreement. Many of the comments made by judges in the case law suggest that the requirement of financial disclosure is not generally viewed as important. In *Z v Z (No. 2)*\(^{37}\), Mostyn J said ‘there was no need for disclosure as both parties knew the financial position of the other.’\(^{38}\) He acknowledged that the wife may not have known the full details of the husband’s carried interest and co-investment schemes, but held that it sufficed that she ‘knew he was doing well at VCF and making ever greater amounts of money.’\(^{39}\) A similar


\(^{34}\) Ibid.

\(^{35}\) See, e.g., Richard Todd and Elisabeth Todd, *Todd’s Relationship Agreements* (1st edn, Sweet & Maxwell 2013) para 2-036. See also, Jens Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective* (1st edn, Hart Publishing 2012) 128: ‘[g]oing forwards, practitioners will still likely advise their clients to follow the [suggested guidelines], if only to try nip in the bud any suggestion of undue influence or irregularities’.

\(^{36}\) *Kremen v Agrest* (n 28) [73].

\(^{37}\) *Z v Z* (n 18).

\(^{38}\) Ibid [46].

\(^{39}\) Ibid.
approach was taken in *Radmacher*. Though Mr Granatino never had full disclosure of his wife’s assets, the court held that full and frank disclosure was not necessary – ‘it was correct in principle for the Court of Appeal to ask whether there was any material lack of disclosure […] if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party’s assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars.’

The importance of financial disclosure was highlighted in the Law Commissions’ recommendations on nuptial agreements, where it was noted that:

Disclosure is in the interests of the payee, for whom the qualifying nuptial agreement may provide significant sums, as much as the payer. The payee may wish to check that the payments that have been promised can and will be made. For example, it may be a cause for concern regarding enforcement of payments, if the wealthy party does not have sufficient assets in the English jurisdiction to make the payments promised in the qualifying nuptial agreement.

In his book, Scherpe briefly discusses the merits of a requirement of full financial disclosure. Though he does not deny that financial disclosure is an important aspect towards ensuring agreements are made fairly, Scherpe is highly sceptical of allowing parties to argue successfully that because there had not been full disclosure, the agreement was not made with a full awareness of the consequences and therefore should be given less weight, or set aside completely. ‘Should the policy behind the law seriously allow an argument,’ he asks, ‘such as ‘I thought he/she was worth £10 million and therefore agreed to the separation of property – had I known he/she was worth £125 million, I would never have done so?’’. He argues that in ordinary cases, disclosure would not have affected the decision to sign the agreement and that, ‘as with all formal requirements…these generally can be dealt with by the other, particularly the substantive, safeguards.’

It is interesting that Scherpe should have touched on the subject in this way, because decisions made in reliance on facts that turn out to be false is a matter that the law has dealt with thoroughly, in a wide range of contexts – from the doctrine of mistake and misrepresentation in contract law to mistaken payments in the law of unjust enrichment, to lack of disclosure in consent orders in family law. The importance of both parties having as complete and accurate information as possible when negotiating some form of agreement should not be understated.

There are two problems with Scherpe’s arguments that the current state of the requirement of material financial disclosure is entirely satisfactory. Firstly, it is clear that decisions made in reliance on facts that turn out to be false are not looked upon lightly in other areas of the law. In contract law, the doctrine of misrepresentation ensures that parties’ consent to a contract is not tainted by misinformation. Similarly, in the law of unjust enrichment parties

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40 *Radmacher* (n 6) [69].
42 Scherpe (n 34) 495-98.
43 ibid 497.
44 ibid 498.
45 Misrepresentation Act 1967.
may claim restitution on grounds that a benefit has been transferred based on a mistake of fact, or law. It is difficult to see why inadequate information for spouses negotiating prenuptial agreements should not be treated equally seriously. Secondly, drawing an analogy from property law, the intent of the parties when making a transfer of property is often of great significance – the law generally does not presume that people would readily give away their property voluntarily, with no conditions attached, unless there is evidence to prove otherwise. It is difficult to see why the same approach should not apply to prenuptial agreements – after all, parties to these agreements are often signing away their rights to property that they might otherwise have been statutorily entitled to under the Matrimonial Causes Act.

It may be true that, as Scherpe asserts, precise numbers will not affect the decision of the parties to sign a prenuptial agreement. In many cases the agreement would have been signed regardless of the figures revealed at the negotiation stage, either because of strong emotional pressures – both from the other spouse and family members – affecting the spouse’s decision-making process, or simply due to excessive optimism, leading the spouse to take much less caution with the prenuptial agreement. However, Scherpe’s response, that only material disclosure should suffice because disclosure is unlikely, is problematic. It is impossible to know with full certainty whether a person would have agreed to something or not if given that particular piece of information – indeed it would be paternalistic to make assumptions about this, and in any event surely a better response would be to take greater precautionary steps. The simplest solution would be to require full disclosure from both parties in the process of drafting a prenuptial agreement, as giving both parties all the information that may be relevant will ensure that parties cannot later contest the agreement by alleging that they have not been sufficiently informed.

Moreover, considering that a prenuptial agreement seeks to limit the legal rights of a spouse to property that he or she may otherwise be entitled to, the burden should fall on the party seeking to deprive the other of these rights to show that the applicant has been presented with all the material information prior to signing the agreement. This party should then explain why, if he or she has deliberately omitted information, it was not material to the applicant’s decision to sign the agreement. The respondent is the one who is usually in a position of power over the applicant in these circumstances, and should thus be made to defend his or her decision not to share information which the applicant now claims would have affected his or her consent to the terms of the agreement. As noted by Marston:

The courts’ cavalier treatment of the inequities in prenuptial negotiations only heightens the unfairness of both the bargaining process and the results. Courts often fail to acknowledge the impact of unequal bargaining power on the provisions of prenuptial agreements by emphasizing the contract itself rather than the legal rights the parties have forgone by signing it.

Judicial insensitivity to the presence of circumstances flagging up the possibility of vitiating consent implicitly condones questionable behaviour in negotiations between spouses.

Finally, given recent developments in the law, it would be inappropriate for the procedural requirements of prenuptial agreements to continue to require only material financial disclosure, without distinguishing between different types of respondents. As much as it is within the interests of policy to encourage people to arrange their affairs privately so as to minimise dependence on the already over-burdened family courts, this must not incentivise people to hide their assets from their spouses when negotiating an agreement. The recent Supreme Court judgement in *Sharland v Sharland* provides a good example of a more nuanced approach to financial disclosure. Though this case concerns fraudulent non-disclosure of assets whilst making a consent order, the same principles could equally apply in the context of prenuptial agreements, as both situations concern ensuring that parties make sufficiently informed decisions. In particular, Baroness Hale’s speech evidences the recent trend in family law to borrow legal approaches from contract law:

Although not strictly applicable in matrimonial cases, the analogy of the remedies for misrepresentation and non-disclosure in contract may be instructive [...]. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case.

Baroness Hale distinguished between innocent misrepresentation and fraudulent misrepresentation. Drawing on the decision in *Smith v Kay*, she stated that whilst there would be scope to argue in cases of innocent misrepresentation that the difference in financial disclosure was not material to the decisions made in the consent order, in cases of fraudulent misrepresentation the defendant cannot deny the materiality of the misrepresentation. Furthermore, though it would be possible to argue that the misrepresentation would not have led to a significantly different result in the consent order anyway, it would not be fair to place the burden of proving the materiality of the misrepresentation on the claimant – the onus should be on the defendant to prove that the misrepresentation was not material.

Baroness Hale’s approach to financial disclosure is more satisfactory. Much of the discussion about financial disclosure, among academics and the judiciary, does not distinguish between cases of innocent and fraudulent non-disclosure. The burden of proof is always on the claimant to show that the lack of disclosure was material to his or her decision to sign the prenuptial agreement. This is highly unfair as the weight accorded to an agreement is conditional upon both parties entering the agreement with sufficiently informed consent – and the respondent’s own deliberate, deceitful misconduct would have resulted in the applicant not having the requisite accuracy of information to make a truly voluntary decision.

Perhaps the only recent exception is the curious case of *WW v HW*. Here, the prenuptial agreement was entered at the request of the wife, who was considerably wealthier than the applicant husband. The agreement provided that neither husband nor wife would make any

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50 ibid [31].
51 (1859) VII HLC 749.
52 *Sharland* (n 49) [32].
53 ibid [33].
54 [2015] EWHC 1844 (Fam).
financial claims upon the other should they divorce, save for claims related to child maintenance. Instead of undervaluing his wealth and assets, the applicant overvalued them, because he wanted to secure the agreement and thus the marriage as the wife had made the agreement a condition of the marriage. The husband later sought to derogate from the agreement. The judge proved to be rather unsympathetic to him and it seems clear that the fact that the husband had been dishonest and deliberately misrepresented his finances meant he could not then seek to have the agreement work in his favour.

It remains to be seen whether the emerging approach in WW v HW will be followed in subsequent cases, but it is to be hoped that this will be the case. As a matter of principle this would make the law on financial disclosure in prenuptial agreements more consistent with the developments in Sharland. This will also ensure that parties to prenuptial agreements are as well informed as possible of the assets at stake, and safeguard the finality of the agreements by limiting scope for contesting them on grounds of insufficient disclosure.

**Conclusion**

The importance of clear principles to guide judicial assessments of procedural fairness in prenuptial agreements is often underestimated. This is most evident in the numerous judicial comments made about procedural fairness being subsumed under the question of substantive fairness. As a result, developments in the case law have been somewhat erratic and in some cases the legal principles are unclear. This article has attempted to show the manifestation of inconsistencies and lack of clarity in two of the factors of procedural fairness. The need for independent legal advice is often taken lightly, with judges making questionable assumptions about the parties' level of understanding of the legal subject matter. This is especially worrying given that the level of understanding needed to be 'fully-informed' is set at a worryingly basic level. A similar attitude is taken to financial disclosure, the general consensus being that lack of disclosure will rarely affect the weight of a prenuptial agreement, even if done so fraudulently.

Bearing in mind that determining whether a prenuptial agreement is procedurally fair is not an exercise of judicial discretion, it is easy to see why the development of clear legal principles and more stringent requirements with regards to independent legal advice and full financial disclosure is crucial to ensuring that parties, especially more vulnerable ones, are adequately protected. There are signs that the judicial principles are improving – more recent cases, such as BN v MA, Y v Y and WW v HW suggest stricter approaches to the requirements of independent legal advice and financial disclosure. These cases arguably better capture the essence of the original core principle of procedural fairness enunciated by Lord Philips in Radmacher, that agreements must have been entered into 'freely [...] with a full appreciation of its implications.'

It is hoped that such positive developments will continue in the absence of settled statutory rules setting out mandatory procedural requirements.

55 Radmacher (n 6) [75].
56 ibid [169].
'Once More Unto the Breach': The Quistclose Trust Revisited

Nathalie Koh Jia En

I. Introduction

The Quistclose trust is a legal quagmire, described as both ‘the single most important application of equitable principles in commercial life’ and ‘an aberrant creation of common law’1. Despite recent efforts,2 the area remains besieged with conceptual uncertainty. It sits unsatisfactorily amongst orthodox equitable principles—not (yet) declared sui generis, and repeatedly recast into different theoretical moulds.

This article seeks to add to the current discourse by examining Lord Millett’s prevailing account of the Quistclose trust in Twinsectra v Yardley.3 Two flaws will be pointed out: first, that it has unwarrantedly lowered the threshold for finding an intention to retain the beneficial interest; and secondly, that it also fails to coherently or accurately locate the beneficial interest in the resulting trust. Additionally, the model suggested by Robert Chambers will be supported as a more tenable alternative to the flawed orthodoxy of Twinsectra.

II. Lord Millett’s Account

Lord Millett’s account, which claims to have ‘eliminated the impossible [analyses]’ and uncovered the ‘truth’4, represents the theory of Quistclose trusts currently applied by the courts.5 It classifies the Quistclose trust as a single resulting trust in the lender’s favour—the lender transfers only the legal title to the borrower, while retaining the entirety of the beneficial interest. Specifically, a resulting trust arises as the beneficial interest ‘remains throughout in the lender, subject only to the borrower’s power or duty to apply the money in accordance with the lender’s instructions’.6 This is contrasted to Lord Wilberforce’s theory of the Quistclose trust in the eponymous case, where he identifies a primary express trust for the creditors (the third party to which the purpose is to be applied) and a secondary resulting trust for the lender.7

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4 ibid 192.
6 Twinsectra (n 4) 193.
On this basis, Lord Millett suggests that the Quistclose trust is ‘an entirely orthodox example of the kind of default trust known as resulting trust’.\(^8\) He likens it to a ‘retention of title’ (or Rompala) clause in a contract, which ‘enables the borrower to have recourse to the lender’s money without entrenching on the lender’s property rights more than necessary to enable the purpose to be achieved’.\(^9\)

**III. Questions left unanswered and difficulties posed**

Lord Millett’s account is flawed in two areas: first, it unwisely and unwarrantedly lowers the threshold for inferring an intention to retain the beneficial interest; and secondly, it fails to comprehensibly identify the location of the beneficial interest.

**(A) Inferring intention from purpose: Lowering the standard**

A primary criticism of Lord Millett’s theory is that it results in courts artificially imputing to the lenders an intention to retain the beneficial interest. According to Lord Millett’s theory, the Quistclose trust responds to a negative intention (i.e. the absence of an intention to pass the entire beneficial interest to the borrower) as opposed to a positive intention to retain the beneficial interest.\(^10\)

In *Twinsectra*, Lord Millett states that ‘a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor did not intend to benefit the recipient. In other words, it responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it’ [emphasis added].\(^11\) This dictum is eventually narrowed down to the following test: ‘the question in every case is whether the parties intended that the money be at the free disposal of the recipient’, based on the construction of the relevant documents and the whole circumstances of the transaction.\(^12\) If the money is not at the free disposal of the recipient, then the lender did not intend to benefit him, and a resulting trust in the lender’s favour is established.

By equating lack of ‘free disposal’ with the intention to create a trust, Lord Millett’s Quistclose trust applies an excessively lenient approach to the finding of an intention to retain a beneficial interest—it does so in the absence of words or actions that indicate a positive intention to do so; a simple stated purpose for the money is sufficient. Penner argues that by equating the money not being at B’s free disposal to the lack of beneficial ownership vested in B, courts are able to infer a Quistclose trust whenever a condition is attached to a loan or a purpose is stated, despite parties having no positive intention to retain the beneficial interest.\(^13\) This is quite accurate. There is a meaningful difference between the lender’s act of transferring to the borrower the legal title to the money (for a purpose) and the lender having an intention to retain the beneficial interest. Swadling gives the example of ordering a new computer and making it a term

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\(^8\) *Twinsectra* (n 4) 192.  
\(^9\) ibid 187.  
\(^10\) The lender could only be said to have the positive intention that the beneficial interest should pass to the third party recipient, only if it was dealt with in accordance with its stated purpose.  
\(^11\) *Twinsectra* (n 4) 190.  
\(^12\) ibid 185.  
\(^13\) Penner, ‘Lord Millett’s Analysis’ in Swadling (n 3) 61.
of the contract that it arrives by next Monday. It is absurd to say that this would thereby create a trust, for nothing was said about rights being held by one person on behalf of another.14

The court’s failure to appreciate the correlative gap between attaching a purpose to a loan and creating a trust is emphasized in some Quistclose trust cases, where it was held that a trust existed where, on the facts, there was no mention of a trust or ownership of monies. In making the loan, the parties had simply failed to contemplate the location of the beneficial interest, or even the creation of an equitable interest at all. In Twinsectra and Quistclose, there was no mention of the ownership of monies or the creation of a trust in the undertaking or the resolution of the board respectively. In Re EVTR,15 the Court of Appeal explicitly recognised that there was no conscious consideration that the borrower would ever be insolvent, much less the intention to create a trust upon such insolvency.

(B) A continuation of principle or and unwarranted deviation?

In Twinsectra, Lord Millett attempted to preempt possible criticism by arguing that his approach has not introduced anything novel; he has merely applied the pre-existing standards established in Paul v Constance16 and Re Kayford.17 According to this argument, there is no need for the parties to have subjectively intended to create a trust, as long as the arrangement itself objectively creates one. Drawing from Kayford, Lord Millett argues that: ‘A settlor, must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them’.18 This implies that a transfer for purpose is a situation that has the objective effect of indicating an intention to retain the beneficial interest, and hence, the certainty of intention requirement is not loosened.

Contrary to the arguments above, the requirements for certainty of intention in Paul and Kayford are not coterminal with that proposed by Lord Millett, and his argument above is neither founded on orthodox trusts theory nor a justifiable deviation from such.

(i) Examining Paul v Constance: positive statements, the same as an absence of statement?

First, on its facts, Paul provides no support for Lord Millett’s account as it concerned a positive statement of ownership and inferred the intention to retain the beneficial interest at a higher threshold than that in Lord Millett’s account. More precisely, the court in Paul infers an intention to retain the beneficial interest from positive statements about the location of ownership, which is acceptable, whilst Lord Millett does so merely at the utterance of a purpose related to the transaction (i.e. in the absence of such statements).

14 Swadling, ‘Orthodoxy’ in Swadling (n 3) 14.
15 Re EVTR [1987] BCLC 646.
17 Re Kayford [1975] 1 WLR 279.
18 Twinsectra (n 4) 185.
It is agreed that Paul affirmed that a trust can be created without reference to the word ‘trust’, or even without the settlor being aware that such a legal construct exists. The statement ‘this money is yours as much as it is mine’ was held to be sufficient to manifest an intention to create a trust. In those situations, however, there was some explicit indication as to the location of the beneficial interest in the money—there was an ascertainable intention to ‘split’ the beneficial interest between Mr Constance and the claimant; the courts only stepped in to say that while the legal title continued to be vested in Mr. Constance, the beneficial interest had been vested in both himself and the claimant. In Twinsectra, however, the parties made no mention of the location of the beneficial interest. The courts did not step in to infer an intention as to the beneficial interest from a positive statement (as in Paul)—they stepped in to infer it from a statement about purpose (i.e. a condition indicating that the money was not at the borrower’s free disposal).

On this argument, the threshold for inferring an intention as to the location of the beneficial interest in Twinsectra is significantly lower than that set out by Paul, and by the long history of cases establishing that the standard in Paul was to be considered the lowest threshold of the test for intentions. Lord Millett’s account is an unannounced deviation from authority.

However, one might make a counter-argument that this deviation from authority is otherwise justified: statements concerning purpose could be interpreted as equivalent to statements concerning the location of the beneficial ownership. If conditions are attached to the transfer (i.e. there is a stated purpose for it), it could be argued that that alone is sufficient to indicate an intention not to transfer the entire proprietary interest as a whole (i.e. to retain the beneficial interest).

This is alluded to in Lord Millett’s judgment itself: he clarifies that ‘a Quistclose trust does not necessarily arise merely because money is paid for a particular purpose’. Instead, the question is whether ‘the parties intended the money to be at the free disposal of the recipient’. He reasons that a lender that ‘inquires into the purpose of a loan in order to decide whether or not he would be justified in making it… may be said to lend the money for the purpose in question, but that is not enough to create a trust; once lent the money is at the free disposal of the borrower’. In contrast, in Quistclose trust cases, the condition that the money be used ‘solely… and for no other purpose’ than the stated purpose is a strong indicator that there is an intention to retain the beneficial interest.

This is a salient argument. It is, in response, argued that inferring an intention to retain a beneficial interest from the borrower’s lack of ‘free disposal’ is still a conceptual strain on the notion of intention. It requires the courts to go one step further in extending the logical bounds of the idea by treating the free disposal of the recipient as sufficient to infer the intention to retain the beneficial interest.

19 Re EVTR (n 16) 527.
20 See, for example, Sir George Jessel in Richards v Delbridge (1874) LR Eq 11, relied upon in Paul v Constance (n 17). He states, at page 14, that ‘it is true that he need not use the words, ‘I declare myself a trustee’, but he must do something which is equivalent to it, and use expressions which have that meaning’.
21 Twinsectra (n 4) 185, 186.
This is tenuous because the 'lack of a free disposal' element is liable to be interpreted in other, competing ways: it is indeterminate. For example, Chambers' account can be equally inferable from a lack of 'free disposal'. His account, briefly stated, highlights that the borrower has full beneficial ownership of the money (in addition to the legal title), and the lender only has an equitable right to prevent the use of the fund for any other purpose. This could be an equally valid inference from the borrower’s lack of ‘free disposal’—especially in cases where a large part of the beneficial interest (e.g. the right to revoke, the power to apply it to the purpose) passes onto the borrower, leaving the lender with, practically speaking, only the right to demand the return of the monies on failure of purpose.

In conclusion, the act in Paul is equivalent to a declaration of trust; it directly refers to the location of the beneficial interest and could thus amount to a conveyance of said proprietary interest. It is untenable to argue that statements concerning purpose, such as ‘the loan is made for the acquisition of property’\(^{22}\) or ‘the loan is provided to ensure the continuance of advertising campaigns’\(^{23}\) amount to a similar declaration of trust.

(ii) Examining Re Kayford: a further lowering of the threshold?

Secondly, Kayford (admittedly) presents an initial challenge to the argument made by Penner above. It affirmed that ‘a sender may create a trust by using appropriate words when he sends the money… or the company may do it by taking suitable steps on or before receiving the money’\(^{24}\). There, the payment into a separate bank account was considered a circumstance that created a trust;\(^{25}\) this is more similar to the factual matrix of the Quistclose trust than Paul. In both Kayford and Quistclose trust cases, the only available evidence courts had to infer intention from were certain indicative circumstances, such as the payment of monies into a segregated bank account, rather than positive statements.

It is argued that even when the courts infer intention from indicative circumstances, the threshold for success has been significantly lowered. This occurs with the gradual (and excessive) expansion of the range of indicative circumstances that courts can infer an intention to retain beneficial interest from. While the segregation of funds might be a reasonable circumstance to draw such an inference from, this has been relaxed in recent cases, such that any loan (into segregated bank accounts, or not) that stipulates a purpose can give rise to a Quistclose trust. Unlike the segregation of funds, this is not a reasonable basis for inferring an intention to retain the beneficial interest.

In both older and more recent cases, the requirement of a segregation of funds has been gradually weakened, and currently occupies a nugatory position. Two cases demonstrate this: first, in Quistclose itself, Quistclose Investments did not impose any duty of segregation over the

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22 As in Twinsectra (n 4).
23 As in Carreras Rothman Ltd v Freeman Mathews Treasure Ltd, [1985] Ch 207.
24 Re Kayford (n 18) 282.
25 It is noted that the segregation of funds is an important, but not necessary, proof of intention. This was acknowledged in Re Kayford (n 18) 282.: ‘Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.’
money. The bank was advised to keep the funds in a separate account but this stipulation did not come from Quistclose Investments (and hence could not be indicative of their intention to create a trust). Interestingly, Lord Millett in Twinsectra never retrospectively addressed the issue of why the requirement to segregate funds reveals the intention of Quistclose Investments rather than that of the bank, given that the stipulation came from the latter. This position was even more relaxed in the second case of Cooper v Powerhouse PRG. In Cooper, the fact that the money when paid would be ‘mingled with the company’s funds’ did not detract from the finding of a Quistclose trust; Evans-Lombe J explicitly states that Lord Millett rejected the requirement of the monies being kept in a segregated fund. Importantly, the intention to create a trust in Cooper was based on a stipulation of purpose alone. Evans-Lombe J states that ‘the money paid was only to be used for the purposes of paying off his loan’ and on that basis inferred an intention.

Cooper may be symptomatic of a wider judicial trend in Quistclose trust cases of discarding requirements previously thought to be strictly held and instead relying solely on the stipulation of a purpose to infer an intention. This is startling when one notes very recent Quistclose cases such as Mundy v Brown, where Cooper’s disposal of the segregation of monies requirement is affirmed and applied, and cases such as Bellis v Challinor and Bieber v Teathers in which again, the court bases the inference of intention solely on whether a purpose has been attached to the loan, and not whether there has been a segregation of monies.

This demonstrates the broadness of the test for intention to retain a beneficial interest in Twinsectra and the problems associated with it—as observed, courts face no semantic or analytic difficulty with varying and lowering the threshold upon which an inference of intention to retain a beneficial interest is found. They give no reason for this finding other than the fact that the attachment of a purpose prevented the monies from being at the ‘free disposal’ of the borrower.

Furthermore, the broadening of the test is normatively undesirable, as it disposes of a more concrete, orthodox test of certainty of intention to retain the beneficial interest and create a trust. While it is true that Kayford does not strictly enforce the segregation of bank funds as a requirement that courts can infer an intention to retain a benefit from, the converse situation—inferring it solely on the basis of an attached purpose—is too weak a requirement. It would increase the likelihood of courts inferring a resulting trust in favour of the lender in situations where it is far from likely that the true bargain was that the lender could demand the monies be returned to him where the purpose, in the widest sense of the word, fails (eg if it were applied to paying employees their salary instead of advertising). In such a case, this would amount to what Penner has described as ‘a grossly unwarranted rearrangement by the court of the true bargain’.


26 Cooper v Powerhouse PRG [2008] EWHC 498. Note, however, that the trust in Cooper might also be classified as a purpose trust, depending on how one views it.
27 ibid 598.
28 ibid 596.
32 Twinsectra (n 4) 185.
33 Penner (n 14).
(C) The mysterious location of the beneficial interest

Perhaps the most interesting conceptual conundrum posed by the *Quistclose* trust lies in the inability of courts to accurately pinpoint the location of the beneficial interest. Lord Millett, as explained, states that the beneficial interest is located throughout in the lender. This is untenable—in some cases, imputing a beneficial interest to the lender would be akin to legal fiction.

Two arguments will be made to this effect: that Lord Millett’s account effectively ‘hollows out’ the content of the lender’s beneficial interest; and that it fails to accommodate instances in which the borrower obtains factual benefit from the fund.

(i) ‘Hollowing out’ the content of the lender’s beneficial interest

In insisting that the beneficial interest in the trust remains with the lender throughout, Lord Millett’s account potentially empties the term ‘beneficial interest’ of meaningful content. The lender is artificially affixed with the label of ‘beneficial owner’, while not being able to exercise majority of the concomitant rights. This occurs on both a wide and narrow interpretation of the content of beneficial interest.

First, the lender cannot be said to have the beneficial interest if we employ a wide interpretation of the term as referring to the full range of rights associated with beneficial ownership. Examples of such are expressed in cases such as *Re Bowes*[^34] (beneficiaries allowed to call for the funds reserved for the purpose of maintaining trees, to alleviate their financial problems), *Re Nelson*[^35] (the beneficial interest ‘cannot be fettered by prescribing a mode of enjoyment’),[^36] and *Baker v Archer-Shee*[^37] (beneficiary could direct the trustees how to deal with the trust property). Payne summarises the argument quite succinctly:

> ‘If the lender takes full beneficial ownership of the property from the start then Quistclose ought to be able to wield all the rights normally attached to full beneficial ownership… such as the right to compel Rolls Razor to use the money for the payment of the dividend, or revoke the loan and require immediate repayment of the money, to prevent the payment of the dividend by Rolls Razor to the shareholders while the purpose remains capable of fulfillment or to require the borrower to use the money for some other purpose’[^38]

However, it can be validly argued that the full range of rights constituting a beneficial interest, as outlined above, are only enjoyed by beneficiaries in an express trust. Instead, a more narrow interpretation of beneficial interest must be considered in a resulting trust. This makes sense in the context of a *Quistclose* trust, where the lender does not possess an indefeasible

[^34]: *Re Bowes* [1896] 1 Ch 507.
[^35]: *Re Nelson* [1928] Ch 920.
[^36]: ibid 921.
[^37]: *Baker v Archer-Shee* [1927] AC 844 (HL).
beneficial interest—as explained above, he cannot claim the property unless the power to apply the monies to the stated purpose fails.

There is, however, room to argue that the lender cannot be said to meaningfully possess the beneficial interest, even on the narrow interpretation of the term. This happens when the trust is irrevocable (i.e. the lender cannot revoke it), and also involves a duty to apply the money to the purpose (i.e. the lender cannot request the borrower to apply the monies to a different purpose). In such a circumstance, the lender loses all control over the enforcement of the trust once the money leaves his hands, leaving him with, in effect, a null beneficial interest. He can neither ‘take back’ the trust, nor prevent the borrower from passing it to the third-party beneficiary. 39

This, admittedly, occurs in the limited circumstance of when the loan and its terms are conditions of the trust. Such situations do, however, continue to occur and demonstrate a conceptual lacuna in Lord Millett’s theory. In *Carreras Rothman v Freeman Mathews Treasure*, 40 for example, Peter Gibson LJ (considering *Re Northern Developments Holdings Ltd*) held that the third party creditors had enforceable rights and that the lender could ‘on no footing’ revoke the trust unilaterally. 41 In such cases, the lender was held to be able to be compelled by a third party, and could not revoke the trust. Lord Millett’s theory fails to explain how these judgments co-exist with the lender having even a minimal beneficial interest.

(ii) Factual beneficial interest

Additionally, it would be disingenuous to argue that the lender has the beneficial interest in the monies where, in fact, the third party/borrower directly benefits from it. In other words, the lender cannot be said to have the beneficial interest without accruing any factual benefit. An example of a Quistclose trust whereby the benefit accrues to a third party is *Re EVTR*, where the claimant made it clear that he was to provide financial assistance to a friend (i.e. that a third party was to benefit). It is absurd to argue that the claimant obtained any benefit in the legal sense from doing so, and it is therefore counter-intuitive that he can be said to have the beneficial interest. 42

However, a salient counter-argument is noted: there are cases which indeed reflect a factual benefit accrued to the lender. In particular, Lord Millett identifies *Carreras Rothman* as a case in which the lender had a ‘separate and distinct’ interest in the provision of a loan (the lender’s benefit in that case was that their advertising campaign would be saved). 43 This was also the case in *Quistclose*, where the majority shareholder of Quistclose Investments was also the managing director of the Rolls Razor, and the loan was intended to keep the business going. Additionally, in *Cooper*, the lender was seeking to gain title to his car for personal use following the termination of his employment with the borrower.

39 cf Penner (n 14).
40 *Carreras Rothman v Freeman Mathews Treasure* [1985] 1 Ch 207.
41 ibid 223.
42 *Re EVTR* (n 16).
These criticisms are understandable and valid. However, the specific problem one may continue to have with Lord Millett’s account is that, as a test, it is a faulty indicator of the location of the beneficial interest in a trust. Lord Millett’s states in Twinsectra: ‘When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out’.\(^{44}\) This is true, but it is not the case that whenever there is a purpose attached to a fund, the factual benefit lies with the lender throughout.

In cases such as Cooper, Quistclose and Carreras Rothman, the factual benefit does lie (in part, at least) with the borrower, while in some cases such as Re EVTR and Twinsectra, it does not. Hence, whether the theory ‘fits’ the case is fortuitous, and the test of whether there is a restriction on the use of money is tangential to the actual question of where the beneficial ownership lies.

Furthermore, as argued by Chambers, there are other situations in which the factual benefit is divorced from the location of the beneficial interest. He argues that, ‘if the use of money cannot be restricted without creating a trust, then every restriction on the use of money must eliminate the benefit of having it’.\(^{45}\) To support this, he gives the example of a condition, not for the money to be paid to the third party, but for the money not to be paid to the third party.\(^{46}\) In such a case, the borrower is free to use the money for other purposes beneficial to him. Alternatively, he gives the example of his son asking for money to pay tuition fees, which is given or loaned on the condition that he uses it only to pay those fees—in such a case, the restriction reduces, but ‘cannot be necessarily said to eliminate’ his beneficial ownership.\(^{47}\) His argument therefore furthers the point that, in most Quistclose trusts, the true location of the benefit should not hinge upon the restrictions attached to the loan; there is simply no factual correlation. To state that the lender retains the beneficial ownership in all Quistclose trust cases is stretching the bounds of legal fiction slightly too far.

### IV. Alternative Solutions: Reconsidering Chambers

Chambers provides two different accounts of the Quistclose trust: he first discusses the idea in 1997,\(^{48}\) and revises this in 2004.\(^{49}\)

(i) **Chambers’ account in 1997**

Chambers’ central thesis is that the borrower acquires more than just the bare legal title and has the full beneficial use of the money at common law, subject only to the equitable right of the lender to prevent the loan from being employed for any other purpose, enforceable by an injunction.\(^{50}\) He further contends that a resulting trust arises in favour of the lender when the purpose fails. In that situation, the lender’s equitable interest (i.e. the right to prevent the

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44 Twinsectra (n 4) 184.
45 Robert Chambers, ‘Restrictions on the Use of Money’ in Swadling (n 3) 89.
46 ibid 90.
47 ibid.
48 Chambers, Resulting Trusts (OUP 1997).
49 Chambers (n 46).
50 Chambers, Resulting Trusts (n 49) 86.
The validity of this approach will now be considered: first, it is agreed that this account provides a less contrived explanation of the location of the beneficial interest than Lord Millett’s account. Chambers supports the argument in Part C(i) and (ii) that the problem with orthodox accounts of the Quistclose trust is that they have been overly insistent on a ‘search for the location of the equitable interest as a key to understanding the Quistclose trust’. His account neatly evades the criticism levied against Lord Millett’s account; the beneficial interest is passed onto the borrower subject to the equitable right of the lender, and is not wholly retained by lender.

Secondly, it is noted that Chambers’ account, by virtue of the lender not retaining a beneficial interest, does not implore the same questions regarding the lowering of the threshold for inferring an intention to retain a beneficial interest as discussed in Part B. Instead, it (correctly) fails to impute any intention to the lender to retain beneficial interest; it imputes only an intention to the lender to have an equitable right to enforce the application of the monies to the purpose. Therefore, and to some extent, Chambers’ account solves some of the problems encountered by Lord Millett’s account. It is, however, far from perfect.

It is noted that the exact nature of the lender’s right is unclear—it is described as both contractual and equitable. This might lead to several competing interpretations of Chambers’ account and add to the conceptual disarray posed by the Quistclose trust.

In addition, and more significantly, Chambers’ 1997 account has received both judicial and academic criticism. Such criticism is extensive and varied and, due to exigencies of space, will not be fully outlined here. One such critique, for example, dismisses Chambers’ theory as ‘it provides no solution to cases of non-contractual payment’. This is fully explained by Ho and Smart (cited by Lord Millett in Twinsectra as having successfully countered Chambers’ thesis). Other significant counter-arguments given by Lord Millett in Twinsectra include the fact that Chambers’ account, being partly based on contract, cannot be reconciled with the availability of remedies against third parties.

Lastly, although it generally acts as a better compass for the true location of the beneficial interest, Chambers’ account still leaves us with several conceptual gaps. It does not explain situations in which third parties are capable of enforcing the trust (e.g. Carreras and Re Northern Developments Holdings Ltd, as discussed above). In such a case, Chambers’ account fails in equal measure to Lord Millett’s—it fails to account for the beneficial interest viz. the right to enforce the trust is present in the third party instead of the borrower.

51 ibid 85.
52 ibid 76.
53 Twinsectra (n 4) 190.
54 Ho and Smart, ‘Re-interpreting the Quistclose Trust: A Critique of Chambers’ Analysis’ (2001) 21(2) OJLS 267.
55 Twinsectra (n 4) 191.
56 Ho and Smart (n 55).
57 Twinsectra (n 4) 191.
In conclusion, although Chambers’ account as given in 1997 fails, it can be said to have ‘failed better’ than Lord Millett’s – though not completely accurate, it still provides a better compass for locating the beneficial interest, and inferring an intention to retain the beneficial interest.

**(ii) Chambers’ account in 2004: worth reconsidering?**

Chambers’ account, as given in 2004, will now be considered: essentially, Chambers posits that the *Quistclose* trust is ‘not a particular relationship, but a range of possible relationships’. There are two possible versions of resulting trust that can arise, depending on the nature of the restriction that produces it; both mirror (more accurately than on Lord Millett’s account) the location of the beneficial interest.

Both arise because the lender’s restriction on the borrower’s use of money prevents the borrower from obtaining the full beneficial interest. In the first type of resulting trust, the restriction wholly *eliminates* the benefit of having the money, and B will hold it entirely on resulting trust for the lender. In the second type of resulting trust, the restriction merely *reduces* that benefit, and the beneficial ownership is shared by both the lender and the borrower. Chambers envisages various ‘sharing arrangements’, such as ‘if the permitted uses of the money are for B’s benefit and B has the right to use it for these purposes, B must have at least some beneficial interest in the money’ and ‘if the restriction on B’s use is minor, then B should be regarded as its sole beneficial ownership, subject only to A’s right to restrain its misuse’ (i.e. his account of the trust in 1997).

First, the account clearly benefits from flexibility and comprehensiveness in accommodating varying locations of the beneficial interest under the structural ‘umbrella’ of a *Quistclose* trust. This solves a majority of the problems discussed above: the type of resulting trust (and if relevant, the particular ‘sharing arrangement’) that the transaction is classified as is entirely commensurate with the restrictions imposed on each of them. This belies the theory’s sensitivity to ‘what parties want… the relationship they have chosen’, and its intention ‘to give effect to their intentions if they are known’. Ultimately, it acknowledges the problem with Lord Millett’s thesis in attempting to constrict what is in fact a range of relationships within a single theory.

Secondly, that this effect is achieved through introducing the idea of ‘sharing arrangements’ for beneficial interest is both justified and normatively valuable – the beneficial interest can, and should, be described as shared. Chambers argues this succinctly: ‘If the arrangement is primarily for B’s benefit or for the mutual benefit of A and B and the permitted use of the money will benefit B, then B probably has a beneficial interest in the money. If A’s right to restrain B’s misuse of the money is regarded as a beneficial interest, then beneficial ownership is

59 Chambers (n 46) 118.
60 ibid 120.
61 ibid 119.
shared’.62 Usefully, he cites Isaacs J’s dicta in *Hoystead v Federal Commission of Taxation* as support for the proposition that beneficial ownership can be shared or split: a beneficiary’s ‘interest in the trust estate at any given moment is measured by the relief which equity is then prepared to give him, that is, by the rights which the due execution of the trusts as framed by the creator of the trusts will at that moment give him’.63 Academic support for the notion that beneficial interest can be shared can be derived elsewhere, and it is widely accepted that it represents the normatively desirable way to conceptualise equitable interest.64

However, there may be some room to criticize his account as failing (though, as this article argues, ‘failing better’ than Lord Millett’s account) as it is methodologically flawed. Designating the *Quistclose* trust as a range of relationships rather than a specific one risks emptying the trust of any specific definition or conceptual boundaries, making it difficult to tell where the concept ends and begins and hindering legal certainty. This is apparent as the effect of Chambers’ account is to create two types of resulting trusts with three possible locations of beneficial interest (i.e. in the lender, shared, or in the borrower). Chambers’ account may need some fine-tuning in terms of providing us with essential features of the trust, instead of simply accommodating most features under its varying schema of ‘resulting trust’ type relationships.

**V. Conclusion**

This article highlights the sluggishness of Lord Millett’s theory in responding to changing factual matrices. Specifically, the near-disposal of any serious requirements for inferring an intention to retain the beneficial interest, and the inability to cope with pinpointing varying locations of beneficial interest make his thesis untenable. Instead, it would be useful to consider, as Chambers does, the *Quistclose* trust as a range of relationships.

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62 ibid 99.
63 *Hoystead v Federal Commission of Taxation* (1920) 27 CLR 400, 425.
64 cf Robert Nolan, ‘Equitable Property’ (2006) LQR 232, 233: ‘…very different quanta of benefit from trust assets can be allocated by a settlor to different beneficiaries, very largely as he pleases, while allowing each such beneficiary the security of a proprietary claim on the trust assets, a claim which survives a trustee’s insolvency’; Patrick Parkinson, ‘Reconceptualising the Express Trust’ 2002 CLJ 657, 663: ‘Consequently, it is incorrect to think of trusts always in terms of legal and equitable ownership. Rather, the core idea of the private express trust lies in the notion of equitable obligations in relation to property, which in most cases will also give to beneficiaries commensurate property rights in equity.’
Wither Wesley? Conceptual Confusion in the Supreme Court

Orestis Sherman

**Introduction**

The judicial reasoning and result in *AIB v Mark Redler*\(^1\) illustrate the importance of appreciating the precise juridical nature of trustees’ liability to account. If their Lordships had paid careful attention to the distinctions drawn by Wesley Newcomb Hohfeld between the different types of duty – those correlating with a claim-right and those correlating with a disability – they would have understood that the reasoning in *Target Holdings v Redfem*\(^2\), the governing authority on the liability of trustees to account, marked a shift from the disability-based model to the duty-based model. Given that a shift in the model applied would lead to different results on the same facts, a lack of appreciation for the distinct nature of the models should be a cause for concern. This article will employ a Hohfeldian analysis to properly characterise the nature of trustees’ liability to account, before applying that analysis to *Target* and *AIB* to expose the conceptual confusion present in both cases.

**Hohfeldian Definitions and Distinctions**

The reasoning, though not the result, of *Target* turned on a Hohfeldian distinction. To understand why, it is necessary to demonstrate the substantive distinction between a duty and a disability in strict Hohfeldian terms.

In strict Hohfeldian terminology, a duty translates to B legally having to do/not to do X. This correlates to A’s right that B does/not do X.\(^3\)

Hohfeld does not define a disability *per se*. In order to confine a definition to what Hohfeld intended, it is best to view a disability as the negation of a power (its jural opposite). A power is a legal ability ‘to effect a particular change of legal relations.’\(^4\) If B has the power to affect A’s legal relations in respect of Y, the negation of this would be where B lacks the legal power to affect A’s legal relations in respect of Y.

The substantive difference, in the context of the liability of trustees to account, can be reduced to two models: (1) legally, the duty-bound trustee *should not* enter into an unauthorised transaction, and (2) legally, the disability-bound trustee *cannot* enter into an unauthorised transaction. The two models are wholly distinct, as Hohfeld’s table of correlatives and opposites makes clear:

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\(^1\) I am grateful to Prof. Ben McFarlane and Mr. Julius Grower for their comments on an earlier draft. All errors remain my own.


\(^4\) Wesley N Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 32.
**Consequences of Drawing the Distinction**

The disability-based model generates different remedial solutions than a duty-based analysis. Hohfeld did not specifically consider the remedial implications of his distinctions. However, it is possible to make deductions from his reasoning.⁵

Hohfeld frames claim-rights and duties in strictly normative language – 'that which one ought or ought not to do.'⁶ As a result, duty-based reasoning can countenance the possibility of breach: when only what is legally possible can occur, a party subject to a Hohfeldian duty may choose not to perform that duty. This analysis has long been applied to contract law where, upon the breach of a primary duty, a ‘secondary duty’ arises to compensate for the non-performance of the primary duty.⁷

Conversely, when a trustee is placed under a disability, he is ‘disabled’ from asserting that he acted ‘wrongfully.’⁸ Equity ‘insists’ on treating him as having acted in line with his duty by denying the fact of his contravention of his obligation and legally treating him accordingly.⁹ It seems counter-intuitive to deny the factual reality, but the reason for doing so is that it was legally impossible for the trustee to have entered into the unauthorised transaction. If we accept the disability-based model, we cannot treat the trustee as anything other than a ‘good man.’¹⁰ This marks a stark contrast to the common law duty-based model, which can be seen to encourage the behaviour of the ‘bad man’, who rests easy in the knowledge that he may escape his obligations by breaching his duties and simply paying for his wrongs.¹¹

Disability-based reasoning cannot countenance the possibility of breach: when only what is legally possible can occur, a party subject to a disability can never perform an act that he lacks the power to perform. Any disobedience of the legal disability is ignored and the overriding primary obligation is enforced. The resulting performance is ‘restitutionary or restorative’ rather than ‘compensatory’, as it would be on a duty-based approach.¹² This is because a restitutionary result demands specific performance of the original, primary obligation, whereas a compensatory approach is satisfied by the performance of a derivative, secondary obligation, rather than the original.¹³ It is analogous to a Roman vindicatio action, in which the only response to a successful claim was the return of the property claimed for in specie.¹⁴

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<thead>
<tr>
<th>Jural Opposites</th>
<th>Right No-Right</th>
<th>Privilege Duty</th>
<th>Power Disability</th>
<th>Immunity Liability</th>
</tr>
</thead>
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<tr>
<td>Jural Correlatives</td>
<td>Right Duty</td>
<td>Privilege No-Right</td>
<td>Power Liability</td>
<td>Immunity Disability</td>
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⁶ Hohfeld (n 4) 32.
¹⁰ Hayton (n 9) 487.
The reason why disability-based reasoning has traditionally been employed in certain areas of equity and not, for example, in contract law is because the model prevents the exposure of a vulnerable party to a risk of actually suffering a loss. Contract law assumes a parity of bargaining power between the contracting parties, but trusteeship entails a definitional disparity. In order to redress this imbalance, it is fitting that a trustee, who is ‘armed with extensive powers’, is also ‘restrained’ by disabilities that cannot be breached, rather than duties that might be breached.\(^{15}\)

Of course, regardless of whether a trustee is subject to a duty proper or a disability, he can, in reality, act contrary to the provisions of the trust instrument. The practical protection of the beneficiary is post facto when, regardless of causation, he may insist that the trustee nonetheless perform his obligation.\(^{16}\) The choice as to how the trustee acts is the beneficiary’s. The trustee may choose to breach his obligation, but the beneficiary can ask a court to insist the obligation be performed regardless. By contrast, if the trustee were subject to a duty proper, it is the trustee who can elect not to perform, and instead fulfil the derivative or secondary obligation that arose upon the breach he chose to commit. The fact that a beneficiary may ultimately demand specific performance is a great incentive for the trustee not to breach his primary obligation in the first place.

By legally disabling powerful parties, the law\(^{17}\) limits opportunistic parties from exploiting bargaining, possessory, and evidential advantages. The reason why contract law rejects this model is that it can often be stiflingly rigid: it limits commercial fluidity, and it undermines the presumed autonomy of the parties. Indeed, the courts have been ready to assume that contracting parties can withstand the ‘rough and tumble’ of the commercial world.\(^{18}\) This could not stand in starker contrast to the need, as James LJ expressed it, albeit hyperbolically, to protect vulnerable parties, primarily beneficiaries, ‘for the safety of mankind’.\(^{19}\) These relationships are socially and economically important, and they require safeguarding. The overall result of placing a trustee under a disability in respect of entering into a particular transaction has the effect of holding the trustee to a higher standard of performance by virtue of the fact that he simply must perform and may not substitute that performance with any other action.

**Characterising the Law of Account**

In the trustee-beneficiary relationship, the basic obligation is to administer the fund in accordance with the terms of trust instrument, if any, and the general law.\(^{20}\) Upon establishing the relationship, the beneficiary is ‘entitled to an account as of right.’\(^{21}\) In the event of a breach, the court order given merely identifies and quantifies any deficit in the trust fund. This is not a remedy *per se*, and the actual remedies follow the result of the disclosure order. Should the account disclose an unauthorised disbursement, the claimant can falsify – ‘that is to say ask for the

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\(^{16}\) *Clough v Bond* (1838) 3 My & Cr 490 (Ch).

\(^{17}\) Any disability that a trustee is subject to as against the beneficiary should be considered as having been self-imposed.

\(^{18}\) *DSND Subsea v Petroleum Geo Services* [2000] EWHC 185 (TCC), [2000] BLR 530, [131].

\(^{19}\) *Parker v McKenna* (1874–75) LR 10 Ch App 96 (DC); *cf. York Buildings Company v Mackenzie* (1795) 8 Bro PC 42 (HL) at 63, describing the trustees as those ‘seized with the inclination to use the opportunity for serving [their] own purpose’ against beneficiaries who are ‘frail in nature.’

\(^{20}\) *Target Holdings* (n 3) 434.

\(^{21}\) *Libertarian Investments v Hall* [2014] 1 HKC 368, 168–170; *Ultraframe v Fielding* [2006] FSR 17, [1513].
disbursement to be disallowed'. Should the account be defective because of an absence of property that the defendant 'in breach of his duty failed to obtain', the claimant can surcharge the account – 'that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust'. When a defendant is ordered, as a result of falsification, to make good a deficit, that order 'is not compensation for loss but restitutionary or restorative'. The claimant is 'not bound' to ask for the disbursement to be disallowed. Where a claimant surcharges the account and the defendant is ordered to make good the deficiency 'the payment of “equitable compensation” is akin to the payment of damages as compensation for loss'. The defendant in such cases has long been described as being 'liable to make [the loss sustained] good'.

For centuries, the approach to the regulation of a trustee's office was based on the disability analysis, and this becomes apparent from a Hohfeldian exposition of the law of account.

(1) The Order of Account

The finding of an unauthorised transaction is, in Hohfeldian terms, an operative fact. This description pertains to facts that 'suffice to change legal relations'. Only upon discovering an unauthorised transaction may a claimant either falsify or surcharge the account. The legal relation arising from that operative fact is new, and it is that the trustee is to be liable to account in respect of the beneficiary.

(2) Falsification and Surcharging

When a trustee enters into an authorised transaction, he is demonstrating a legal ability to enter into that transaction. This is an archetypal Hohfeldian power. If authorised transactions are validly entered into due to a trustee having a power, it must follow that unauthorised transactions are barred by a disability, the jural opposite of a power, as against the beneficiary. This would explain why the defendant's payment that makes good the deficit is restorative rather than compensatory: legally speaking, there is nothing to compensate because the trustee could never have entered into an unauthorised transaction, and so he is simply restoring the trust fund to what it should have been in reality.

There is no reason to consider other legal concepts like remoteness or mitigation. Due to the nature of the remedy and the content of falsification as a process, it is undeniable that conceptually, as against the beneficiary, a trustee is under a disability in respect of unauthorised transactions. Furthermore, it is appropriate to say that the beneficiary is legally immune, with an 'immunity being the jural correlative of a disability, from the consequences of an unauthorised transaction'.

One counter-argument to the proposed analysis is that it may occasionally appear as if a trustee is compensating a beneficiary for a breach that, on a disability-based analysis, is a legal

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22 ibid.
23 ibid.
24 ibid.
25 ibid.
26 ibid.
27 Clough (n 17).
28 Hohfeld (n 4) 26.
29 Phillipson v Gatty (1848) 6 Hare 26 (Ch); Knott v Cottee (1852) 16 Beav 77 (Ch).
30 Hohfeld (n 4) 45.
31 Bristol and West Building Society (n 13).
32 Hohfeld (n 4) 53.
impossibility. This can be explained as follows. A trustee owes a beneficiary various obligations beyond the call of his stewardship duty. It is possible for disabilities and duties to coexist: an agent can be both disabled from entering into an unauthorised transaction, in his capacity as a fiduciary, and simultaneously be bound by a duty, in the strict Hohfeldian sense, not to enter into that same transaction in the capacity of a contracting party. Such an agent could, in the right circumstances, be liable for both a restitutio and a compensatory claim.\(^{33}\)

In *Morison v Thompson*, A was employed to broker the purchase of the ship, initially offered at £9,000, as cheaply as possible. A was aware of the fact that if the ship was sold for anything in excess of £8,500 then the vendor’s agent, S, would retain the excess. A’s principal was not aware of that agreement. Before the sale was agreed, A and S agreed that A would retain a portion of S’s commission. The ship was bought for £9,250. The principal was successful in claiming £250 by way of an account of profits, a restitutio remedy retrospectively enforcing the disability against making such a profit which his agency imposed on him, but he could also conceivably have been liable to pay compensation in breach of his duty to achieve the lowest possible price.\(^{34}\) Both obligations could be ‘breached’ by the same event. It is not that, in such cases, the beneficiary is receiving restitution for the breach of a duty, but rather that the beneficiary is receiving restitution for the disobedience of a coexisting disability. Whilst duties and disabilities commonly coexist, the two are certainly conceptually distinct and can exist separately. Hohfeld himself presents duties and disabilities as entirely unrelated in his table of jural relations: they are neither opposites nor correlates. This is unequivocally proven by cases of parties that are fiduciaries for reasons other than a contract with their principal, such as gratuitous agency cases\(^{35}\) or cases in which an agent lacks the capacity to enter into a contract.\(^{36}\)

When an account is falsified, the subsequent remedy awarded against the trustee is one of substitutive performance – an obligation that he could conceivably specifically perform by producing the property itself. By contrast, surcharging requires the trustee to pay reparative compensation for losses.\(^{37}\) A reparative claim can only be triggered by the existence of a primary duty, the breach of which entails a secondary obligation to compensate for the loss sustained. This is the model of compensation found in contract law. By way of further contrast to falsification, terms commonly employed to describe surcharging include: ‘duty’, ‘breach’, and ‘compensation’.\(^{38}\) These have the traditional consequence of importing causation and remoteness, but they do not arise here despite the fact that it has been stated that ‘there is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case.’\(^{39}\) This oddity should be shelved as one of English law’s unprincipled quirks. The remaining question is whether or not it would be correct to state that the beneficiary has a claim-right correlating to the trustee’s primary duty to acquire specific property. The authority suggests that such terminology is fitting.\(^{40}\)

Hohfeldian disabilities and duties map onto falsification and surcharging respectively and this reveals that the nature of the two are distinct and they should be recognised as such. This view is supported by further observations that reparative compensation ‘matches the injury caused by the defendant’s misconduct’, whereas substitutive compensation consists of ‘a money equivalent

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\(^{33}\) Diplock v Blackburn (1811) 3 Camp 43.

\(^{34}\) (1873-74) LR 9 QB 480, 486.

\(^{35}\) Chaudry v Prabhakar [1989] 1 WLR 29 (CA).


\(^{37}\) Elliott and Mitchell (n 14).

\(^{38}\) Libertarian Investments v Halk; Bristol & West Building Society v Mothew; Bartlett v Barclays Bank Trust (No. 1) [1980] 2 WLR 430, 440.

\(^{39}\) Bristol and West Building Society (n 13), 17.

\(^{40}\) Walker v Symonds (1818) 3 Swans 1 [8].
to property of which a person has been deprived'. Nevertheless, the material process that follows falsification and surcharging is, generally, the same: the trustee pays the sum required from his own pocket and that fact explains much of the unprincipled elision of the concepts.

(3) The Claimant’s Choice

In the realm of reparative compensation, a secondary obligation arises upon the breach of a primary duty. As Hohfeld indicates, for the trustee to be held liable to account, the beneficiary must have a power. Characterising the beneficiary’s ‘right’ as a power makes sense. The beneficiary has the ‘legal ability’ to effect the particular change of legal relations that is involved with the problem. This ability entails an inherent choice, which is why Hohfeld describes it as a ‘volitional’ power, as to whether or not to exercise the ability. This explains why the beneficiary is not bound to surcharge the account. Therefore, in the context of surcharging, a beneficiary is endowed with a power to hold the trustee liable. This is the new legal relationship that the operative fact, discovered in process of ordering an account, has given rise to. Upon the exercise of that power, the trustee comes under a duty to reparatively compensate the beneficiary. Hohfeld summarises this legal phenomenon as: ‘It is a liability to have a duty created.’

This also illuminates why the trustee is only subject to a disability as against the beneficiary. Hohfeld is at pains to clarify the fact that a jural relation is a description of a bilateral relationship between two legal entities.

The phrase ‘liable to account’ is also used in a falsification claim, but in that context it is being employed differently. Upon the finding of an actual disobedience of a disability by way of making an unauthorized transaction, a beneficiary acquires the power to falsify the account. Much like in a surcharging claim, the beneficiary may elect not to falsify the account. If the beneficiary elects not to exercise their power, there is a real sense in which the unauthorised transaction is being ratified. This does not mean that an actual power to ratify has been exercised. The ‘power’ to adopt a transaction is merely an echo of the decision not to exercise the real power to falsify the account – it is a negative derivative concept. As a matter of fact, the transaction is treated as authorised. However, this does not change the fact that, subject to a possible estoppel claim, the trustee continues to be ‘liable’ because, until he performs, he remains subject to the disability he has always been under. The trustee’s so-called ‘liability’ is never anything other than primary. The use of the phrase ‘liable to account’ is thus one that makes convenient sense, but is not, in strict Hohfeldian terms, correct.

Paying careful attention to Hohfeldian distinctions logically justifies why different remedies are available on different models of analysis. The concept of a disability that Hohfeld exposes perfectly explains the process of falsification, why it is different to surcharging, and why the remedy is one of primary, substitutive performance.

**Target Holdings**

*Target* involved an unauthorised disbursement of trust funds by a trustee solicitor, who did not have the power to release the monies held on trust until certain documents were obtained. The trustee can be said to have been subject to a Hohfeldian disability in respect of that transaction. The disability would dissipate once the documents were acquired. These documents were only

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41 Elliott and Mitchell (n 14), 24.
42 Hohfeld (n 4) 45.
43 ibid 53.
44 ibid 30.
obtained *after* the release of the funds. However, as the events unfolded, regardless of whether or not the trustee had ignored his disability in reality, the beneficiary would have sustained the same actual loss as the property that the wider commercial transaction pertained to had been substantially overpriced.

Peter Gibson LJ, giving the majority judgment in the Court of Appeal, gave judgment in favour of the beneficiary. He correctly identified that the ‘duty’ in play is different to that employed in orthodox common law circumstances. Indeed, he stated that in *Target* ‘all’ the loss is ‘recoverable’ on account of equity adopting a distinct conceptual model, since ‘it would not have been on the application of principles derived from the law of tort relating to causation’. However, Peter Gibson LJ failed to recognise the fact that at the time of the proceedings, the account was no longer deficient since the trustee, by producing the necessary property, had in fact performed his obligation. This is why he found in favour of the beneficiary.

The House of Lords reversed that decision. Lord Browne-Wilkinson, delivering a unanimous judgment, felt a ‘strong predisposition against such a conclusion [that the solicitors should be liable]’ and, given that the traditional disability-based model, at least as applied by Peter Gibson LJ, could not produce the result he felt just, he shifted the conceptual model to a duty-based one. The equitable obligation that the trustee was under could hence be brought within the established framework of duty and breach, with notions of causation and remoteness attaching to the latter. Upon the breach of the primary duty that was owed to the beneficiary, the beneficiary acquired the power to hold the trustee liable. That liability was declared not strict by his Lordship, who held that the trustee should not be held liable for a loss suffered by the beneficiary that he would have suffered regardless of his breach.

In attempting to justify this shift, his Lordship elided the language of disability and duty. He relied on authority for the proposition that if specific restitution of the trust property is not possible, then the trustee must pay sufficient ‘compensation’ to the trust estate to put it back to what it would have been had the ‘breach’ not been committed. Indeed, Peter Gibson LJ had relied on much the same authority to support the same proposition. However, Lord Browne-Wilkinson continued to cite reparation cases for the proposition that in a claim for restitutionary performance there must be ‘some causal connection’ between the ‘breach’ of trust and the ‘loss’ to the trust estate for which ‘compensation’ is recoverable. The importation of terms associated with duty is clear. Under the disability-based model ‘liability’, in the derivative sense, is primary, and so introducing any such causal requirement would be ‘inapt’. This conceptual elision was unnecessary and would impact the understanding of *Target* in *AIB*.

Remarkably, neither judge acknowledged the significance of the fact that the documents, that the trustee was under a duty to obtain, had been acquired. This thus ‘curing’ the apparent ‘breach’. Indeed, had Peter Gibson LJ ‘stopped the clock’ at the time of trial, rather than at the moment of the transaction, as Lord Browne-Wilkinson correctly suggested should be the case, he would have accounted for the fact that the documents had been acquired and thus would have found in favour of the trustee solicitors.

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45 *Target Holdings v Redferns* [1994] 1 WLR 1089 (CA), 1102.
46 ibid 1106.
47 *Target* (n 3) 433.
48 *Caffrey v Darby* (1801) 6 Ves. Jun. 488, Clough (n 17).
52 *Target* (n 3), 437.
The effect of shifting to a duty-based approach was to accord a lower degree of protection to all beneficiaries. In his defence, Lord Browne-Wilkinson attempted to distinguish trusts in the context of a wider commercial transaction from ‘traditional trusts’, perhaps indicating a desire to maintain a higher degree of protection in non-commercial trusts. However, there is no good conceptual reason for such a distinction since the nature of the trust mechanism is singular and universal in its application. Firstly, the argument that certain trusts, especially those that are part of an ‘underlying commercial transaction’, incur no ongoing duties of stewardship sits in tension with the well-accepted idea of the ‘irreducible core’ of trustee duties. Secondly, even the Lords in AIB could not provide a ‘categorical distinction’ between commercial and non-commercial trusts. The only case they could cite in support of the proposition was the controversial case of Kelly v Cooper in which the Privy Council decided that the relationship between an estate agent and their client did not necessarily import fiduciary obligations. That case was confined to its facts and the result was reached through ‘an implied term in the contract’, rather than a general proposition of law. If the Supreme Court cannot offer a working definition of a commercial trust, the uncertainty flowing from this will make it difficult for trustees to forecast potential liability. Consequently, the distinction should not be accepted.

It may be argued that the duty-based model with its accompanying causation test allows a court to identify wrongdoing and punish that wrongdoing, such as in cases of fraudulent breach of trust. But this encapsulates the gravity of the shift. The law now looks to the trustee’s wrongdoing and treats him as a bad man when appropriate, instead of treating him as an undeniably good man and reasserting the primary obligation, thus according the beneficiary the highest level of protection. Contrary to Lord Browne-Wilkinson’s speech, the principles of the former model are not applicable as much in equity as at common law. The shift was undertaken on the premise that the disability-based model could not produce the ‘right’ result in the presented circumstances. However, on account of the trustees ‘curing’ the breach, both models would have produced the same substantive result. Despite this, the choice of approach is not inconsequential – this was demonstrated by the need to import the causation test – and does not, as the facts of AIB demonstrate, mean they will always produce the same result.

The Confusion in AIB

In AIB, their Lordships had the opportunity to depart from Target, or at least substantially limit its impact. The facts of the case were identical for all relevant purposes to those of Target, but for the fact that the trustees never ‘cured’ their breach.

Their Lordships faced almost the same concerns with regards to reaching the ‘right’ result as Lord Browne-Wilkinson did. Counsel for the lenders contended that Target should be distinguished on the grounds that the trustees in AIB never ‘cured’ their ‘breach’. But, on the duty-based model employed by Lord Browne-Wilkinson, that fact is irrelevant. Secondary liability

53 Target (n 3), 435; See Browne-Wilkinson V-C’s earlier suggestion in Imperial Group Pension Trust v Imperial Tobacco [1991] 1 WLR 589, 596 that there are certain conceptual distinctions between family trusts and pension trusts. For a full argument against drawing distinctions between commercial and non-commercial uses of the same instrument see Nicholas Hopkins, ‘The Relevance of Context in Property Law: A Case for Judicial Restraint?’ (2011) 31 LS 175.
54 ibid, 436.
56 AIB (n 2), 1536 (Lord Reed).
59 ibid, 214.
60 Collins v Brehner [2000] Lloyd’s Rep PN 587.
61 Target (n 3) 432.
has arisen upon breach of the primary duty and all that remains is to quantify the trustee’s contribution to the actual loss suffered. It is true that the duty-based model cannot be said to be ‘penal’, since the trustee never pays more than the loss his wrongdoing occasioned. 62 However, it equally would be a mistake to also characterise the disability-based model as penal, since wrongdoing is irrelevant to it.

Their Lordships did not appreciate that there was a choice between two potential models of analysis. Lord Toulson commented that the extent of equitable compensation for ‘breach’ of an obligation under a trust should be the ‘same’ as if ‘damages’ for breach of contract were being pursued under the common law. This could not be further removed from Peter Gibson LJ’s definitive comments as to the separateness between the mechanisms employed by common law and equity. Due to the fact that Gibson LJ did not acknowledge the ‘cure’ in Target, he was faced with substantially similar facts to their Lordships in AIB, and he asserted that on those facts the two mechanisms could never produce the same result. They are quite simply conceptually distinct. Trusts are an instrument of legal fiction, and the process of falsification, which seeks to deny the physical reality and enforce only what was legally possible, is equally a fallacy. However, it was a fallacy that served to offer a higher level of protection to beneficiaries by disabling trustees from asserting the physical truth. Lord Toulson was quick to assert that anything other than Lord Browne-Wilkinson’s model would result in a ‘fairy tale’, which is something that English law could not support. And yet the law had promoted such a model for centuries on account of the protection it offered to vulnerable parties – as Hohfeld’s table of jural correlatives and opposites demonstrates, it offered beneficiaries the highest conceivable level of protection: immunity.

Rather ironically, Lord Reed describes any analogy between tortious or contractual compensation and equitable compensation as entirely ‘artificial’ and ‘inapplicable’, and yet he finds that they would produce the same result. 63 His Lordship specifically cites cases that demonstrate the conceptual disparity between a restitutory compensation claim and a reparative compensation claim, but goes on to state that the beneficiary cannot be entitled to more than he has ‘in fact’ lost. 64 However, falsification never primarily looks to what has in fact been lost – it primarily looks to what should legally be present in the trust account because liability is primary.

Throughout their speeches, their Lordships appear to be under the impression that there is only one mode of analysis, resulting from the ‘stitching together’ of the common law and equity under the Judicature Act 1874, and that their role was merely to provide a tighter definition as to what the singular approach is. A Hohfeldian approach to the two forms of analysis demonstrates that there are indeed two models and that they are wholly incompatible with each other. They are conceptually distinct and consequently result in different remedial processes. Any attempt to assimilate them will be artificial and will fail to appreciate the nuances between the two models, which Hohfeld draws out so neatly.

In this case, the disability-based model would have produced a different answer to the duty-based model in finding in favour of the beneficiary. If, for whatever policy reasons there may be, such a result was ‘wrong’ their Lordships should have taken the bold step in discarding the disability-based model and instated a clearly defined duty-based approach to a trustee’s liability to account. However, their Lordships never contemplated any other result than that which the duty-based analysis would find. Lord Browne-Wilkinson did not have this luxury since the Court of Appeal had reached the very result he wished to avoid on a near-perfect application of the traditional disability-based approach. The speeches in AIB demonstrate a lack of appreciation for

62 AIB (n 2), 1528.
63 ibid, 1532.
64 ibid, 1537-38.
the shift that occurred in Target – indeed, they treated the case as if it was perfectly in line with orthodoxy.\(^6\) Given the strong disposition in both cases to find in favour of the solicitors, most likely due to the idea that it is the lender who ought to bear the risk of a transaction turning sour, their Lordships may well have opted for the duty-based approach in spite of having considered the disability-based model. However, that in itself should not exempt their Lordships for a lack of principled reasoning and understanding that two approaches were possible and, in light of the relevant authority, that the approach they opted for was novel and demanded justification.

**Conclusion**

The duty-based approach, which would find no wrongdoing and thus no causal link, and the disability-based approach, which would appreciate that a trustee had substitutively performed, both treat a well-behaving trustee alike. However, in respect of misbehaving trustees, the duty-based approach offers an escape if, with the benefit of hindsight, their misbehaviour cannot be said to have worsened the beneficiary’s position from what it would have been have they never misbehaved. The policy question is whether or not such a trustee should be held liable. Depending on that answer, a Hohfeldian analysis of obligations proffers two distinct suggestions as to how to achieve the different results.

Disability-based reasoning has been a longstanding niche of equity, which was adopted to protect vulnerable parties to a higher standard than merely demanding the compensatory damages owed at common law. Hohfeld himself believed in the division of common law and equity and that there are concepts, such as restitutory and compensatory claims, that are often incongruent.\(^6\) Disabilities and duties are distinct at every juncture: linguistically, substantively, and remedially. The lack of appreciation in AIB for the adoption of a conceptually distinct model of obligations in Target is unsatisfactory. Regardless which model their Lordships felt was just, the critical distinctions between the models should have been discussed. By assuming the existence of only one model and explaining it in a linguistically unjustifiable way, vulnerable parties are now no longer immune to the consequences of an unauthorised transaction, but the greater tragedy is the lack of appreciation for the fact they were once immune.

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