

Conscience and Unconscionability in English Equity

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Abstract

This thesis will consider the role and definition of conscience and unconscionability in English equity. Whilst conscience is at the heart of equity, surprisingly little has been written, either academically or juridically, about how equity uses and defines unconscionability. It is this significant gap that the thesis seeks to fill.

The thesis will ask and answer three questions. The first is how does equity conceptualise conscience? The thesis will demonstrate that equity adopts an objective conception of conscience, which is a modified version of the scholastic conception of conscience, which was used by the medieval Church. The second question is asking what the role of conscience in equity is. The thesis will demonstrate that the role of conscience is to provide an objective moral baseline by which to judge all parties. Conscience also has an important role to play in expanding, developing and adapting existing equitable principles to new circumstances. The third question is identifying the definition of unconscionability. This is done both by looking at some of the few existing academic writings on conscience as well as case studies on some of the major equitable claims, including breach of fiduciary duties and constructive trusts. The thesis offers a range of unconscionability indicia, which, taken together, outlines the meaning of unconscionability.

The aim of the thesis is to provide greater clarity into how equity operates and how it uses its conscience. This will be of use to judges, lawyers, and academics (and indeed law students) and will address the critics of equity who posit that conscience is subjective, vague, and leads to arbitrary and capricious judgments. With this clear definition, it will be demonstrated that equity is not subjective, nor vague, nor arbitrary, but rather provides a clearly identified path to justice.

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The Law

The law in the thesis is correct as of August 1, 2016.

Author's Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as References.

Work emanating from the research which this thesis is based upon has been published or presented elsewhere.

- Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4 Oxford Journal of Law and Religion 119-140
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- Richard Hedlund, 'Jungian Archetypes and Unconscionability in English Equity' (Conference Paper, SLS, 2015, York Law School, September 2015)

Chapter 1

Introduction

‘...this court can extend its hands of protection: it has a conscience to relieve...’¹

This thesis will address equity’s conscience. It will demonstrate how equity conceptualises its conscience, the role that conscience plays, and how equity defines unconscionable behaviour. This introduction will outline the rationale behind the thesis, look at the core questions being asked and answered, and outline the structure of the thesis.

Part 1: The rationale for the thesis

There are two things that may seem odd about English equity. The first is that equity seeks to remedy unconscionable behaviour; in effect, it does not seem to just enforce rules but also to regulate morality. The second is that despite the centrality of conscience, judges have been notoriously poor at explaining what is meant by conscience and unconscionable behaviour. So, at first glance, equity regulates morality but does not explain what that morality is. This must be a most peculiar legal system.

The purpose of this thesis is to explore the meaning and usage of conscience within English equity. What is equity’s conscience and what is meant by unconscionable behaviour? To answer these questions, the thesis must first embark on a historical journey, before studying the modern case law. It will consider theologians, philosophers and psychologists who have written on conscience and given meaning to the term, and see how this has influenced centuries of Lord Chancellors and Chancery judges. The thesis will not forget the final objective, namely understanding the contemporary meaning of unconscionability in English equity. It must be recognised, though, that cases currently finding their way through the Chancery Division owe much to their historical origins.

¹ *Norton v Rely* (1764) 2 Eden 286, 288; 28 ER 908, 909 (Lord Northington)

The thesis will not present a comprehensive examination of all perspectives on conscience. Such a study would be well beyond the scope of any single thesis. Chapter three will address a limited number of theories. These theories have been selected to give an overview of the field and, more importantly, because they have had an impact either directly on English equity, or played a role in English legal and political thought. As a legal thesis, the study will not stray far from the law, but at the same time the law is not wholly detached from other ideological currents in society, and to be properly understood the concept of conscience must be seen as a whole.

The subsequent chapters will explore the meaning and role of conscience in equity. This is an examination that has to be undertaken. Hudson laments that ‘what appears little in the modern literature on the juristic concept of equity is any discussion on what this notion of conscience means’.² Birks, an equity sceptic if ever there was one, was correct in challenging us to better understand the meaning of conscience in equity.³ It is difficult to use a legal system where its linchpin is vague and subject to competing theories that are, in many ways, diametrically opposed.

Conscience came to be the centrepiece of equity in medieval times, when (perhaps) there was more agreement on the nature of conscience. There are unfortunately few records of medieval Chancery judgments, though some will be considered in chapter four. However, concerns about the perceived subjectivity and arbitrariness of conscience go ‘back a long way’, and is raised in sixteenth-century commentary.⁴

Chancery clung on to conscience, but the impression given by some post-medieval judgments is that its definition was fading away. With Lord Chancellors encountering an ever increasing number of theories of conscience, it is not surprising that there might be uncertainty and contradicting statements. The centrality of conscience has been reaffirmed in modern times.⁵ However, equity still lacks an overarching theory of what its conscience means and how courts detect unconscionable behaviour. Turner has said that given the importance equity attaches to conscience, the lack of judicial

² Alistair Hudson, *Equity and Trusts*, (8th edn, Routledge, 2015), 1309

³ Peter Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23 *Melbourne University Law Review* 1, 21

⁴ Dennis R Klinck, ‘Lord Nottingham and the Conscience of Equity’ (2006) 67 *Journal of the History of Ideas* 123, 124

⁵ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705 (Lord Browne-Wilkinson); consider also *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516 (Lord Templeman); *Gibbon v Mitchel* [1990] 1 WLR 1304, 1310 (Millett J); *Mussen v Van Diemen’s Land Company* [1936] Ch 253, 261 (Farwell J); see also Alistair Hudson, *Equity and Trusts*, (6th edn, Routledge, 2009), 38-39

guidance is 'curious'.⁶ It has prompted Hudson to note that conscience is a deeply misunderstood aspect of equity.⁷

Part 2: The questions being asked and answered

This thesis will address three major questions. The emphasis is looking at how conscience is used in contemporary equity.

What is the nature of equity's conscience?

The first question is whether equity adopts an objective or subjective conception of conscience. By this is meant whether equity looks objectively at wrongdoing or subjectively asks whether the defendant personally believed he was acting wrongly. This can make a major difference in the outcome of litigation. The core difference is one of evidence: does the claimant have to prove wrongdoing to an ascertainable objective standard or does the claimant have to prove that the defendant knew he was acting wrongly? The thesis will demonstrate that equity adopts an objective conscience. In addressing this question, the thesis will review some theological, philosophical and psychological conceptions of conscience, in order to better understand the concept of conscience. Given the medieval link between the canon law and the Chancery, the thesis will demonstrate that equity adopted and then developed a medieval, scholastic conception of conscience, which is objective in nature. This leads to the next questions, if conscience is an objective framework for behaviour, how is it used by the courts, and how is that objective framework defined?

What is the role of equity's conscience?

The second question is asking what role conscience plays in equity. There has been much debate on this topic. Broadly speaking, there are two options (not necessarily contradictory). The first is that unconscionability is a cause of action in its own right, and that a claimant can seek a remedy whenever someone has acted unconscionably

⁶ David Turner, 'Relief Against Forfeiture of a Proprietary Interest: When Will Equity Come to the Rescue?' (2004) 23 University of Queensland Law Journal 464, 473

⁷ Hudson (n 2), 10

towards them. This view has been criticised for giving too broad a scope to equity and giving too much discretion to judges. The second option is that the role of conscience is the standard of behaviour against which equitable claims are judged. The claim must be brought for a recognised equitable right, such as breach of fiduciary duty, and conscience is used to assess wrongdoing. The wrongdoing can be objectively or subjectively assessed. The thesis will demonstrate that the role of conscience in equity is the latter, namely the standard of behaviour against which to judge parties. Further, as previously stated, the thesis will show that the standard of behaviour is an objective one.

The thesis will also posit that conscience, as the linchpin of equity, has a second role, in that it can be the driving force to develop new equitable claims or adapt existing ones to new circumstances. Whilst conscience nonetheless is not a cause of action in its own right, identifying unconscionable behaviour in new circumstances has helped equitable rights and remedies to grow and develop.

Having established that equity's conscience is an objective standard of behaviour, and that a remedy can be imposed against a person who falls below that objective standard, the thesis will continue by defining what English equity deems to be unconscionable behaviour.

What is the definition of unconscionability in equity?

What does equity mean by unconscionable behaviour? The thesis will posit a range of indicia of unconscionability, drawing on a range of sources. This will include looking theoretically at English equity's original link to Christian theology and the natural law, as well as studying case law in various equitable claims.

The thesis will show that the idea of unconscionability is complex and highly fact-dependent. The indicia of unconscionability comes in three parts. The first are indicia which are antecedent to the wrong, and involve looking at the context in which the dispute took place and the nature of the relationship between the parties. It will be shown that the standard of unconscionability varies between, for instance, a private family dispute and an arms-length commercial dispute. The second part are indicia which relate directly to the dispute. These indicia of unconscionability in this part will generally have to be made out in relation to the particular ingredients of each equitable claim. The specific indicia themselves includes looking at the balance of power

between the parties and standards of good behaviour such as acting in good faith. The third part are indicia which are posterior to the claim itself, which includes behaviour after the dispute and whether a claim was brought after an unacceptable delay.

The aim is that these indicia will help demonstrate what is meant by unconscionability in equity, and provide a framework for what has to be proven when an equitable claim is brought before a court.

Beyond the definition: the proper role of conscience

It is important at this stage to clearly delineate from the question that the thesis will not discuss, namely, should equity use unconscionability? The thesis will solely address the definitional questions of what conscience and unconscionability means. Of course, if the thesis should fail to find a definition of unconscionability, it would clearly be inappropriate to use unconscionability. However, as the thesis will posit a definition of unconscionability, any specific discussion of the appropriateness of using a test of unconscionability must be left for another time.

The question of the appropriateness of conscience is of course inherent in any attempt to define it. Whenever a judge criticises conscience for being vague or subjective, it is in essence a challenge to its continued judicial use. Similarly, whilst the indicia presented in this thesis are culled from the case law, they are of course subject to criticism. The thesis does not seek to justify the indicia beyond referring to their origins in the case law.

The question of the appropriateness of conscience has been discussed in academic papers, though seemingly less so in the case law. Samet argues that conscience remains relevant in the 21st century, as a means of regulating communal morality, fairness and ensuring an even playing field.⁸ Despite criticism, the thesis will show that equitable principles are commonly used in commercial disputes, and arguably there is a demand for a moral counterweight to the economic self-interest which otherwise seems to underpin capitalist commerce. Building on this, Harding similarly argues for the continued use of equity and its unconscionability test, saying that society may lose respect for the law if legal rules are strictly applied even where the outcome would be

⁸ Irit Samet, 'What Conscience can do for Equity' (2012) 3 Jurisprudence 13, 35

intrinsically unjust or where claimants are allowed to exploit the strict application of the rules for personal gain at the expense of weaker or innocent parties.⁹

A particular issue which is missing from these debates is why the role of equity and its conscience cannot be undertaken by the common law. Chapter five will posit that there are substantive and procedural differences between the common law and equity, which seem more to do with historical accident than with any deliberate attempt by the common law to somehow permit its rules to be exploited. This also leads to the question of whether equity and the common law should become fully merged.

These are important and complicated jurisprudential questions which demand proper attention. This thesis is not the place for those debates, but it is recognised that defining the role of conscience and the indicia of unconscionability is a very important part of the bigger debate.

Part 3: The structure of the thesis

The thesis consists of a number of chapters which will address the above three questions. In chapter two the thesis will review some of the available literature in order to clearly identify the conceptual gap that the thesis seeks to fill. That chapter will also discuss the methodology that will be employed in the later chapters.

Chapter three will look at some theoretical conceptions of conscience. The primary aim of this chapter is to get a clear sense of the scholastic conception of conscience, which was the main idea of conscience during the Middle Ages. This is the conscience which English equity adopted. The secondary aim of the chapter is to see the other ways in which conscience has been conceptualised. This is to demonstrate that there is no uniform idea of conscience. There has been much criticism against equity using conscience, and this criticism seems predicated on an assumption that equity uses a subjective conscience. Samet argues that those who criticise the use of unconscionability ‘tacitly presume a specific model of conscience which presents it as a merely subjective psychological disposition to follow your hunch about right and wrong’.¹⁰ The thesis will demonstrate that equity uses an objective conscience, but the subjective alternatives must be understood in order to fully respond to the critics.

⁹ Matthew Harding, ‘Equity and the Rule of Law’ (2016) 132 LQR 278, 298

¹⁰ Samet (n 8), 14

Chapter four will look specifically at the nature of equity's conscience. The chapter will go through the case law, starting in the early medieval chancery up to today, addressing solely the question of whether equity has an objective or subjective conscience. This chapter will demonstrate through the case law that equity uses an objective conscience, in essence, a modified legal version of the scholastic conscience.

Chapter five will look specifically at the role of equity's conscience. The aim of the chapter is to demonstrate that conscience is not a cause of action in its own right. The proper role of conscience is to be an objective standard of behaviour against which the actions of the parties can be judged. As a corollary to that, conscience is the linchpin around which equitable claims can continue to develop and expand to face new circumstances. This allows equity to remain relevant and stay up-to-date with a changing and developing society.

Chapter six and seven will start to look at how equity defines unconscionability. These chapters will look at some of the existing academic writing on unconscionability, to see what has been said and how those works have been unsatisfactory in providing a full explanation of unconscionability. Chapter six starts by looking at the law of reason and how that has translated into the equitable maxims and chapter seven will continue by looking at a few other theoretical suggestions on the meaning of unconscionability. Chapter seven will also introduce some of the psychological ideas that are relevant to understanding unconscionability.

Chapters eight through eleven will explore the meaning of unconscionability by looking at a range of different equitable claims. This is primarily done through case studies, and the chapters will attempt to tease out how the courts have identified unconscionability on the facts of individual cases. Mason has expressed hope that the perceived uncertainty caused by conscience 'will be dissipated by an increase in the number of decisions on a wide range of fact situations'.¹¹ The aim of these case studies is to build up clear indicia of unconscionability.

Chapter twelve will draw together the lessons learnt from chapter six and seven, as well as the case studies in chapters eight through eleven. In this final chapter the thesis will present a range of unconscionability indicia that the courts can use to determine whether, on the facts of future cases, parties have acted unconscionably.

¹¹ Anthony Mason, 'The place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, 258

The conclusion is that equity uses an objective conscience, in essence a modified form of the scholastic conception of conscience, that the role of conscience is to be an objective standard of behaviour against which parties are judged, and that there are clear indicia of unconscionability which judges can adopt. The aim of the thesis is to remove the uncertainties associated with conscience and unconscionability, and that this area of the law can become better understood and appreciated by judges, lawyers and law students.

Chapter 2

Literature Review and Methodology

As noted in the introduction, this thesis will address the role and meaning of unconscionability in English equity, but will shy away from a direct normative evaluation as to whether the use of unconscionability is appropriate. This is because the definition of conscience must come before the evaluation, and, as it turns out, conscience is a difficult term to define. The thesis will define equity's conscience by drawing on available legal, philosophical, theological, and psychological sources.

This chapter will provide a brief overview of some of the important works on conscience, especially those which deal with equity's conscience directly. Subsequently, the chapter will outline the methodology that the thesis will use, as well as justifying the use of legal history to help find the modern definition of equity's conscience.

Part 1: Reviewing the literature

This section will present an overview of some of the key works on equity and conscience. It is not a detailed literature review, since most of the literature will be engaged with in later chapters. As part of this overview, this section will outline the gap in legal understanding that this thesis seeks to fill.

Equity has been written about extensively. The origins of the juridical idea of equity was in Ancient Israel, and was later developed in Ancient Greece and Rome, before continuing in the early and medieval canon law and eventually coming into English law.¹ Jurists have written about equity, both by way of overviews as well as deeper historical studies.² The medieval and renaissance idea of equity has been examined by

¹ K Kahana Kagan, *Three Great Systems of Jurisprudence* (Stevens & Sons, 1955)

² Jamie Glister and James Lee, *Hanbury and Martin on Modern Equity* (20th edn, Sweet & Maxwell, 2015); Alastair Hudson, *Equity and Trusts* (8th edn, Routledge, 2015); Sue Tappenden, 'The Role of Equity in a Changing Society: From Ancient Greece to Present Day New Zealand' (2015) 21 *Trusts & Trustees* 389-398; Gary Watt, *Equity Stirring: The Story of Justice Beyond the Law* (Hart, 2009); Sarah Worthington, *Equity* (2nd edn, OUP, 2006); Darien Shanske, 'Four Theses: A Preliminary to an Appeal to Equity' (2004-2006) 57 *Stanford Law Review* 2053; M Drakopoulou, 'Equity, Conscience, and the Art of Judgment as *Ius Aequi et Boni*' (2000) 5 *Law Text Culture* 345; Margaret Halliwell, 'Equity as Injustice: The Cohabitant's Case' (1991) 20 *Anglo-American Law Review* 500; Ralph Newman, 'The Place and Function of Pure Equity in the Structure of Law' (1964-1965) 16 *Hastings Law Journal* 401;

Fortier, who ventures beyond its legal usage.³ There have also been studies on the work of the medieval Chancery.⁴ Additional works have been done on equity in other common law jurisdictions.⁵ This thesis does not seek to add anything substantial to the general understanding of equity. The sole focus is on equity's conscience and the indicia of unconscionability.

Conscience

However well-known conscience is, there is less written about it than one might think.⁶ By using the works that exists, conscience has been conceptualised in different ways, and some of these ideas will be discussed in chapter three. To begin with, there are those who argue that conscience does not exist.⁷ Most theologians, philosophers and psychologists however do accept that conscience exists as a concept. It is often referred to as the 'soft inner voice that tells you when you have done wrong', but the thesis will demonstrate that conscience is much more than that, albeit that there is no theoretical agreements on what it actually is.⁸

Different attempts have been made to taxonomise the various theories of conscience.⁹ Some of those categorisations have focused on the theoretical bases of conscience, others have tried to categorise conscience based on different ideas if its

F Maitland, *Equity: A Course of Lectures* (A Chaytor and W Whittaker (eds), 2nd edn, revised J Branyate, CUP, 1936); H Hanbury, 'The Field of Modern Equity' (1929) 45 LQR 196

³ Mark Fortier, *The Culture of Equity in Early Modern England* (Ashgate, 2005); Mark Fortier, *The Culture of Equity in Restoration and Eighteenth-Century Britain and America* (Ashgate, 2015)

⁴ P Tucker, 'The Early History of the Court of Chancery: A Comparative Study' (2000) 115 *The English Historical Review* 791-811; Timothy Haskett, 'The Medieval English Court of Chancery' (1996) 14 *Law & History Review* 245; William Holdsworth, *A History of English Law, Volume 2* (4th edn, Methuen, 1936, reprinted 1966); Willard Barbour, 'Some Aspects of Fifteenth-Century Chancery' (1917-1918) 31 *Harvard Law Review* 834-859

⁵ Edwin Woodruff, 'Chancery in Massachusetts' (1889) 5 LQR 370; Thomas Main, 'Traditional Equity and Contemporary Procedure' (2003) 78 *Washington Law Review* 429

⁶ Peter Fuss, 'Conscience' (1964) 64 *Ethics* 111, 111; Timothy Potts, *Conscience in Medieval Philosophy* (CUP, 1980), 1

⁷ Karen S Feldman, *Binding Words: Conscience and Rhetoric in Hobbes, Hegel, and Heidegger* (Northwestern University Press, 2006), 4; Anders Schinkel, *Conscience and Conscientious Objections* (Pallas Publications, 2007), 124

⁸ Arnold Tkacik, 'Conscience: Conscious and Unconscious' (1964) 4 *Journal of Religion and Health* 75, 76

⁹ Thomas Hill Jr, 'Four Conceptions of Conscience' in Ian Shapiro and Robert Adams (eds), *Integrity and Conscience* (New York University Press, 1998), pp 17 onwards; Allen Wood, *Kantian Ethics* (CUP, 2008), 182; Douglas Langston, *Conscience and Other Virtues: From Bonaventure to MacIntyre* (The Pennsylvania State University Press, 2001), 99-100; Ryan Lawrence and Farr Curlin, 'Clash of Definitions: Controversies About Conscience in Medicine' (2007) 7 *American Journal of Bioethics* 10, 10

role and purpose. Arguably, one can identify two categories in which any definition of conscience will fall.

The first category is what theoretical base a conception of conscience has, namely from which school of study does the theory of conscience come from. Three broad bases exist: theological, philosophical, and psychological. The second category is asking what moral baseline a conception of conscience uses. Broadly speaking, there are two options: an objective and a subjective baseline. Is an action judged based on an objective baseline, derived from an external source of morality, or is an action judged based on a subjective baseline, derived from an internal source of morality. In the end, of course, because people have different moral training, all decisions of conscience have some subjective element to it.¹⁰ However, the question is whether, in a community, everyone chooses their own morality or taps into a communal moral source.

Conscience in the law

Given that conscience is at the heart of equity, one reasonably expects that much will have been written about how equity conceptualises conscience. The reality is, however, the opposite. Few judgments engage with conscience as a concept, and although the facts of each case give examples of unconscionability, an overarching theory of conscience is absent.

The judicial debate on using the test of unconscionability is polarised. Judges have, in support of unconscionability, suggested that it is no different from other general legal terms, which have been given clear (and thus formalised and predictable) meanings. One comparison in the 1960s was to unjust enrichment, which has subsequently been clarified by lawyers and academics.¹¹ This suggests that unconscionability, if properly analysed, can also be clarified to a similar standard. Other judges have questioned the concept, saying unconscionability is vague. Lord Simonds said that he found ‘little help in such generalities’ as conscience and unconscientious behaviour.¹² Similarly, Kirby P stated that conscience will lead to

¹⁰ Hill (n 9), 19

¹¹ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 301 (Edmund Davies LJ)

¹² *Ministry of Health v Simpson* [1951] AC 251, 276 (Lord Simonds); *National Westminster Bank v Morgan* [1985] AC 686, 709 (Lord Scarman); *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 392 (Lord

decisions which are ‘partly impressionistic’.¹³ These statements inherently address the appropriateness of equity using a test of unconscionability, but again, the thesis will not engage with that question. Rather, the thesis takes the unifying message from these statements as being that unconscionability has to be better defined, and that this is something the judges have not done. Its appropriateness can only be properly evaluated once it has been defined.

There have been academic studies on the legal idea of conscience, however not in the field of equity. These have been jurisprudential and human rights studies on civil disobedience (conscientious objection) and freedom of religion (freedom of conscience). These studies will be used, but only in so far as they discuss theoretical and philosophical approaches to conscience itself.¹⁴

The main equity jurist to examine conscience is Klinck.¹⁵ His work will be discussed in chapter seven. Other jurists looking at equity’s conscience, also discussed in chapter seven, include Hudson and Macnair.¹⁶ The role of unconscionability has also been covered in academic writing dealing with specific equitable rights and remedies; many of these works will be covered in the later chapters.¹⁷ However, anyone criticising equity for the fact that its conscience is vague can be forgiven. Millett LJ has stated that there is no clear definition in order for conscience to be able to adapt to new situations.¹⁸ That is a valid statement in that equity strives for flexibility over rigidity, but at the same time there has to be some understanding of what conscience means. The law needs to be able to say what is conscionable and what is unconscionable if it is to be anything other than arbitrary. It is this gap in the legal understanding of conscience that this thesis will seek to cover.

Nicholls); *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491, [58] (Sedley LJ)

¹³ *PS Chellaram & Co Ltd v China Ocean Shipping Co (The Zhi Jiang Kou)* [1991] 1 Lloyd’s Law Reports 493, 512 (Kirby P) (NSWCA)

¹⁴ For instance, Schinkel (n 7); William Galston, ‘Should Public Law Accommodate the Claims of Conscience’ (2014) 51 San Diego Law Review 1, 9-12; Candice Delmas, ‘False Convictions and True Conscience’ (2015) 35 Oxford Journal of Legal Studies 403-425

¹⁵ In particular, Dennis R Klinck, ‘The Nebulous Equitable Duty of Conscience’ (2005-2006) 31 Queen’s Law Journal 206

¹⁶ Alastair Hudson, *Great Debates in Equity and Trusts* (Palgrave, 2014), Ch 1; Mike Macnair, ‘Equity and Conscience’ (2007) 27 Oxford Journal of Legal Studies 659

¹⁷ Consider, Nicholas Hopkins, ‘Conscience, Discretion, and the Creation of Property Rights’ (2006) 26 Legal Studies 475

¹⁸ *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1, 9 (Millett LJ)

Conscience in theology

The early works on conscience were theological. Key works will be considered in chapter three.¹⁹ The first to write extensively on conscience were the medieval scholastics, including the influential theologians St Bonaventure and St Thomas Aquinas. Chapter three will focus on the scholastics, since the scholastic idea of conscience was predominant in medieval Europe at the time when English equity first emerged. Their influence remains today, with Aquinas being credited with playing a ‘pivotal role’ in the development of ‘Western moral and political theory’.²⁰ Aquinas’ work on morality and natural law has been interpreted in many different ways, but the thesis will focus on his definition of conscience.²¹ The link between the scholastic conception of conscience and medieval equity will be expanded upon in chapter four, which traces the theory into case reports and judgments.

Conscience was reinterpreted by Protestant theologians, including the influential theologians Martin Luther and John Calvin. Later, the Anglican bishop Joseph Butler made important contributions to the development of the idea of conscience. In order to fully understand the modern, subjective, idea of conscience the thesis will more briefly consider these Protestant theologians.

Conscience in philosophy

Conscience was further examined by philosophers, starting in the Age of Enlightenment.²² This removed conscience from the religious, Christian sphere and repackaged it for the “enlightened”, rational mind. This is an important step in that it shows that conscience is not intrinsically linked to theology. Important Enlightenment philosophers include Thomas Hobbes and Immanuel Kant. The thesis will also consider modern philosophers, including Gilbert Ryle and Douglas Langston.

¹⁹ Consider also, Robert Hutcheson, ‘The Nature and Validity of Conscience and Moral Principle’ (1919) 12 *Harvard Theological Review* 435-451

²⁰ Anthony Liska, ‘Right Reason in Natural Law Theory’ in Jonathan Jacobs, *Reason, Religion, and Natural Law: From Plato to Spinoza* (OUP, 2012), 156

²¹ Eileen Sweeney, ‘Thomas Aquinas on The Natural Law Written on Our Hearts’ in Jonathan Jacobs, *Reason, Religion, and Natural Law: From Plato to Spinoza* (OUP, 2012), 133-135; Kevin Flannery SJ, ‘John Finnis on Thomas Aquinas on Human Action’ in John Keown and Robert George, *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP, 2013), 118

²² Consider Michel Despland, ‘Can Conscience Be Hypocritical? The Contrasting Analyses of Kant and Hegel’ (1975) 68 *Harvard Theological Review* 357-370

Conscience in psychology

Psychologists have also considered conscience and how people understand and utilise morality. The thesis will consider the two great psychologists Sigmund Freud and Carl Gustav Jung, whose theories of the human psyche led them to present detailed theories of conscience. Again, this is important since it shows that conscience is not purely an abstract theological or philosophical idea, but also has scientific credence.

Law and morality

The question of what is unconscionable is a moral question. It is an evaluative statement about acceptable human behaviour. Inherently, it raises the question of the proper interplay between law and morality. Much jurisprudential work has been written on this topic.²³ The judges, however, have written little about morality. Lord Sumption has highlighted the judicial hesitation to answering questions of morality, saying such questions were the proper purview of Parliament.²⁴

This thesis will not directly address the proper relationship between law and morality, and whether moral norms should be developed and enforced judicially. The aim is solely to identify what indicia of unconscionability, which clearly are moral norms, are used in equity. It is a statement of how it is, which necessarily precedes a statement of what it should be.

The divide between the “is” and the “should be” is not always an easy one to draw, not least since equity enforced legally approved moral norms. For instance, Samet writes that ‘the most convincing justifications for fiduciary duties suggest that they embody moral duties which can be legitimately enforced by the state’.²⁵ In *Parker v McKenna*, the fiduciary no-conflict rule was described as ‘founded upon the highest

²³ Consider Lon Fuller, ‘The Case of the Speluncean Explorers’ (1948-1949) 62 *Harvard Law Review* 616 – 645; HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593 – 629; Brian Leiter (ed), *Objectivity in Law and Morals* (CUP, 2001); Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press, 1969); John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP, 2011)

²⁴ *R (on the application of Nicklinson) v Secretary of State for Justice* [2014] UKSC 38, [2014] 3 WLR 200, [207] (Lord Sumption); consider also *Shaw v DPP* [1962] AC 220, 275 (Lord Reid); *C (A Minor) v DPP* [1996] AC 1, 28 (Lord Lowry)

²⁵ Irit Samet, ‘Fiduciary Loyalty as Kantian Virtue’ in Andrew Gold and Paul Miller, *Philosophical Foundations of Fiduciary Law* (OUP, 2016), 130

and truest principles of morality’ rather than being ‘a technical or arbitrary rule’.²⁶ However, this position is far from clear-cut.²⁷ For instance, in *Bray v Ford*, a seminal case on fiduciaries, Lord Herschell stated that the no-profit rule was not ‘founded upon principles of morality’.²⁸ These divides and disagreements are important to take note of, since they speak to the different fundamental justifications for the equitable principles.

In the end, the thesis will posit that equity is based upon moral norms. It is not always possible to avoid that normative analysis when seeking to define what the law is, though finding the “is”, what the indicia of unconscionability are, remains the sole aim of the thesis.

Law and psychology

The interdisciplinary study of law and psychology is relatively modern. Psychological works will be used to explore the nature of conscience as well as to uncover the indicia of unconscionability.

Law and psychology ‘share a basic preoccupation: understanding the nature of human thought and action’.²⁹ Decades ago, Redmount lamented that jurists failed to discuss ‘theories of man’ as part of their understanding of the legal system.³⁰ Similarly, Haward raised concerns that changes to the law were made without an ‘understanding of behavioural mechanisms’ which could improve the law, both substantively and procedurally.³¹ Reasons why the law was slow to embrace psychology might have been the fallacies and limitations of early psychology; a gap which was filled by the still popular school of law and economics.³²

²⁶ *Parker v McKenna* (1874-75) LR 10 Ch App 96, 118 (Lord Cairns LC); also *Armstrong v Jackson* [1917] 2 KB 822, 824 (McCardie J)

²⁷ Matthew Conaglen, ‘Public-private intersection: comparing fiduciary conflict doctrine and bias’ [2008] Public Law 58, 70

²⁸ *Bray v Ford* [1986] AC 44, 51 (Lord Herschell)

²⁹ Oliver Goodenough, ‘Can Cognitive Neuroscience Make Psychology a Foundational Discipline for the Study of Law?’ in Belinda Brooks-Gordon and Michael Freeman (eds), *Law and Psychology* (OUP, 2006), 77; L.R.C. Haward, ‘A Psychologist’s Contribution to Legal Procedure’ (1964) 27 *Modern Law Review* 656, 656

³⁰ Robert Redmount, ‘Psychological Views in Jurisprudential Theories’ (1958-1959) 107 *University of Pennsylvania Law Review* 472, 472

³¹ Haward (n 29), 657

³² Goodenough (n 29), 78

Psychology has in fact been used judicially for a long time, though perhaps without any clear theoretical underpinning. Oliver Wendell Holmes was an early jurist to write in-depth about the role of psychology in law, discussing in particular how subconscious factors influence human decision-making.³³ This will be looked at in chapter seven, when exploring how psychological factors both explain behaviour and how they can be exploited.

Sigmund Freud wrote about law and psychology.³⁴ Freud said that early authority, such as parents, form the child's superego wherein is found the conscience. The law, as people grow older, replaces the parents' authority, and people fear legal consequences in the same way they fear rebuke from their parents.³⁵ Freud wrote that the law, in short, is a reflection of our desire for order and community.³⁶ It was an early psychological treatise on why the law is obeyed, question later taken up by the Scandinavian legal realists.³⁷

The law has gradually taken psychological concepts into account in its development. An important early contribution was the eye-witness guidance issued in *R v Turnbull*.³⁸ Juries must be instructed about the potential fallacies of eye-witness accounts, such as misidentification and loss of memory.

In more recent times there has been an increase in the interdisciplinary study of law and psychology.³⁹ These studies have tended to focus on criminal law and trial procedure, but have branched out into other areas of law.⁴⁰ The studies have also

³³ Anne C Dailey, 'Holmes and the Romantic Mind' (1998-1999) 48 *Duke Law Journal* 429, 431; see Oliver Wendell Holmes, 'The Path of the Law' (1896-1897) 10 *Harvard Law Review* 457, 477; Oliver Wendell Holmes, *The Common Law* (Little, Brown & Co, 1881), 1

³⁴ Consider, e.g., Alistair Hudson, *Equity and Trusts*, (8th edn, Routledge, 2015), 1315

³⁵ Sigmund Freud, *Civilization and Its Discontents* (The Hogarth Press, 1957), 137; also Redmount (n 30), 500

³⁶ Freud (n 35), 59-60

³⁷ Redmount (n 30), 473, 483-484, 487; see eg Karl Olivecrona, *Law as Fact* (OUP, 1939), 16, 46

³⁸ *R v Turnbull* [1977] 2 QB 871; following on from Lord Devlin's report on the issue, *Report of the Departmental Committee on Evidence of Identification* (Cmnd 338, 1976); see Jenny McEwan, 'Breaking Down the Barriers' in Belinda Brooks-Gordon and Michael Freeman (eds), *Law and Psychology* (OUP, 2006), 10

³⁹ James Ogloff, 'Law and Psychology in the 1990s: The Broadening of the Discipline' (1990) 69 *Nebraska Law Review* 1, 1; Belinda Brooks-Gordon and Michael Freeman, 'Law and Psychology: Issues for Today' in Belinda Brooks-Gordon and Michael Freeman (eds), *Law and Psychology* (OUP, 2006), 1; Robert Hillman, 'The Limits of Behavioural Decision Theory in Legal Analysis: The Case of Liquidated Damages' (1999-2000) 85 *Cornell Law Review* 717, 718; Michael Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (OUP, 2013)

⁴⁰ Brooks-Gordon and Freeman (n 39), 2-3; Jeremy Blumenthal, 'Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications' (2005) 29 *Law and Psychology Review* 1

looked at how people react and respond to law and legal changes, summed up under the broad heading of “behavioural decision theory” (BDT).⁴¹ The focus tends to be on judges, juries and witnesses.⁴² People can make decisions based on emotions, feelings, biases, and other misunderstandings of facts, without necessarily being aware of how they are being guided by their unconscious.⁴³ This is important to bear in mind as judges and juries evaluate evidence and assess witnesses.

The contribution that psychology will make to this thesis is, firstly, in chapter three, looking at conscience itself and how people engage in moral reasoning. Secondly, the thesis will look at BDT and how psychological factors impact decision-making. Psychological factors such as naiveté or optimism can be unscrupulously exploited, which the thesis will posit forms part of the definition of unconscionable behaviour. This will be discussed in chapter seven and then picked up on in the case comments in the subsequent chapters.

Equally, it is important to take note of what psychology cannot do. Whilst psychology explains human behaviour, it in itself does not present any value judgments on what is right or wrong; that task still falls to social morality, which is, in part, expressed through the law.⁴⁴ This demonstrates that the definition of unconscionable behaviour remains a legal construct, which this thesis will uncover, but that psychology has a role to play in finding that definition.

The gap

It is clear that too little has been written about equity’s conscience. The reasons behind this are many, and include a judicial hesitation to engage with morality. This is regrettable, given the reaffirmed centrality of conscience in equity. This thesis will weave together theories from theology, philosophy and psychology with the law to cover that gap in legal understanding.

⁴¹ Jeffrey Rachlinski, ‘The “New” Law and Psychology: A Reply to Critics, Sceptics, and Cautious Supporters (1999-2000) 85 Cornell Law Review 739, 739; Hillman (n 39), 718

⁴² Rachlinski (n 41), 740

⁴³ Paul Bennett Marrow, ‘The Unconscionability of a Liquidated Damages Clause: A Practical Application of Behavioural Decision Theory’ (2001) 22 Pace Law Review 27, 54

⁴⁴ Carl Gustav Jung, *Aion: Researches into the Phenomenology of the Self* (2nd edn, Routledge, 1968), 53; Michael S Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (OUP, 2013), 63

Part 2: Methodology

The purpose of this thesis is to fill that gap, by reviewing the available primary and secondary materials to present a definition of equity's conscience and the meaning of unconscionability. This section will consider the methodology that will be used to answer the three questions posed by the thesis; namely, how is equity's conscience characterised, what role does equity's conscience have, and how does equity define unconscionability. In answering those questions the thesis will take a two-pronged approach. It will consider both the theory that underpins the law as well as studying the case law that builds up the law. By using the theory and synthesising the cases the thesis will explain the role of equity's conscience and the indicia of unconscionability.

The thesis thus adopts both "top-down" and "bottom-up" reasoning.⁴⁵ Top-down reasoning 'invents or adopts a theory' about how the law should look, and ensures thereafter that all juridical decisions conforms to this theory. Bottom-up reasoning 'starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there'. The former approach broadly mirrors the civil law, starting with overarching legal theories; the latter approach roughly corresponds to the common law system of gradually creating theory out of comparing and contrasting the reasoning of a series of judicial decisions.⁴⁶

Top-down reasoning and unconscionability

There has been much debate about the proper role of theory in the common law. Whilst some posit that theory undoubtedly has a role in informing the law, others have argued that the common law shows distrust towards 'abstract philosophy' and that the law must come out of the cases.⁴⁷ It seems clear, however, that theory must play some role,

⁴⁵ Richard Posner, 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 433

⁴⁶ Joseph Hutcheson, 'This Thing Men Call Law' (1934-1935) 2 *University of Chicago Law Review* 1, 3; *Ringsted v Lady Lanesborough* (1783) 3 *Dougl* 197, 203; 99 *ER* 610, 613 (Lord Mansfield); *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] *HCA* 68, 208 *CLR* 516, [72] (Gummow J); Roscoe Pound, 'What is the Common Law' (1936-1937) 4 *University of Chicago Law Review* 176, 186

⁴⁷ Kagan (n 1), 69; Posner (n 42), 435; Joachim Dietrich, 'Giving Content to General Concepts' (2005) 29 *Melbourne University Law Review* 218, 228; Hutcheson (n 43), 3; Edward Levi, 'An Introduction to Legal Reasoning' (1947-1948) 15 *University of Chicago Law Review* 501, 501; *McGinty v Western Australia* [1996] *HCA* 48; (1996) 186 *CLR* 140; *Edwards v Kumarasamy* [2016] *UKSC* 40, [63] (Lord Carnwath)

both in terms of establishing the law but also to inform new cases on novel points. Judicial reasoning by analogy can only be taken so far.⁴⁸

Given the objections to “top-down” reasoning in the common law system, is this an appropriate approach for understanding unconscionability in equity? The answer is yes, based on the fact that equity, given its historic origins, shares much in common with the civil law tradition.⁴⁹ Indeed, in the medieval Chancery judgments did not stand as precedent, and the appropriateness of following precedent in equity was discussed as late as in the 17th century.⁵⁰

In the 19th century, Royal Commissions argued for reforms to the judiciary, which would lead to the Judicature Acts of 1873 and 1875. The first Commission report stated that numerous ‘mischiefs’ had arisen by having multiple courts with separate jurisdictions, in particular the ping-pong effect of parties moving their case between courts depending on what claims and remedies they sought. The Commission opined that those mischiefs are based ‘in part [on] the different principles by which the different Courts are governed, and the different systems of law from which those principles are derived’.⁵¹ Importantly, the Commission writes that the ‘Court of Equity, for instance, acts on the conscience of the party, and in a great degree administers justice according to the principles of the Civil Law’.⁵² English equity is based on the Civil Law, in particular the ecclesiastical Canon Law and Roman law before it. This historical origin will be outlined in chapter three. It suggests that it is appropriate, when looking at equity, to start with a top-down approach, to see what theory of unconscionability underpins the system.

⁴⁸ *Malnak v Yogi* 592 F.2d 197, 208 (1979), (Adams CJ); see *R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [37], [44], [50] (Lord Toulson); *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* [1983] HCA 40, (1983) 154 CLR 136, [23] (Mason ACJ and Brennan J)

⁴⁹ Hudson (n 34), 10

⁵⁰ *Fry v Porter* (1670) 1 Modern 300, 307; 86 ER 898, 902 (Vaughn CJ)

⁵¹ Chancery Commission, Copy of the First Report of Her Majesty’s Commissioners appointed to inquire into the Process, Practices, and System of Pleading in the Court of Chancery, (W. Clowes & Sons, 1852), 1

⁵² *Ibid*, 1

Bottom-up reasoning and unconscionability

The thesis will thereafter adopt a “bottom-up” approach by looking at case law. In chapters eight through eleven, the thesis will engage in a series of case studies aimed at identifying the indicia of unconscionability. It is emphasised that these chapters are solely focused on that task; they do not aim to present a comprehensive understanding of the law in each of the areas covered. As such, the cases are chosen primarily for their factual matrix, which leads to the identification of relevant indicia, as opposed to any standing the case might have as a “key” or “leading” case. Many of the cases will be familiar to the equity jurist but others will be relatively obscure first-instance decisions.

This bottom-up study has been recommended by Sir Anthony Mason, the former Chief Justice of the High Court of Australia. Mason has expressed hope that the perceived uncertainty caused by conscience ‘will be dissipated by an increase in the number of decisions on a wide range of fact situations’.⁵³ Australian case law is more fleshed out in its treatment of conscience, and it is here we will find the most assistance when trying to construct the modern legal understanding of conscience. Australian law will be used interchangeably with English law, due to their broad similarities; whilst recognising that some suggest that the two are, at times, ‘markedly different’.⁵⁴

Conclusion

The aim, in chapter twelve, is to bring the two strands together to present a comprehensive picture of the indicia of unconscionability.

Part 3: The use of legal history explained

For a thesis that will explain what the modern meaning of conscience and unconscionability is, it will spend a surprising amount of time in the past. This should not lead to any miscomprehension that this is a historical study. Rather, it recognises

⁵³ Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 LQR 238, 258

⁵⁴ Derek Davies, ‘*Publication Review*, Interpreting Principles of Equity: The W.A. Lee Lectures 2000-2013’ (2014) 130 LQR 696, 696

that the answer to “what is the law” is often best understood by going back in time. This section will seek to justify the use of legal history to answer the three questions addressed in the thesis.

Historical methodology

It is important to note that there is no set methodological approach to the study of history. The noted legal historian Sir John Baker has written that he does not have a set methodology, but rather that legal historical research is a ‘creative process’.⁵⁵ However, historians have tried to posit some theoretical fundamentals that underpins historical research.⁵⁶ The starting point is what Tosh refers to as ‘historical awareness’, namely ‘respecting the autonomy of the past, and attempting to reconstruct it in all its strangeness before applying its insights to the present’.⁵⁷ The past was a different society, including having different social mores. Sewell posits that different points in time are ‘heterogeneous’, and that the way that people act, think, behave, rationalise, and so on, differ.⁵⁸ Any historical observation has to be seen as part of the wider social context.⁵⁹ This becomes very important when considering case law from the past. This does not imply that the world radically changes with each era, epoch, or even decade. Rather, Sewell writes that historical development is ‘always a mix of continuity and change’.⁶⁰ Tosh similarly writes that historical study is a ‘mixture of estrangement and familiarity’, and that whilst some things change others have remained the same.⁶¹

A methodological battleground has been whether legal research differs from general social science research, to which law can be taken to belong. Sewell writes that a difference between history and the social sciences is that historical research is “descriptive” in that it seeks to ‘capture the uniqueness and particularity of its object’

⁵⁵ Sir John Baker, ‘Reflections on “Doing” Legal History’ in Anthony Musson and Chantal Stebbings, *Making Legal History: Approaches and Methodologies* (CUP, 2012), 16; also Dirk Heirbaut, ‘Exploring the Law in Medieval Minds’ in Anthony Musson and Chantal Stebbings, *Making Legal History: Approaches and Methodologies* (CUP, 2012), 118

⁵⁶ Consider John Tosh, *The Pursuit of History* (6th edn, Routledge, 2015); William Sewell Jr, *Logics of History: Social Theory and Social Transformation* (University of Chicago Press, 2005); E.H. Carr, *What is History?* (2nd edition reprint, Palgrave, 2001); R. G. Collingwood, *The Principles of History* (W.H. Dray and W. J. van der Dussen (eds), OUP, 1999)

⁵⁷ Tosh (n 56), 11; Richard Evans, *In Defence of History* (Granta Books, 1997), 17

⁵⁸ Sewell (n 56), 9

⁵⁹ Tosh (n 56), 29

⁶⁰ Sewell (n 56), 9

⁶¹ Tosh (n 56), 27

whereas social science research is “explanatory” in that it seeks to ‘establish general laws or at least valid generalizations’.⁶² This divide has not been universally accepted, with Carr opining that historians are ‘not really interested in the unique, but in what is general in the unique’.⁶³ It has led to calls for historical and social science methodologies to be combined. Surely legal history straddles the two; precedent allows for both an insight into contemporary society in all its complexity, as well as a rich picking-ground for general principles which can be brought forward and applied to later problems.

This raises the important question of whether historical research can reveal anything about current issues. Historians tend to say yes, but with an important caveat. Tosh argues that ‘historical training should encourage a less blinkered approach to current problems’, provided that the historical research looks at the wider context rather than addressing individual events separately.⁶⁴ It allows for lessons to be learnt and trends identified, which can be used to address current problems and indeed predict future actions. Carr similarly posits that history can be ‘mastered’ and understood ‘as they key to the understanding of the present’.⁶⁵ This is because, as Collingwood puts it, in order to explain an event one must provide ‘an account of its origin’.⁶⁶ Gawronski puts it nicely when he wrote that the historian’s ‘ambitious hope’ is that an understanding of the past ‘will provide worthwhile guidelines for future use’; as such history is an attempt to explain the present and hypothesise future trends, but without pretending to prophesise specific events.⁶⁷

Legal history

The relevance of legal history can be extrapolated from this. The law as it is today has emerged from the past, and thus legal historical research can help explain the current legal framework.⁶⁸ Beyond that, Wilson argues that historical legal research can

⁶² Sewell (n 56), 3

⁶³ Carr (n 56), 57

⁶⁴ Tosh (n 56), 30

⁶⁵ Carr (n 56), 20

⁶⁶ Collingwood (n 56), 140

⁶⁷ Donald Gawronski, *History, Meaning and Method* (Sernoll Inc, 1967), 7

⁶⁸ Consider *The Mayor’s Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] UKSC 18, [2016] 2 WLR 1148, [13] (Lord Hodge); Jonathan Rose, ‘Studying the Past: the Nature and Development of Legal History as an Academic Discipline’ (2010) 31 *Journal of Legal History* 101, 110

provide a ‘comprehensive setting’ for exploring future law reform.⁶⁹ For instance, some legal theorists, such as Holmes and Roscoe Pound, ‘studied history to rid the law of rules that were only pointless survivals of a past that had disappeared’.⁷⁰

Whilst it is clear that legal history can help explain and justify the current law, and provide a platform for law reform arguments, there is no consensus on the role of history in legal studies. Holmes was a proponent positing that the ‘rational study of law is still to a large extent the study of history’.⁷¹ Others are more hesitant, saying that modern society is too changed for the cases of old to have any value.⁷² Given the theoretical fundamentals identified above, societal changes have to be understood and respected, even if one is a proponent of legal history.

This thesis argues that using legal history is appropriate. Precedent and other primary and secondary legal sources explain where specific legal principles came from, how and why they might have changed over time, and helps assess whether the law requires future change. As for conscience in equity, legal history can tell us how the role and meaning of conscience has developed over the centuries. Watt, rightly, highlights the need to properly distinguish the modern legal conscience from any religious or moral conscience of the past.⁷³ However, much can be gained by understanding how conscience was seen in medieval society at the genesis of English equity, why Chancery adopted conscience as its linchpin, and the principles that underpinned the finding of unconscionable behaviour.

Interestingly, as noted, the use of precedent in equity has not always been accepted. In *Fry v Porter*, Vaughan CJ stated that ‘equity is a universal truth, and there can be no precedent in it’.⁷⁴ In short, “top-down”; there is a primary theory to be applied and thus precedent has no value. Lord Keeper Bridgman replied by saying that precedents are useful ‘for in them we may find the reasons of the equity to guide us’. Bridgman

⁶⁹ Sarah Wilson, *The Origins of Modern Financial Crime: Historical Foundations and Current Problems in Britain* (Routledge, 2014), 11

⁷⁰ David Rabban, ‘The Historiography of Late Nineteenth-Century American Legal History’ (2003) 4 *Theoretical Inquiries in Law* 541, 552

⁷¹ Oliver Wendell Holmes, ‘The Path of the Law’ (1896-97) 10 *Harvard Law Review* 457, 469; Richard Posner, ‘Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship’ (2000) 67 *University of Chicago Law Review* 573, 573

⁷² See, for instance, *R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [34] (Lord Toulson); *Williams & Glyn’s Bank Ltd v Boland* [1981] AC 487, 511 (Lord Scarman)

⁷³ Gary Watt, ‘Unconscionability in Property Law: A Fairy-Tale Ending?’ in Martin Dixon and Gerwyn Griffiths (eds), *Contemporary perspectives on property, equity and trusts law* (OUP, 2007), 118

⁷⁴ *Fry v Porter* (n 47), 902 (Vaughn CJ)

continued by saying that it would be ‘strange’ to ‘disturb and set aside what has been the course for a long series of time and ages’, given that earlier judges had invested time and effort to arrive at the correct outcome.⁷⁵ The court agreed to use precedent.⁷⁶

The use of precedent in equity is today uncontroversial, but the courts remain in two minds when it comes to using older precedent. There seems to be broad agreement that legal history is appropriate in order to understand the origins of legal principles. This helps understand the purpose, role and scope of those principles.⁷⁷ However, concern has also been raised not to apply old precedent too strictly, because they are fact specific and society changes.⁷⁸ Viscount Haldane argued that centuries-old fact specific outcomes might confuse rather than clarify, but that the cases do point to the principle that underlined the fact-specific outcome.⁷⁹ In support of this it has been argued that the ‘development of law case by case not only illustrates the boundaries of a principle, action or conclusion; that development *is* the law’.⁸⁰ It is appropriate to look at historical legal sources to understand equitable principles, but what can they reveal about the modern meaning of unconscionability?

Historical study of unconscionability in equity

There have been academic concerns about the lack of history in equity. Klinck suggests that judicial references to conscience are ‘perfunctory, almost completely failing to acknowledge the problematics of “conscience”, and displaying virtually no historical consciousness’.⁸¹ Because conscience is not analysed or understood through its historical lens, modern conscience has no discernible meaning. A “historical consciousness” is required.

Legal history can also tell us about the meaning of unconscionability. It has already been identified above that unconscionability is a moral standard of behaviour, and

⁷⁵ Ibid, 902 (Lord Keeper Bridgman)

⁷⁶ Consider *Lumley v Wagner* (1852) 1 De GM & G 604, 619; 42 ER 687, 693 (Lord St Leonards); *Re Chapman’s Settlement Trusts* [1954] AC 429, 444 (Lord Simonds)

⁷⁷ See for instance, *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 39 (Viscount Haldane; commenting on principle); *Re Diplock* [1948] Ch 465, 481-482; *Re Chapman’s Settlement Trusts* [1954] AC 429, 444 (Lord Simonds)

⁷⁸ *Re Hallett’s Estate* (1880) 13 Ch D 696, 710 (Sir George Jessel MR)

⁷⁹ *G and C Kreglinger* (n 57), 39 (Viscount Haldane; commenting on using specific cases)

⁸⁰ JT Gleeson, JA Watson, RCA Higgins, *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013), 1

⁸¹ Dennis R Klinck, ‘The Unexamined “Conscience” of Contemporary Canadian Equity’ (2000-2001) 46 McGill Law Journal 571, 576

societal mores necessarily change as society develops. One thus must take care when looking at what might have been unconscionable in the past. This thesis will posit that the Christian morality, on which English equity was originally based, provides the foundation for determining unconscionability. However, the practical application of those fundamental principles has changed over time. Ibbetson writes that whilst legal rules stay the same, their application can vary over time, especially if the rules are broad and value-based, since they will change with changes in society and societal norms.⁸² The indicia of unconscionability is a good example of this. Young J similarly wrote that ‘[w]hat is unconscionable will depend to a great degree on the court’s view as to what is acceptable to the community as decent and fair at the time and in the place where the decision is made’.⁸³ This means that the definition of unconscionability, although based on the broad principles equity have inherited from centuries past, is related to the community in which the decision takes place as well as the time in history in which the decision is made.

An example can be given. Undue influence, which will be looked at in chapter eight, is an equitable claim through which the courts can protect the “weak” and “vulnerable” from exploitation. Protecting the weak and vulnerable is a principle that has remained true and constant from the beginning. What has changed, however, is who might fall within the category of weak or vulnerable. In times gone by, women in general were referred to as the ‘weaker sex’.⁸⁴ This is no longer the case; it is an outdated view of society. The application of the indicia of unconscionability thus changes as society develops, but the indicia themselves remains the same. This perhaps gives the illusion of conscience changing, when in reality it is not. It is merely the context in which the principle is applied that has changed, necessitating an application which may be seen as different from past cases.

For this reason, it remains important to study the old legal sources, to understand where the fundamental principles came from and what they are. To that must be added the new cases, to understand how those principles are understood and applied today. By weaving together both old and new cases, the thesis will try to get a deep understanding of the meaning of conscience in equity today.

⁸² David Ibbetson, ‘Comparative Legal History’ in Musson and Stebbings (n 55), 138-139

⁸³ *Lincoln Hunt Australia Pty Ltd v Willesee* [1986] 4 NSWLR 457, 463 (Young J); his assertion was approved in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [175] (Kirby J)

⁸⁴ *Norton v Rely* (1764) 2 Eden 286, 288; 28 ER 908, 909

Chapter 3

English Equity and Theories of Conscience

This chapter will begin to answer the first question, namely what is conscience and what are its objective and subjective elements. It will take a theoretical approach by looking at how conscience has been conceptualised by different schools of thought. What theory of conscience was dominant at the creation of English equity? Have critics of equity's conscience adopted a different understanding of conscience, based on subsequent theological, philosophical and psychological thought?

Part one will look at the objective, communal scholastic conscience which the medieval clerical Lord Chancellors would have referred to. Part two will look at conceptual challenges, which posit a subjective, individualistic conscience. Part three will look at more recent conceptions of conscience to see whether an objective conscience remains a plausible model for equity to adopt. The aim of the chapter is to demonstrate that an objective conception of conscience is theologically, philosophically, and psychologically possible, and that equity can safely talk about an objective test for unconscionability. Chapter four will continue by tracing the existence of the scholastic conception of conscience in Chancery case reports.

Part 1: The scholastic conception of conscience and English equity

Placing the scholastic conscience in context: canon law and early English equity

At the Norman Conquest, Christianity was well-established in England. The Ecclesiastical Courts were popular, and remained so for a few centuries, whilst the new English common law was finding its feet. The Ecclesiastical Courts came with substantive and procedural benefits that surpassed the local laws and the early common law.¹

¹ Ronald Marchant, *The Church under the Law. Justice, Administration and Discipline in the Diocese of York, 1560-1640* (CUP, 1969), 6; Timothy Haskett, 'The Medieval English Court of Chancery' (1996) 14 *Law & History Review* 245, 252; Jack Moser, 'The Secularization of Equity' (1997) 26 *Capitol University Law Review* 483, 512; Gerald O'Collins and Mario Farrugia, *Catholicism: The Story of Catholic Christianity* (OUP, 2003), 74; Peter Jason, 'The Courts Christian in Medieval England' (1996-1997) 37 *Catholic Lawyer* 339

The characteristics of the common law are well-known. In contrast to the civil law system, the common law has predominantly been created and developed by judgments. In the eleventh and twelfth centuries it is likely that the King's Court had wide discretionary powers.² The law was too young, and there was no body of precedent to draw on. At the time, 'no common lawyer' would have believed that the common law was anything other 'than part of the moral law or the law of God'.³ However, once a decision had been recorded, it stood as precedent, and the 'rigour of the law' developed.⁴ Cases which fall within the rule are decided by the rule, even if the outcome would be harsh or unjust.⁵ It is this rigour that has caused concern.⁶ The view that the common law is rigid should not be overstated; indeed it is sometimes celebrated for its flexibility. The courts are able to distinguish rules and develop ancillary rules based on new and different circumstances.⁷ As such, discretionary powers and "law of God" ideas of justice and morality remain when new rules are formed and old ones distinguished.⁸ However, the rules once established stand firm. If a case arises within the rule, the rule will be applied, despite any perceived injustice. The Chancery grew naturally in this setting, coming 'forward in the name of conscience and fairness for the protection of the maltreated individual'.⁹

In early times, the canon law, working *ex defectu justitia*, could provide an equitable remedy when the common law had led to an injustice. The aggrieved party could ask for a stay on the common law judgment and an alternative remedy. However, the canon law was not to last. The growth and royal promotion of the common law had to

² Frank Tudsbury, 'Equity and the Common Law' (1913) 29 *Law Quarterly Review* 154, 156; Fiona Roughley, 'The Development of the Conscience of Equity' in JT Gleeson, JA Watson, RCA Higgins, *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013), 150

³ K Kahana Kagan, *Three Great Systems of Jurisprudence* (Stevens & Sons, 1955), 33; Lord Coke, cited in Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (4th edn, Macmillan & Co, 1918), 291; the medieval jurists saw the common law as intrinsically linked to reason, Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP, 2004), 145

⁴ Tudsbury (n 2), 156; AI Goodhart, 'Precedent in English and Continental Law' (1934) 50 *LQR* 40, 41; Theodore Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown and Co, 1956), 158; Timothy Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47 *University of Toronto Faculty Law Review* 549, 552; Kagan (n 3), 15

⁵ J H Baker, *An Introduction to English Legal History* (4th edn, OUP, 2007), 102; Duxbury (n 3), 152

⁶ See, for instance, the comments in *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 322 (Lord Denning MR)

⁷ See, for instance, the comments in *Ingram v Little* [1961] 1 QB 31, 73 (Devlin LJ); *R (on the application of Nicklinson) v Secretary of State for Justice* [2014] UKSC 38, [2014] 3 WLR 200, [191] (Lord Mance); *Zurich Insurance plc UK v International Energy Group Ltd* [2015] UKSC 33, [2015] 2 WLR 1471, [209] (Lord Neuberger and Lord Reed)

⁸ Tudsbury (n 2), 161

⁹ Kagan (n 3), 15

be at the expense of the canon law, as jurisdiction shifted from one court to the other.¹⁰ It has been suggested that it was the disputes between the common law and the canon law that resulted in the rapid growth of the Chancery.¹¹

Those who had suffered hardship in the King's Court, for whatever reason, retained the right to petition the King for mercy. These petitions for grace were handled, usually, by the King-in-Council. This work was eventually delegated to the Lord Chancellor, who was the key member (if not only member) of the Council with legal training.¹² Most of the medieval Lord Chancellors were senior clerics.¹³ Holt CJ mentioned that 'until the time of Henry the Eighth clergy-men sat in Chancery' and that the Chancellors had 'power over men's consciences'.¹⁴ As clerics, they had knowledge and experience of the canon law as well as training in classical philosophy, including Greek and Roman philosophies of justice and equity.¹⁵

In exercising their judicial functions, the Lord Chancellors continued with the canon law, but created a secularised version which more directly responded to the strengths and failures of the common law. Marchant wrote that 'it was from canon law that the developing court of equity, the Chancery Court, received some of its basic principles and also its method of procedure'.¹⁶ Adopting the substantive and procedural rules of the canon law, which were superior to the early common law, partly accounts for the popularity of the Chancery.¹⁷

There is a dispute over the extent of the canon law's influence. English equity, unlike the canon law, is fully secular.¹⁸ It derived its authority from the King. This limits the influence that canonical equity could have had. Coing argues that there was no direct replication and there were notable differences.¹⁹ For instance, English equity is adversarial, distinct from the inquisitorial system in Roman and canon law. This

¹⁰ Moser (n 1), 515

¹¹ Ibid, 487; *Re Diplock* [1948] Ch 465, 489

¹² Baker (n 5), 99

¹³ Haskett (n 1), 247

¹⁴ *Jones v Morley* (1702) 12 Modern 159, 162; 88 ER 1234, 1236 (Holt CJ)

¹⁵ Moser (n 1), 492

¹⁶ Marchant (n 1), 2; Haskett (n 1), 260

¹⁷ William Holdsworth, *A History of English Law, Volume 2* (4th edn, Methuen, 1936, reprinted 1966), 346-347; see eg *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [20] (Lord Sumption) (on rules of evidence); *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 476 (Lord Diplock) (the medieval common law gave no remedies for fraud, whether criminal or civil)

¹⁸ James Diamond, 'Talmudic Jurisprudence, Equity, and the Concept of *Lifnim Meshurat Hadin*' (1979) 17 *Osgoode Hall Law Journal* 616, 619; cf Deuteronomy 6:18; Exodus 18:20; Kagan (n 3), 84

¹⁹ Helmut Coing, 'English Equity and the *Denunciatio Evangelica* of the Canon Law' (1955) 71 *Law Quarterly Review* 223, 224, 238-239

argument, overall, is questionable; references to God and divine justice were abounding in the medieval Chancery, up to Lord Ellesmere confirming that equity spoke as the Law of God.²⁰ That said, English equity did not have a religious mission, and it was not in competition with the common law. It was a supplement to the common law; as Baker writes, equity came to ‘fulfil’ the common law.²¹

Others have argued that the canon law had a strong influence. Holmes posits that by the end of the reign of Henry V, the Chancery had invented nothing original except the “use”.²² Importantly, the use of “conscience” was a ‘clerical invention’.²³ Certain equitable principles can be traced back to the canon law.²⁴ Indeed, going further, Dodd has argued that the Chancery was successful because it was ‘not obviously secular’ but instead ‘operated more clearly in accordance with the fundamental precepts of morality and the divine will’.²⁵

The speculation remains and will perhaps never be solved.²⁶ It seems likely that the Chancellors were inspired and borrowed from the canon law, but did so in a way that respected the political desire to promote Royal justice over the Ecclesiastical courts, and respected the political fact that English equity was secular and that English equity should develop alongside and in response to the common law. English equity therefore finds its origins in the canon law, in turn inspired by Christian morality and Roman law.²⁷

²⁰ *The Earl of Oxford’s Case* (1615) 21 ER 485, 486 (Lord Ellesmere)

²¹ Baker (n 5), 102; Haskett (n 1), 253

²² Oliver Wendell Holmes, ‘Early English Equity’ (1885) 1 *Law Quarterly Review* 162, 162

²³ George Spence, *The Equitable Jurisdiction of the Court of Chancery, Vol 1* (Lea and Blanchard, 1846), 410; Maurice Amen, ‘Canonical Equity Before the Code’ (1973) 33 *Jurist* 256, 271; John Coughlin OFM, *Canon Law: A Comparative Study with Anglo-American Legal Theory* (OUP, 2010), 45

²⁴ *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 35 (Viscount Haldane) (clog on the equity of redemption); *Ward v Turner* (1752) 2 *Vesey Senior* 431, 438; 28 ER 275, 280 (Lord Hardwicke) (doctrine of *donatio mortis causa*)

²⁵ Gwilym Dodd, ‘Reason, Conscience and Equity: Bishops as the King’s Judges in Later Medieval England’ (2014) 99 *History* 213, 225

²⁶ Kagan (n 3), 14

²⁷ Ralph Newman, ‘Equity in Comparative Law’ (1968) 17 *International and Comparative Law Quarterly* 807, 808; Eric Kemp, ‘The Spirit of the Canon Law and its Application in England’ (2012) 14 *Ecclesiastical Law Journal* 5, 7; see generally Kagan (n 3)

Proving the existence of conscience

It would be remiss not to start with the fundamental question: does conscience exist?²⁸ This is the question that the scholastics began with. This leads to the knotty science of metaphysics and ontology. Proving the existence of general concepts (particularly God) ‘figured prominently in medieval discussion’.²⁹ Two broad schools of ontology arose: universalism and nominalism.³⁰

a. *The Universalists*

The Universalists, also known as realists, believed that generalities existed *ante rem*, that is to say, before the thing. General concepts have an existence prior and independent to any particular example; the concept is ‘something real and not a mere word’.³¹ One could therefore, for instance, accept that dragons exist, despite the absence of any specific dragon. Similarly, one could show that abstract concepts such as feelings, emotions, and personal characteristics, exist independently of specific individuals.³²

The realists went down an unfortunate route in trying to prove the existence of God. St Anselm posited the “ontological argument”: God exists because we can rationally conceive of God.³³ The argument was quickly challenged. There are many things which can be thought of which do not exist.³⁴ Later, Kant brought a strong challenge,

²⁸ Nicholas Hopkins, ‘How should we respond to unconscionability? Unpacking the relationship between conscience and the constructive trust’ in Martin Dixon and Gerwyn Griffiths (eds), *Contemporary Perspectives on Property, Equity and Trusts Law* (OUP, 2007), 4

²⁹ Frederick Copleston SJ, *A History of Medieval Philosophy* (Methuen & Co, 1972), 68

³⁰ See eg, Carl Gustav Jung, *Psychological Types* (H.G. Baynes and R. F. C. Hull (trans), Routledge, 1991), 26; Wolfgang Fikentscher, ‘Intellectual property and competition - human economic universals or cultural specificities? A farewell to neoclassics’ (2007) 38 *International Review of Intellectual Property and Competition Law* 137, 142-143

³¹ Jasper Hopkins, *A Companion to the Student of St Anselm* (University of Minnesota Press, 1972), 201; David Armstrong, *Nominalism and Realism: Universals and Scientific Realism Volume 1* (CUP, 1978), 11-12; Marilyn McCord Adams, *William Ockham, Volume 1* (University of Notre Dame Press, 1987), 75

³² St Augustine, *Eighty-Three Different Questions*, Question 46.2; cited in Jasper Hopkins, *A Companion to the Student of St Anselm* (University of Minnesota Press, 1972), 128

³³ Frederick Copleston SJ, *A History of Medieval Philosophy* (Methuen & Co, 1972), 74

³⁴ *Ibid*, 75, 77; McCord Adams (n 31), 75

arguing that proving the existence of an object must be by reference to an objective reality.³⁵ If concepts are just imaginary, their existence cannot be proven.

Criticisms aside, it is clear how the Universalists would prove the existence of conscience. Conscience exists because it has been postulated, and because a large number of societies have conceived of the concept and have broadly similar ideas of what conscience is. Since conscience exists independently and prior to individuals, it can be objectively studied in its own right.

b. *The Nominalists*

The nominalists believed that ‘generic or universal concepts such as beauty, goodness, animal, man, etc, are nothing but *nomina*, names, or words’.³⁶ There are only the specifics.³⁷ Show the example or it does not exist. More relaxed nominalists, such as William Ockham, accepted that general terms can be useful for grouping together various specifics.³⁸ Even so, the concept is merely a word. It does not exist independently from specific examples. Take the example of a red apple. One could say the colour red exists independently of the apple, since other objects can also be red. However, trying to describe the colour red without recourse to a particular example poses severe linguistic difficulties, coming up on being impossible. Thus, the general (red) cannot exist independently of the particular (the apple).

There is support for the nominalist view of conscience. If a person was asked to describe conscience, this would prove difficult. As an abstract concept, conscience is perhaps most easily described through other abstract terms.³⁹ Just as when we try to describe general concepts such as “good” or “beauty”, we paint a picture, describing something which is perhaps not there. It logically leads to the question that if ‘conscience is in fact represented only and everywhere in terms of figures, then can it be certain that conscience exists at all?’⁴⁰ Building on this, Langston suggests a “reductionist view”, which holds that what is generally referred to as conscience ‘can

³⁵ Immanuel Kant, *Critique of Pure Reason* (Max Muller (trans), The MacMillan Company, 1896), 482, 485

³⁶ Carl Gustav Jung, *Psychological Types* (H.G. Baynes and R. F. C. Hull (trans), Routledge, 1991), 26; John Marenbon, *The Philosophy of Peter Abelard* (CUP, 1997), 176

³⁷ Copleston (n 33), 70

³⁸ *Ibid*, 247

³⁹ Karen S Feldman, *Binding Words: Conscience and Rhetoric in Hobbes, Hegel, and Heidegger* (Northwestern University Press, 2006), 3

⁴⁰ *Ibid*, 4

be reduced to moral reasoning or emotional conditioning'.⁴¹ It is either a philosophical or psychological moral decision-making process, but there is no need to ascribe that process the term "conscience".

A strict nominalist view would deny the existence of conscience as an independent concept which could be studied separately from each individual human agent. The study would be focused on how individuals approached moral reasoning and decision-making. Less strict nominalists, such as Ockham, would perhaps accept that since everyone does engage in some form of moral reasoning, that moral reasoning process could perhaps be studied independently of the individuals, but without accepting the existence of "conscience" as distinct from the individuals.

c. *Carl Gustav Jung and attempting to solve the problem*

The scholastics made this problem a philosophical one. Perhaps, though, there might be another reason why the philosophers had such different opinions on the existence of things. It has to do with psychology.

Jung looked at Anselm's ontological argument (the thing exists because it is thought of) and wrote that the 'logical weakness of the ontological argument is so obvious that it even requires a psychological explanation to show how a mind like Anselm's could advance such an argument'.⁴²

Jung posits two personality types: the introvert and the extrovert.⁴³ The introvert focuses on the inner reality; thoughts and ideas are as real as external objects. The extravert focuses on the outer reality; the objective world.⁴⁴ Jung argues that these differences explain why philosophers could forward arguments such as Anselm's. Jung writes that "reality" 'is simply what works in a human soul' and there is no single answer.⁴⁵ It would be wrong to suggest that there is one single, objective reality. To the introvert, the ontological argument is a 'psychological demonstration of the fact that there is a class of men for whom a definite idea has efficacy and reality'.⁴⁶ God becomes real, is real, because he is thought of. Jung wrote that the 'radical difference

⁴¹ Douglas Langston, *Conscience and Other Virtues: From Bonaventure to MacIntyre* (The Pennsylvania State University Press, 2001), 100

⁴² Jung (n 36), 40

⁴³ Ibid, 4

⁴⁴ Calvin Hall and Vernon Nordby, *A Primer of Jungian Psychology* (Mentor, 1973), 97

⁴⁵ Jung (n 36), 41

⁴⁶ Ibid, 41

between nominalism and realism is not purely logical and intellectual, but a psychological one'.⁴⁷ To the extrovert, saying God is real because he is thought of becomes absurd, because the extrovert focuses on the objective reality, which can be empirically proven.

Thus, if we ask, does God exist, or do dragons exist, different people will provide different answers. It would be easy to say that dragons do not exist, because they do not have an objective, external existence. On the other hand, they do exist in our imagination. Their extensive use (through history and across cultures) in art and literature shows that the idea or symbol of a dragon carries some meaning and thus has some kind of existence.

Jung's suggestion that this debate is psychological may explain why conscience comes easier to some than others. So, does conscience exist? The answer must be yes and no. It can hardly be said that conscience has an objective existence *ante rem*. Put it this way, humans can exist without conscience, but conscience cannot exist without humans. On the other hand, if conscience relates to moral reasoning and decision-making, this is a process which is similar in all humans and the process can be compared. As such, it would be possible for the idea of conscience to be extracted from the individual and looked at as an independent concept.

English equity has long used the concept of conscience. English equity has a basis in theology and the canon law. The medieval Church adopted the Universalist approach. Conscience was a real concept discussed in detail by the scholastic theologians, and it is clear that they saw conscience as something having an independent existence. It should be assumed (because of the dearth of documents and the fact that Chancery judgments were not recorded) that the clerical Lord Chancellors had the same Universalist view of conscience when they sat in Chancery as when they exercised their clerical functions. This is a presumption, but it is submitted that to assume otherwise would be illogical. Hence, equity's conscience is something real and has an independent existence from particular individuals in the court process. As such, this thesis will take a Universalist approach. Conscience exists as a real concept independent of individual humans, in so far as it relates to the comparative study of moral reasoning and decision-making. This view is taken in light of English equity's

⁴⁷ Ibid, 50

theological origins. It is stressed that this is not the only philosophically or psychologically correct interpretation of conscience.

The scholastic conception of conscience

Having established the existence of conscience in scholastic thought it is possible to consider how the scholastics conceptualised conscience. The scholastics placed great emphasis on the power of reason. The rational mind was divided into two: ‘the understanding and the will’, the former being the ‘power of apprehension’ and the latter being ‘a power of motion’; one understood and the other acted.⁴⁸ This led to two broad ideas of conscience. One school of thought, spearheaded by St Bonaventure, was known as the voluntaristic school, and placed conscience in the will. The other, spearheaded by St Thomas Aquinas, was known as the intellectual school, and placed conscience in the understanding.

Conscience, or moral reasoning, which is its essential descriptor, came in two parts: synderesis and conscientia. St Jerome was the first theologian to present a theory of moral reasoning which included this duality. Synderesis is the ‘spark of conscience’ and conscience ‘corrects’ people ‘when they go wrong’.⁴⁹ Synderesis prods to action and conscience makes the moral decisions. Modern scholarship has questioned whether ‘Jerome meant to distinguish the two’.⁵⁰ The problem is that synderesis and conscientia are Greek and Latin for the same thing. The reason why a distinction arose is not clear and may be lost in the obscurity of ancient history.⁵¹ Whatever St Jerome’s intention, scholastic theologians drew a clear line between synderesis and conscientia, and they made good use of the distinction.⁵²

An early scholastic was Peter Abelard. He saw conscience as ‘our power to recognize obvious truths’ and that it issued a ‘command’ in response to such truths as

⁴⁸ John Wilks, *The Idea of Conscience in Renaissance Tragedy* (Routledge, 1990), 11

⁴⁹ St Jerome, *Commentary on Ezekiel, 1.7*; cited in Timothy Potts (ed and trans), *Conscience in Medieval Philosophy* (CUP, 1980), 79

⁵⁰ Langston (41), 23

⁵¹ Robert Greene, ‘Synderesis, the Spark of Conscience, in the English Renaissance’ (1991) 52 *Journal of the History of Ideas* 195, 195; Arthur McGrade, John Kilcullen, and Matthew Kempshall, *The Cambridge Translations of Medieval Philosophical Texts, Vol II: Ethics and Political Philosophy* (CUP, 2001), 169; see similarly Anthony Fisher, *Catholic Bioethics for a New Millennium* (CUP, 2012), 44

⁵² McGrade, Kilcullen, and Kempshall (n 51), 170

to how we should or should not act.⁵³ The first proper treatise on conscience came in 1235 by Philip the Chancellor.⁵⁴ He drew the distinction between synderesis which knows general moral precepts and conscientia which applied those moral precepts.⁵⁵ To Philip, synderesis was ‘the spark of *conscientia*’.⁵⁶ Philip argues that synderesis ‘affects free choice by telling us to do good and restraining it from evil’.⁵⁷ This voluntaristic view of synderesis was adopted by Bonaventure.

Bonaventure said that synderesis ‘resides in the affective’ part of the mind and ‘urges toward good’.⁵⁸ Synderesis is the “spark of conscience”, and it is required because ‘conscience by itself can neither move nor string nor urge except by means of synderesis, which, as it were, urges and ignites’.⁵⁹ As part of the rational mind, conscientia alone, in knowing and applying morality, is insufficient; there must also be the catalyst for action.

Bonaventure divided conscientia into two parts.⁶⁰ Langston terms them the “potential conscience” and the “applied conscience”.⁶¹ The “potential conscience” knows general ‘practical principles’ of what a person should do. The “applied conscience” is the act of applying the principles to specific situations. The potential conscience derives its moral precepts from multiple sources; firstly reason (the natural law) and the teaching of the Church, but also from personal experience.⁶² Langston suggests that Bonaventure’s view of conscience is very ‘dynamic’.⁶³ The moral framework is not static, but changes and grows with time and experience.⁶⁴ Before experience comes an intuitive understanding of morality. Potts suggests that many people today are intuitionists, believing in an intuitive understanding of right and wrong.⁶⁵ The criticism against such beliefs is asking what ‘basic deontic propositions’

⁵³ John Marenbon, *The Philosophy of Peter Abelard* (CUP, 1997), 274-275

⁵⁴ Timothy Potts, *Conscience in Medieval Philosophy* (CUP, 1980), 12

⁵⁵ Philip the Chancellor, *Summa de Bono*; cited Potts (n 54), 104

⁵⁶ *Ibid*, 104

⁵⁷ *Ibid*, 101

⁵⁸ St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 2, Question 1-2*; cited in McGrade, Kilcullen, and Kempshall (n 51), 190

⁵⁹ St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 2, Question 1-3*; cited in McGrade, Kilcullen, and Kempshall (n 51), 190

⁶⁰ St Bonaventure, *Commentary on Peter Lombard’s “Books of Judgments”, Book II, Distinction 39, Article 1, Question 1-1*; cited in and translated by Potts (n 54), 111

⁶¹ Douglas Langston, ‘The Spark of Conscience: Bonaventure’s View of Conscience and Synderesis’ (1993) 53 *Franciscan Studies* 79, 82

⁶² St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 1, Question 2-2*; cited in McGrade, Kilcullen, and Kempshall (n 51), 179

⁶³ Langston (n 41), 29

⁶⁴ Langston (n 41), 36

⁶⁵ Potts (n 54), 38

are actually ‘known by intuition’.⁶⁶ How can we agree on them? Bonaventure steps around this problem by ascribing these intuitive moral precepts to the natural law, the law of reason, given by God.⁶⁷

Aquinas approached conscience from the intellectual school. Aquinas argued that synderesis was in the ‘rational part of human agents’.⁶⁸ Both synderesis and conscientia were rational, and the catalyst to act was elsewhere. Aquinas writes that ‘the first principles of practice, naturally inborn in us, are not evoked by a special faculty or moral sense, but by a special natural habit of mind, called synderesis’.⁶⁹ Synderesis mirrored the potential conscience described by Bonaventure in so far as we innately know moral precepts. Further, synderesis is our rational connection with the law of reason. Conscientia, ‘also in the rational part, applies these first principles to particular situations’.⁷⁰ Aquinas writes that conscience is ‘an activity, namely, the actual application of moral science to conduct’.⁷¹ It is an act of ‘judgment’ or an act of ‘practical reason’ based on ‘a person’s innate knowledge of natural law’.⁷² Conscience was the direct application of moral precepts.

It is Aquinas’ view which has been primarily adopted by the post-medieval Church. It is simplistic and explains how the rational conscience works. The first part, synderesis, knows morality. To Aquinas, it is primarily innate; the law of reason which all rational humans understand. The second part, conscientia, applies those moral principles either to proposed acts or retrospectively to past acts, and issues as verdict. This leads on to the question of whether that verdict is binding on us.

The authority of conscience in scholastic theology

Conscience, as part of reason, was deeply revered. The reason for this was that conscience was treated as a direct link between the individual and God.⁷³ Bonaventure

⁶⁶ Potts (n 54), 38

⁶⁷ Ibid, 37-38

⁶⁸ Langston (n 41), 39

⁶⁹ St Thomas Aquinas, *Summa Theologica*, 1a. lxxix 12, cited in Thomas Gilby, *St Thomas Aquinas – Philosophical Texts* (OUP, 1951), 290-291

⁷⁰ Langston (n 41), 39

⁷¹ St Thomas Aquinas, *Summa Theologica*, 1a. lxxix 13, cited in Gilby (n 69), 291

⁷² Noah Feldman, ‘The Intellectual Origins of the Establishment Clause’ (2002) 77 *New York University Law Review* 346, 356

⁷³ St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 1, Question 3-4a*; cited in McGrade, Kilcullen, and Kempshall (n 51), 184

wrote that the commands of conscience came not from ‘itself’ but ‘from God, like a herald proclaiming the edict of a king’.⁷⁴ Conscience was to be taken seriously.

Disobeying conscience was tantamount to disobeying God.⁷⁵ Because of its importance, the scholastics emphasised the virtue of educating conscience.⁷⁶ It is possible to break God’s law through ignorance, and if the ignorance was genuine, there was no liability. In this respect, Bonaventure writes that ‘it is always a sin to act *against* conscience, because it always shows contempt for God, yet to act *according* to conscience is not always good’.⁷⁷ Aquinas similarly said that ‘every judgment of conscience, be it right or wrong, be it about things evil in themselves or morally indifferent, is obligatory’.⁷⁸ Conversely, there is no excuse if the ignorance or misunderstanding of God’s law is brought about deliberately, by someone refusing to learn about God’s law.⁷⁹ This is replicated in equity; Chancery may forgive honest mistakes, but will condemn the conscience that wilfully ignores the facts.⁸⁰

That conscience had a high standing in theology might also explain why conscience was adopted as a yardstick in the canon law. This was the means by which to test the merits of an act. This may also explain why it was adopted by Chancery. It was not merely a convenient legal tool to take over from the canon law; it was a serious concept which was understood by the whole of society.

The scholastic conscience in English equity

In medieval England, though there were theological disagreements about the details of conscience, the basics were quite clear. Conscience is the understanding and practical application of the law of reason. Rather than merely being an appeal to personal values, the scholastic conception of conscience connects to a shared,

⁷⁴ St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 1, Question 3-4b*; cited in McGrade, Kilcullen, and Kempshall (n 51), 185; John Henry Newman, *Difficulties of Anglicans, Vol II*, (Christian Classics, New Impression, 1969), 247

⁷⁵ St Thomas Aquinas, *Summa Theologica, 1a-2ae, xix 5*, cited in Gilby (n 69), 292; Langston (n 41), 27

⁷⁶ St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 1, Question 3-5*; cited in McGrade, Kilcullen, and Kempshall (n 51), 185

⁷⁷ St Bonaventure, *Commentaries on the Sentences of Peter Lombard, Book II, Distinction 39, Article 1, Question 3-4a*; cited in McGrade, Kilcullen, and Kempshall (n 51), 184

⁷⁸ St Thomas Aquinas, *III Quodlibet 27*, cited in Gilby (n 69), 291

⁷⁹ St Thomas Aquinas, *Summa Theologica, 1a-2ae, xix 6*, cited in Gilby (n 69), 292

⁸⁰ This is discussed further in later chapters; see eg *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509, [250] (Peter Gibson J); *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [4] (Lindsey J)

communal morality. People's understanding of this law was furthered by the teachings of the Church and personal experiences.⁸¹ Importantly, Haskett posits that conscience was readily understood in medieval England.⁸² There was nothing peculiar about the Chancellors using conscience in Chancery. The meaning of unconscionability, stemming from the law of reason, will be discussed in chapter six.

Part 2: The subjective challenges to the scholastic conscience

The scholastic conception of conscience, as a rational engagement with an objective morality, was challenged by the Protestants. They questioned the rational mind and the teaching of the Church. Philosophers followed on, arguing that morality was personal, and individualism overtook reason as the highest virtue. Now, each individual must personally determine his moral code and apply it to his actions. The moral code is not necessarily shared by all people; rather it is a personal creation or a personal interpretation of an external source. In particular, the argument goes that all morality must be 'ultimately subjective' because it is the individual who makes the final decision.⁸³ In modern discussions on conscience, commentators question whether 'consensus about the role and significance of conscience' can be 'achieved in a multicultural society', arguing it is 'unlikely'.⁸⁴ The argument is that a multifaceted society cannot share a moral ethos, given that different communities treat morality differently.

Subjective conscience in Christian theology

The fundamental shift that came with the Protestant reformation was, in some quarters, an all-out assault on reason. Eve had failed in Eden, and together with Adam, had been

⁸¹ Robert Barron, *Catholicism: A Journey to the Heart of the Faith* (Image Books, 2011), 3-4; Scott Idleman, 'Private Conscience, Public Duties: The Unavoidable Conflicts Facing a Catholic Justice' (2006-2007) 4 University of St Thomas Law Journal 312, 323; Richard Gula S.S., *Reason Informed by Faith: Foundations of Catholic Morality* (Paulist Press, 1989), 155

⁸² Timothy Haskett, 'Conscience, Justice and Authority in the Late-Medieval English Court of Chancery', in Anthony Musson (ed), *Expectations of the Law in the Middle Ages* (The Boydell Press, 2001), 159

⁸³ Nomi Stolzenberg, 'Jiminy Cricket: A Commentary of Professor Hill's Four Conceptions of Conscience' in Ian Shapiro and Robert Adams (eds), *Integrity and Conscience* (New York University Press, 1998), 66

⁸⁴ Claudia Emerson and Abdallah Daar, 'Defining Conscience and Acting Conscientiously' (2007) 7 American Journal of Bioethics 19, 19

expelled. This is known as the Fall. From here on, reason was corrupted and ineluctably led to sin. The Catholic Church accepted this, but a crucial tenet of Catholic theology was that salvation was dependent not only on faith but also on performing good deeds, dependent on ‘will and reason’.⁸⁵ The performance of good deeds could be mandated by the Church, both as part of the confessional and as part of the canon law. A person could, through his rational understanding of the world, free himself from his sins.

The Protestants denied this. The only route to salvation was through faith alone.⁸⁶ They denied the scriptural basis of the canon law and the right of priests and canon law judges to absolve sins by demanding acts of penance. Thus, in Protestant countries, the canon law courts disappeared, and with them the ‘historical notions of a law of conscience’.⁸⁷ Conscience was no law; even the late scholastic William of Ockham argued that God’s will could not (as earlier scholastics had argued) be reduced ‘to law’, and hence there could be ‘no Natural Law in the scholastic sense’.⁸⁸ In the Protestant movement, conscience was to take on a different role.

Conscience became a faculty of its own, set above will and reason. It was, in many ways, our highest and most important faculty. Calvin called it a ‘medium between God and man’.⁸⁹ There is no uniform Protestant view of conscience, but broadly it is seen as an independent faculty guiding the individual, through reason (however impaired by the Fall) and by the Holy Spirit.⁹⁰

To Luther, conscience did not just judge individual actions but also judged the person as a whole.⁹¹ Because people are sinners and salvation could only come from faith, conscience has to judge a person as damned.⁹² This differs fundamentally from Catholic theology, which clearly recognised sin, but held that through a strong

⁸⁵ Harold Berman, ‘Conscience and Law: The Lutheran Reformation and the Western Legal Tradition’ (1987) 5 *Journal of Law and Religion* 177, 178

⁸⁶ John Wilks, *The Idea of Conscience in Renaissance Tragedy* (Routledge, 1990), 3

⁸⁷ Benjamin Nelson, ‘Conscience and the Making of Early Modern Cultures: *The Protestant Ethic* beyond Max Weber’ (1969) 35 *Social Research* 5, 16

⁸⁸ Wilks (n 86), 25

⁸⁹ John Calvin, *Institutes of the Christian Religion, Vol II* (John Allen (trans), Philip H Nicklin and Hezekiah Howe, 1816), 335

⁹⁰ Consider William Perkins, *A Discourse of Conscience* (1596); cited in Camille Wells Slight, *The Casuistical Tradition in Shakespeare, Donne, Herbert, and Milton* (Princeton University Press, 1981), vii

⁹¹ Michael Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther* (E. J. Brill, 1977), 202; Langston (n 41), 73

⁹² Ronald Rittgers, *The Reformation of the Keys: Confession, Conscience, and Authority in Sixteenth-Century Germany* (Harvard University Press, 2004), 206

conscience and penance, a person could obtain salvation. It was not something to merely hope and pray for, it was something personally achievable. Lutheran theology has thus been seen as gloomy and downcast, condemning people as sinners and giving them no chance of redeeming themselves.

Calvin, who led the puritan movement, had similar ideas about conscience. Conscience was our ‘apprehension’ of God’s will.⁹³ Through it, God ‘dictates’ what is ‘proper or useless to do’.⁹⁴ In guiding people through life, Calvin argues that conscience is free from obligations which are not imposed by God.⁹⁵ In this respect, conscience stands above the law if they conflict. It highlights the ever-increasing role given to conscience.

A century later, Butler became a leading Anglican theologian, and wrote extensively about conscience. Butler is ‘the person most responsible for the modern view that conscience is a faculty’.⁹⁶ He regarded conscience ‘as an unerring faculty that judges actions as well as the agent’.⁹⁷ Butler viewed the ‘authority of conscience’ as ‘absolute’, and a ‘failure to follow the direction of conscience is, in fact, a failure to follow one’s own nature’.⁹⁸ He argued that conscience ‘carries its own authority’ because it is ‘assigned [to] us by the Author of our nature’.⁹⁹ Conscience was now seen as our own supreme moral tribunal, and our conscience is always right because it is a gift from God. The importance of conscience keeps growing.

These Protestant views of conscience as judging the whole person resulted in conscience ‘no longer’ being merely ‘part of a process (of practical reason)’ but instead being seen as an ‘independent entity’, leading the way for the more modern interpretation of conscience as an independent faculty akin to will or intellect.¹⁰⁰ Conscience becomes a “faculty of the soul”, making a move away from the scholastic view of conscience as an integral part of reason.¹⁰¹ Langston calls it an ‘unfortunate turn in the history of the concept of conscience’.¹⁰² The ‘scholastic discussions

⁹³ John Calvin, *Institutes of the Christian Religion, Vol III* (John Allen (trans), Philip H Nicklin and Hezekiah Howe, 1816), 190-191

⁹⁴ *Ibid*, 275

⁹⁵ Calvin (n 89), 327

⁹⁶ Langston (n 41), 80

⁹⁷ *Ibid*, 81

⁹⁸ Langston (n 41), 81; Joseph Butler, *Five Sermons Preached at the Rolls Chapel and a Dissertation upon the Nature of Virtue* (Hackett, 1983), 16-17, 37

⁹⁹ Butler (n 98), 41

¹⁰⁰ Langston (n 41), 77

¹⁰¹ Wilks (n 86), 37

¹⁰² Langston (n 41), 77

emphasized that conscience plays a role in practical reason and is closely connected to the development of the virtues’ but that ‘under the influence of Butler and Kant, conscience is conceived of as an independent entity (a faculty) that is infallible, directive, and punitive, and the guarantor of morality’.¹⁰³ Conscience changed from being a ‘point of contact’ with an objective morality to being a personal faculty, ‘wholly autonomous and subjective’.¹⁰⁴ Langston continues by saying that this is the ‘view of conscience that has fallen into disfavor in more recent times’.¹⁰⁵ Modern history has shown that a personal and subjective conscience can be wrong and should not always be obeyed.

During the 16th Century, with the English state religion changing with various monarchs, and Protestants and Catholics intermittently being persecuted, there arose the idea that the individual has control over his conscience and was allowed ‘to decide on a course of action in the light of a specific set of circumstances’.¹⁰⁶ The Reformation and the gradual acceptance of rival Christian denominations undermined the idea of a universal truth, which gradually disappeared.¹⁰⁷ It was the rise of subjectivity and individualism.

How did Anglican theology relate to the conscience used by equity? The Anglican Church was, then as now, deeply divided between those leaning towards Catholic theology and those leaning towards other Protestant theologies. Many Anglicans did continue to see conscience as a ‘rational faculty’, broadly following the scholastic tradition.¹⁰⁸ The divides in Anglican theology and existence of scholastic inspired theology, coupled with the continued influence of St German’s *Doctor and Student* treatise on equity, can account for why equity continued using an objective, scholastic-informed conscience. To adopt a phrase, whilst society was forever changing, Chancery simply kept calm and carried on.

¹⁰³ Ibid, 84

¹⁰⁴ David Robinson, *Conscience and Jung’s Moral Vision: From Id to Thou* (Paulist Press, 2005), 12

¹⁰⁵ Langston (n 41), 84

¹⁰⁶ Alexandra Walsham, ‘Ordeals of Conscience: Casuistry, Conformity and Confessional Identity in Post-Reformation England’ in Harald Braun and Edward Vallance (eds) *Contexts of Conscience in Early Modern Europe 1500-1700* (Palgrave, 2004), 40

¹⁰⁷ Ibid, 46

¹⁰⁸ Camille Wells Slight, *The Casuistical Tradition in Shakespeare, Donne, Herbert, and Milton* (Princeton University Press, 1981), 11; Wilks (n 86), 4

Subjective conscience in philosophy

Conscience was written about by secular philosophers who continued to see it as part of understanding morality. By the Age of Enlightenment it had primarily become a personal sense of morality.

Hobbes recognised the view of conscience as a personal judgment.¹⁰⁹ Hobbes saw conscience as private, and therefore subordinates it to the law. The risk otherwise was that people would discuss and potentially ignore the law if they believed that the law conflicted with their own conscience. Hobbes argued that this will weaken the state.¹¹⁰ He also denied that a man can be the judge of good and evil, which must be left to the law. Hobbes referred to the law as the ‘public conscience’ which a person must obey.¹¹¹ In other words, they must obey the positive law. The laws of nature are ‘not properly laws’ and Hobbes described them as ‘qualities that dispose men to peace’; they only become civil law if the sovereign commands it.¹¹² Hobbes’ argument is that conscience, being private and limited to the individual, should have no role within the law. This view, of private judgement, has become the dominant modern view of conscience, and the arguments forwarded by Hobbes later philosophers can help explain the hostility against the equity’s use of conscience.

It is not necessary to discuss the Age of Enlightenment philosophers in detail. Kant will be discussed below since he posited an objective conscience based on universal principles of reason. However, this too can be seen as a subjective theory of conscience, since there is no universal guidance on their application. The principles posited by Kant are taken from the scriptures (Kant indeed was referred to as the “philosopher of Protestantism”¹¹³), but denies the interpretation and guidance that Catholics derive from the Magisterium and the theologians. Conscience came to be firmly a personal faculty which used an internal sense of morality.

One modern philosopher to write about conscience was Ryle. Ryle states that conscience is purely a personal judgment, writing that ‘verdicts of conscience’ are limited to the ‘acts only of the owner of that conscience’.¹¹⁴ Ryle makes that claim that

¹⁰⁹ Thomas Hobbes, *Leviathan* (OUP, 1909, reprint 1929), 249 (electronic print of Hobbes’s original, where needed the author has modernised spelling)

¹¹⁰ *Ibid*, 249

¹¹¹ *Ibid*, 249

¹¹² *Ibid*, 205

¹¹³ Roger Sullivan, *Immanuel Kant’s Moral Theory* (CUP, 1989), 262

¹¹⁴ Gilbert Ryle, ‘Conscience and Moral Convictions’ (1940) 7 *Analysis* 31, 31

if ‘asked to advise someone else on a moral point, I could not without absurdity say that I must consult my conscience. Nor, if someone else misbehaves, can *my* conscience be said to disapprove’.¹¹⁵ Conscience is clearly inward looking, with Ryle saying that the ‘particular verdicts of conscience are applications of general rules, imperatives or codes’, but only apply to the individual person.¹¹⁶ We identify a sense of morality and apply it to ourselves. Our consciences cannot deal with other people and their actions. This very clearly denies the possibility of an objective conscience being applied in a legal sense, whether in a confessional, a canon law court, or in Chancery.

Langston challenges Ryle’s argument that conscience is purely personal and not binding on others. If conscience only applies to a person’s personal moral convictions, how can someone ever act against conscience?¹¹⁷ This is an important question. Clearly a person can decide to act contrary to his convictions, thus acting unconscionably, but this cannot be the subject to public sanctions, since Ryle’s view is that every person will form his own convictions. This type of subjective conscience should not have any role in equity; the law should not publicly judge a personal conviction. The law can only judge on communal convictions.

Subjective conscience in psychology

Scientific psychology emerged as a field of study in the 1860s.¹¹⁸ Psychology also came to explore the concept of conscience. One of the first major psychologists was Freud, who presented an overall subjective view of conscience.

To understand Freud’s conscience, one must understand his concept of the id, the ego and the superego.¹¹⁹ The “id” is the first of the three parts of the personality to develop. At its core, the id seeks to avoid or reduce tension.¹²⁰ This is done through what Freud called the “primary process”, which in essence is the creation of a ‘memory image’ of the item or activity which reduces tension.¹²¹ This accounts for why

¹¹⁵ Ibid, 31

¹¹⁶ Ibid, 32

¹¹⁷ Langston (n 41), 97

¹¹⁸ Hall and Nordby (n 44), 38

¹¹⁹ Langston (n 41), *Conscience and Other Virtues: From Bonaventure to MacIntyre* (The Pennsylvania State University Press, 2001), 88

¹²⁰ Calvin S Hall, *A Primer of Freudian Psychology* (Meridian, 1999), 22

¹²¹ Ibid, 25

fantasies can be as pleasurable as real experiences. Since the id is inward-looking and fails to distinguish between its own mental images and reality, the “ego” gradually develops in order to make that distinction.¹²² The ego is the link to reality.¹²³ The ego is driven by the “reality principle”, namely being able to ascertain the objective world, through thinking, feeling, touching, sensing, and so forth.¹²⁴ For instance, a child’s id knows that eating reduces hunger. A hungry child will eat anything (such as dirt in the playground) because the id fails to distinguish between reality and wish. The ego eventually develops so the child can determine what amounts to actual food and what is not. The id and the ego cooperate, with the id producing the image of what is desired and the ego achieving that goal in the real world.

Left unchecked, the id and the ego will achieve whatever brings pleasure. Because an absolute right to seek pleasure is not possible in a community, a person starts to develop a moral code. This is the superego. It is not a given that the superego develops automatically; the superego comes from the imposition of parental authority.¹²⁵ Thus the superego is ‘something like a repository of authority that has been internalized’.¹²⁶ The superego is a subjective conception of conscience, it develops from experience.

The superego, once properly developed, becomes the ‘judicial branch of personality’.¹²⁷ It consists of two parts: the “ego-ideal” and the “conscience”. Respectively, they correspond to what the child believes his parents (and others with authority) believe to be good or bad.¹²⁸ The punishment of disobeying the dictates of the superego is the fear of a loss of (parental) love. It is in this way that the superego tries to control our actions, through imposing a ‘sense of guilt’.¹²⁹ The superego does not distinguish between the inner world and reality, and will reward or punish both actions and thoughts.¹³⁰

¹²² Sigmund Freud, ‘The Ego and the Id’ in James Strachey and Anna Freud (eds), *The Complete Psychological Works of Sigmund Freud, Vol XIX* (The Hogarth Press, 1961), 25

¹²³ Hall (n 120), 28

¹²⁴ Ibid, 28

¹²⁵ Freud (n 122), 31

¹²⁶ Langston (n 41), 88

¹²⁷ Hall (n 120), 31; Freud (n 122), 37

¹²⁸ Sigmund Freud, ‘The Economic Problem of Masochism’ in Strachey and Freud (n 122), 167; Robert Redmount, ‘Psychological Views in Jurisprudential Theories’ (1958-1959) 107 *University of Pennsylvania Law Review* 472, 500

¹²⁹ Freud (n 122), 51; Langston (n 41), 90

¹³⁰ Sigmund Freud, *Civilization and Its Discontents* (The Hogarth Press, 1957), 127; Hall (n 120), 33

Summary

In the 16th century, a new idea of conscience emerged. Conscience was subjective, personal; reason was impaired by Original Sin; and eventually individualism became the enlightened man's religion. Has this subjective challenge to conscience undermined equity's use of conscience? Is it still possible for equity to claim to use an objective conscience? To answer this question the thesis turns to other, modern, conceptions of conscience which maintain that an objective, communal, conscience is plausible.

Part 3: Modern objective conceptions of conscience

The idea that conscience can relate to an objective, communal morality shared by all people did survive through the age of enlightenment. Hobbes, mentioned above, lamented the fall of conscience. Its original Greek use (*synderesis*) referred to being 'conscious', namely where two or more people share a known fact.¹³¹ Because conscience was a shared set of knowledge, it was a 'very evil act' to speak against conscience or 'force another to do so'.¹³² This was because one then spoke against the community. During the Reformation, conscience became a metaphor for personal knowledge. Eventually, people, 'vehemently in love with their own new opinions', as Hobbes with some sarcasm puts it, assigned 'their opinions also that revered name of Conscience, as if they would have it seem unlawful to change or speak against them'.¹³³ This kind of personal thought Hobbes refers to as an 'opinion'.¹³⁴ Conscience thus went from a shared, communal understanding to being a purely private "opinion" or view, but the idea that conscience was right and should be universally obeyed remained.

This demonstrates that, linguistically, conscience has become personal and subjective, but that this has not always been the case. The English language itself suggests that conscience is subjective, by separating the private (conscience) from the

¹³¹ Hobbes (n 109), 50

¹³² Ibid, 50

¹³³ Ibid, 50

¹³⁴ Ibid, 51

public (consciousness), which was not the case in Greek and Latin (synderesis and conscientia respectively).¹³⁵

Immanuel Kant

Kant wrote extensively about moral philosophy and conscience. Samet has suggested that equity should adopt a Kantian conscience, to alleviate concerns about subjectivity and capricious judgments.¹³⁶ This is because Kant presented an overall objective conception of conscience. He followed the scholastics in arguing that all people have certain inborn knowledge, including basic morality.¹³⁷ Kant placed great emphasis on reason in a way that seems to echo the scholastics.¹³⁸ However, Kant did not link his views to the natural law, but to what he called categorical imperatives of reason. There does not seem to be much difference between the two in content, though Kant emphasised personal reason over following the moral teachings of the Church.¹³⁹ Kant argued that a morally “good” act is one which is ‘objectively necessary’ in and of itself, and not made merely to obtain a particular ‘end’.¹⁴⁰ Further, any act undertaken must be an act which will ‘hold good as a universal law’, which is to say, if you do the act you must be happy for others to do the same.¹⁴¹ In common parlance, the ends do not justify the means, and do to others what you would have them do to you.

Kant’s view of conscience has been hailed as objective in that all people rationally conceive of the categorical imperatives. However, because the imperatives are not grounded in an external moral force, they leave much by way of interpretation to the individual. In some ways, Kant’s theory of conscience has hallmarks of being subjective.¹⁴²

¹³⁵ Langston (n 41), 7

¹³⁶ Irit Samet, ‘What Conscience can do for Equity’ (2012) 3 *Jurisprudence* 13, 14

¹³⁷ Kant (n 35), 1-2

¹³⁸ Allen Wood, *Kantian Ethics* (CUP, 2008), 186; Irit Samet, ‘Taking Evil Seriously’ (2007) 27 *Oxford Journal of Legal Studies* 741, 741

¹³⁹ Roger Sullivan, *Immanuel Kant’s Moral Theory* (CUP, 1989), 263

¹⁴⁰ Immanuel Kant, *Critique of Practical Reason and other works on the Theory of Ethics* (Thomas Kingsmill Abbott (trans), Longmans, 1909, reprint 1959), 278

¹⁴¹ *Ibid*, 281. This aspect of Kant’s universal law stems from the Biblical “golden rule”, explained by Jesus who says “In everything do to others as you would have them do to you; for this is the law and the prophets” (Matthew 7:12, Luke 6:31).

¹⁴² David Velleman, ‘The Voice of Conscience’ (1999) 99 *Proceedings of the Aristotelian Society* 57, 66

Kant describes conscience as a courtroom. Conscience is the ‘practical reason’ where a person must try, in a judicial sense, his actions, leading either to ‘acquittal or condemnation’.¹⁴³ The role of accuser, defender and judge, though the ‘same natural person’ are ‘literally distinct *moral persons*’.¹⁴⁴ Wood argues that Kant used the courtroom metaphor as a link to those ‘values that would be displayed in an ideal judicial process’. These include a free, fair and public decision based on an objective standard. This is seen in conscience, which is to be based on the ‘objectivity and universality of reason’s standards’.¹⁴⁵ Kant writes that the “judge” should be an ‘actual or a merely ideal person which reason frames to itself’, whom Kant compares to God, namely someone ‘who knows the heart’, and to whom ‘all duties are to be regarded as his commands’. Kant finishes by saying that ‘conscience must be conceived as the subjective principle of a responsibility of one’s deeds before God’.¹⁴⁶

As a ‘moral being’, all humans have conscience since birth.¹⁴⁷ Kant posits that when it is said that a person has no conscience, what is really meant is ‘that he pays no heed to its dictates’.¹⁴⁸ Conscience cannot be escaped; it ‘follows’ us like our ‘shadow’.¹⁴⁹ In our ‘utmost depravity’ we can try to disregard our conscience, but we ‘cannot avoid *hearing it*’.¹⁵⁰ Our duty is to educate our conscience and to train ourselves to carefully listen to its commands.¹⁵¹ Once we have understood the moral imperatives, we can objectively know whether or not we have a moral obligation to act or not to act: our conscience is the tribunal judging the correctness of our choice.¹⁵²

What perhaps sets Kant apart from the scholastics is that he does not see conscience as moral reasoning. To Kant, choosing the morally correct is a two-stage process.¹⁵³ First comes moral reasoning itself, asking whether there is a moral duty to act; secondly comes conscience, when we judge either the proposed course of action or an

¹⁴³ Kant (n 140), 311

¹⁴⁴ Wood (n 138), 184

¹⁴⁵ Ibid, 185

¹⁴⁶ Kant (n 140), 322

¹⁴⁷ Ibid, 311

¹⁴⁸ Ibid, 311

¹⁴⁹ Ibid, 321

¹⁵⁰ Ibid, 321

¹⁵¹ Samet (n 136), 27

¹⁵² Kant (n 140), 312

¹⁵³ Sullivan (n 139), 60

action already undertaken.¹⁵⁴ Kant accepts that people can err in moral reasoning, but that conscience itself is always correct when judging the moral decision.¹⁵⁵

Objective conscience in modern psychology

There is a psychological argument in favour of an objective understanding of morality and an objective conception of conscience. It is beyond the scope here to consider all trends in how psychology has considered moral development and moral reasoning.¹⁵⁶

In the field of moral development (that is to say, how a person develops his moral reasoning processes, as distinct from an evaluative statement of morality), researchers have posited that there is a universal model for moral development. An early developmental psychologist was Kohlberg. He posited a universal six-stage process through which humans develop their moral reasoning.¹⁵⁷ Kohlberg accepts that moral norms do differ between different communities but argues that they are nonetheless based on ‘a basic and universal standard’, namely justice, which he defines as ‘the primary regard for the value and equality of all human beings and for reciprocity in human relations’.¹⁵⁸

This theory has, of course, not been without its critics. Gibbs suggests that a divide has arisen between scholars accepting universal standards in morality (meaning a definitive moral evaluation can be made) and others insisting that norms differ but rather stresses ‘tolerance’ between different views (meaning that whilst one must show tolerance to others one cannot engage in a definitive moral evaluation of another’s acts).¹⁵⁹

A leading psychologist who did posit that there are universal norms is Jung. As part of Jung’s discussion of a universal morality, he also posited a conception of conscience. As with Freud, to understand the Jungian conscience one must first understand how Jung categorised the psyche. Jung argued that the psyche has three

¹⁵⁴ Wood (n 138), 190

¹⁵⁵ Kant (n 140), 311

¹⁵⁶ Consider Melanie Killen and Judith Smetana (eds), *Handbook of Moral Development* (Lawrence Erlbaum Associates, 2006)

¹⁵⁷ Lawrence Kohlberg and Richard Hersh, ‘Moral Development: A Review of the Theory’ (1977) 16 *Theory Into Practice* 53, 54

¹⁵⁸ *Ibid*, 56

¹⁵⁹ John C Gibbs, *Moral Development and Reality: Beyond the Theories of Kohlberg and Hoffman* (Sage Publications, 2003), 2; Larry Nucci, ‘Education for Moral Development’ in Killen and Smetana (n 156), 658

parts to it: the conscious (our engagement with the present), the personal unconscious (our storehouse of memories forgotten or repressed) and the collective unconscious. Jung emphasises the point that the conscious is only one part of the psyche, the unconscious (both the personal and collective) play important roles.¹⁶⁰ The person is the totality of the three parts of the psyche working together. The focus here is on the collective unconscious.¹⁶¹

The collective unconscious ‘is that portion of the psyche which can be differentiated from the personal unconscious by the fact that its existence is not dependent upon personal experience’.¹⁶² It is knowledge that we have inborn. Jung has been praised for finding that our unconscious mind has had a process of evolution, adding to it the wisdom of the ages, a point which has been picked up by evolutionary biologists.¹⁶³ It gives psychological credence to the works of the theologians and philosophers already referred to, who posited inborn knowledge including an inherent understanding of morality. The collective unconscious consists of two things: instincts and archetypes.¹⁶⁴

The archetypes are universal “models” of human characters and behaviour that are found across all societies.¹⁶⁵ These ‘primordial images’ are ‘predispositions or potentialities for experiencing and responding to the world in the same ways’ as a person’s ancestors.¹⁶⁶ An example, which Jung discusses, is the fact that all ‘ages before us have believed in gods in some form or other’.¹⁶⁷ (This is despite the absence of any “objective” or external proof of the existence of deities). The central argument, which does seem to carry a great deal of weight, is that human societies (long before they made contact with each other) employed the same archetypes, the same stereotypes in the arts, the same motifs in theology, and so forth. As such, in addition

¹⁶⁰ Carl Gustav Jung, *Civilization in Transition* (R. F. C. Hull (trans), Routledge & Kegan Paul, 1964), 441

¹⁶¹ Carl Gustav Jung, *The Archetypes and the Collective Unconscious* (2nd edn, Routledge, 1959, tenth printing 1991), 4

¹⁶² Hall and Nordby (n 44), 39

¹⁶³ Hall and Nordby (n 44), 39; Sally Walters, ‘Algorithms and Archetypes: Evolutionary Psychology and Carl Jung’s Theory of the Collective Unconscious’ (1994) 17 *Journal of Social and Evolutionary Systems* 287, 303

¹⁶⁴ Andrew Fritzsche, ‘The Role of the Unconscious in the Perception of Risks’ (1995) 6 *Risk: Health, Safety & Environment* 215, 220

¹⁶⁵ Jung (n 161), 42; Jolande Jacobi, *Complex/Archetype/Symbol in the Psychology of C G Jung* (Routledge, 1925, reprint 1999), 34

¹⁶⁶ Hall and Nordby (n 44), 39

¹⁶⁷ Jung (n 161), 23

to the belief in gods, there is the use of “fairy-tale” stereotypes such as heroes and heroines, good and evil, light and darkness.

It lends some weight to the argument that there are universal moral norms, which have been transcribed (with clear regional and historical variations) in countless religions, cultures and societies. In this respect, Jung writes that morality is ‘not a misconception invented by some vaunting Moses on Sinai, but something inherent in the laws of life’.¹⁶⁸ As Jung and others argue, both philosophically and psychologically, these ‘laws of life’ are shared globally.

Jung linked his idea of conscience to the collective unconscious. He first addressed the historical view that conscience is the voice of God to see whether there is psychological credence for it. The answer is yes. Jung sees conscience as an archetype.¹⁶⁹ Gates, in agreement, argues that seeing conscience as the voice of God is a ‘psychological truth’ because ‘religious sentiment’ is a Jungian archetype (the God archetype). This archetype is described as that ‘sense of awe’ felt when in the ‘presence of a reality that has a majesty surpassing comprehension’.¹⁷⁰ The “inner voice” of conscience, a sort of instinctive understanding of right and wrong, can produce this sense of awe. Hence, conscience is the voice of God. This finding gives greater understanding to why the theologians and philosophers of old ascribed conscience the authority of God’s voice within us. It may also explain why conscience continues to fascinate; it is an inexplicable sensation.

Jung argued that a person has two consciences (or perhaps that conscience has two parts to it). These he termed the moral conscience and the ethical conscience. In essence, the moral conscience is the process of abiding by social mores and the ethical conscience is abiding by the inner “archetypical” morality.¹⁷¹

The moral conscience engages with social mores, which have been consciously created, and exists presently in the conscious or forgotten in the personal unconscious. Social mores, however, are typically created based on archetypical ideas of morality, and the difference between the moral and ethical conscience should not be

¹⁶⁸ Carl Gustav Jung, *Psychological Types* (H.G. Baynes and R. F. C. Hull (trans), Routledge, 1991), 212

¹⁶⁹ Jung (n 160), 440

¹⁷⁰ Larry Gates, ‘Conscience as the Voice of God: a Jungian View’ (1992) 31 *Journal of Religion and Health* 281, 281-282

¹⁷¹ David Robinson, *Conscience and Jung’s Moral Vision: From Id to Thou* (Paulist Press, 2005), 21

overstated.¹⁷² The moral conscience comes to life in a person when a thought or action suggests a ‘real or supposed deviation from the moral code’.¹⁷³ Then the conscience must determine the appropriate course of action. Robinson writes that the moral conscience is an ‘examination’ of our motives for actions.¹⁷⁴ Self-interest can be a strong motivational factor to override a moral code, necessitating an internal moral check. It is similar to the courtroom role of Kant’s conscience.

At times, however, the moral code does not provide a clear answer or the moral conscience is inadequate. This activates the ethical conscience, which decisions derive from ‘the unconscious foundation of the personality’.¹⁷⁵ The unconscious consists of counterpoints, and thus there are two ethical codes, the good and the bad.¹⁷⁶ Every archetype has this dual persona, exhibiting both good and bad characteristics. The God archetype, which is heard as conscience, similarly has both. It is for the conscious mind to identify which voice is good and which voice is bad.¹⁷⁷ Jung cites St Paul, who famously lamented that ‘I do not do the good I want, but the evil I do not want is what I do’.¹⁷⁸ Jung’s view that people inherently have both good and bad characteristics is in contrast to Freud and many before him who argue people are ‘essentially good’ and the school of behavioural psychology which ‘works on the assumption that people are born morally neutral’.¹⁷⁹

Where there is conflict between the ethical conscience and the moral conscience, the ethical conscience takes priority. Gates discussed the example of Huckleberry Finn.¹⁸⁰ The essence of the story is that Huckleberry Finn, the protagonist, saved Jim, a runaway slave, in contradiction of the then prevailing social morality in southern United States. Thus the archetypal, ethical morality was pitched against the moral conscience, with the former taking precedent. There are no doubt countless examples of people doing what is “right” contrary to social norms, or contrary to the wishes of their family or community. Gates says it is ‘interesting’ that the ethical conscience can

¹⁷² Jung (n 160), 444; David Robinson, *Conscience and Jung’s Moral Vision: From Id to Thou* (Paulist Press, 2005), 18

¹⁷³ Jung (n 160), 454

¹⁷⁴ Robinson (n 171), 18

¹⁷⁵ Jung (n 163), 454

¹⁷⁶ *Ibid*, 442

¹⁷⁷ Gates (n 170), 284

¹⁷⁸ Romans 7:19; 1 John 4:1

¹⁷⁹ Gates (n 170), 284

¹⁸⁰ *Ibid*, 282

command a person to break his inner moral code.¹⁸¹ In this respect, Jung's conscience has to be understood with the backdrop to the collective unconscious. It is an inherent sense of right and wrong, and it is doubtful that socially imposed morality can truly surpass that.¹⁸²

It is not possible within the scope of this thesis to draw a definitive conclusion on whether moral norms are psychologically universal, but the many theories in that direction cannot easily be dismissed. Jung's work, which is as much anthropological as it is clinically psychological, is persuasive. Indeed, if nothing else, one would posit that showing tolerance towards others, at the very least, would be a universal norm.

Objective conscience in modern philosophy

The objective conscience has been hailed by others in modern times. Stout, for instance, has followed Jung in arguing that there are universal moral rules.¹⁸³ She posits that these include objection to violent crimes, 'concepts of property', the 'ideas of fairness and taking turns', and so forth. Further, 'the universal moral norms generally have to do with helping, or at least not harming, other people'.¹⁸⁴

Langston insists that conscience should not have merely personal authority, and argues that even though conscience as an objective moral force can differ between cultures and even change within a person over time, to see conscience as a purely personal thing is 'misguided'.¹⁸⁵ Langston argues strongly for the view that conscience can be a positive force, which is 'tied to the cultivation of the virtues', rather than (particularly following Freud) purely seeing conscience as a 'reactive punisher of misdeeds'.¹⁸⁶ Langston notes that modern virtue theorists 'have neglected issues concerned with conscience'.¹⁸⁷ A possible reason for this is the focus of modern theorists on different virtues in and of themselves, but a lack of attention on how a

¹⁸¹ Ibid, 282

¹⁸² Jung did write about mass psychosis, including how National Socialism could arise in Germany under Hitler. It is beyond the scope of this thesis to explore the psychological reasons behind such events.

¹⁸³ Lynn Stout, *Cultivating Conscience: How Good Laws make Good People* (Princeton University Press, 2011), 56

¹⁸⁴ Ibid, 57

¹⁸⁵ Langston (n 41), 101

¹⁸⁶ Ibid, 119

¹⁸⁷ Ibid, 144

person should form virtues.¹⁸⁸ Langston's view of virtue ethics is one that 'includes a mixture of duty- and virtue-based morality', and thus 'requires the commitment of individuals to the duty-based rules of society'. His idea of conscience is immediately linked to this. Langston writes that 'conscience as I have defined it incorporates societal rules and thus serves as a source for adherence to societal rules'. Indeed, conscience 'would provide the sense of societal standards a virtuous person must have'.¹⁸⁹ This link between conscience and the development and adherence to virtues is based on the medieval theologians following Aquinas.¹⁹⁰

The work by Stout and Langston suggest that an objective conscience remains valid in modern philosophy. Subjectivism and individuality might be the dominant idea in Western philosophy, but it is not the only one.

Objectivity and communal stories

The subjective conscience seems like a modern creation. However, prior to the 16th century, 'the subjectivity of "conscience" was only very rarely acknowledged'.¹⁹¹ As seen with the scholastics, a communal morality existed, which nonetheless highly praised reason and each person's inherent free will. Modern Britain is multi-angular; we are exposed to competing moral teachings from family, friends, social/ethnic/cultural groups we interact with, societies we belong to, political or religious affiliations, and so forth. Can a communal morality still exist? Some have argued in the affirmative, saying that our conscience can come to reflect the 'values and loyalties of the most influential communities'.¹⁹² Our characters grow from exposure to these different groups, and a role of a shared moral consciousness is to accept or reject the norms and values those different groups project. A broad, communal morality can still exist, centred on general moral precepts.

The theologians and philosophers have shown that a communal morality can be possible, in that all people share general moral precepts. There may well be

¹⁸⁸ Ibid, 150

¹⁸⁹ Ibid, 172

¹⁹⁰ Ibid, 173-174

¹⁹¹ Alexandra Walsham, 'Ordeals of Conscience: Casuistry, Conformity and Confessional Identity in Post-Reformation England' in Harald Braun and Edward Vallance (eds) *Contexts of Conscience in Early Modern Europe 1500-1700* (Palgrave, 2004), 33

¹⁹² Richard Gula S.S., *Reason Informed by Faith: Foundations of Catholic Morality* (Paulist Press, 1989), 142

disagreements about the details, but agreement on the broad concepts. Fisher notes that a criticism of modern subjectivism is that it regularly fails ‘to take seriously the extent to which community, tradition and shared narratives shape people’s identity and values’.¹⁹³ Gula says similarly that ‘rules and regulations’ in society tries to teach communal morality, but that ‘stories, images, rituals do it better’; it is through the imagery, not the codes, that ‘we come to see what life centred on the convictions of these communities is about, and how life is to be lived’.¹⁹⁴

There is no doubting the importance of storytelling, including within the law.¹⁹⁵ These stories can be told through the archetypes; images and ideas found in all communities around the world. Story-telling through using the Jungian archetypes has been explicitly advocated in the literary community.¹⁹⁶ It can explain the universal popularity of stories such as “Harry Potter” and “Lord of the Rings”, which share the same archetypal story of the evil-vanquishing hero.¹⁹⁷ The archetypes are also utilised in legends and myths that join together specific communities; modern examples include Sir Winston Churchill, Lady Diana and Evita, where the legend, around which a community can rally, is distinguishable (and sometimes completely removed) from the historical person.¹⁹⁸ There is more communal morality than one might expect, shaped through stories, rituals, pageants and even the law.

Conclusion

It is submitted that an objective, or communal, morality is a real phenomenon. It can be found in communal stories, arts, rituals, and so on. It is possible for equity to insist on an objective conscience. The conscience of modern equity, it is argued, is found

¹⁹³ Anthony Fisher, *Catholic Bioethics for a New Millennium* (CUP, 2012), 63

¹⁹⁴ Gula (n 192), 144

¹⁹⁵ Linda H Edwards, ‘Once Upon a Time in Law: Myth, Metaphor, and Authority’ (2010) 77 *Tennessee Law Review* 883, 886; Warren Binford, ‘How to Be the World’s Best Law Professor’ (2015) 64 *Journal of Legal Education* 542, 550

¹⁹⁶ Christopher Vogler, *Writer’s Journey: Mythic Structure for Writers* (3rd edn, Michael Wiese Productions, 2007); Joseph Campbell, *The Hero with A Thousand Faces* (3rd edn, New World Library, 2008)

¹⁹⁷ Richard Hedlund, ‘Jungian Archetypes and Unconscionability in English Equity’ (Conference Paper, SLS, 2015, York Law School, September 2015), 8-11

¹⁹⁸ Nicholas Fraser and Marysa Navarro, *Evita: The Real Lives of Eva Peron* (2nd edn, Andre Deutsch, 1996), i; Richard Young, ‘Textualizing Evita: “Oh, What a Circus! Oh, What a Show!”’ (1999) 24 *Canadian Journal of Latin American and Caribbean Studies* 215, 218; Marysa Navarro, ‘Wonder Woman was Argentine and Her Real Name was Evita’ (1999) 24 *Canadian Journal of Latin American and Caribbean Studies* 133, 137

within the body of case law; the case reports serving the social function of telling morality tales. The conclusion will support the proposition put forward by Hudson, who sees equity's conscience as 'being an embodiment of an objective ethics to which the individual is intended to aspire and by reference to which her deeds and misdeeds will be judged by the civil courts'.¹⁹⁹

¹⁹⁹ Alistair Hudson, *Equity and Trusts*, (8th edn, Routledge, 2015), 1310

Chapter 4

The Nature of Equity's Conscience

The previous chapter showed that the conscience came into English equity from the medieval canon law. At that point, the Lord Chancellors would have adopted the scholastic conception of conscience, which, although theologians disagreed on the details, was a rational engagement with the law of reason; an objective morality. The psychological studies by Jung demonstrate that an objective, communal morality (whether classified as natural law, categorical imperatives, archetypes, ethical conscience, or otherwise) is a psychological reality.

This chapter will trace these ideas into English equity. The sole purpose of the chapter is to answer the first of the three questions addressed in this thesis: does English equity adopt a subjective or objective test for unconscionability? Ultimately, whilst there are conflicting judicial statements, the chapter will demonstrate that equity did adopt a scholastic form of conscience and continues to do so.

This chapter will proceed in chronological order, starting in the medieval Chancery and finishing with contemporary judgments. The importance of this question will be addressed at the end of the chapter. Equity should not adopt a subjective conscience (either by looking at the defendant's or the judge's personal opinion) since it would undermine the idea of legal certainty and predictability. There has to be an objective morality which serves as a common baseline by which all parties are judged.

Part 1: Conscience in medieval equity

The best evidence for equity using a scholastic conscience would be found in medieval judgments. However, in the 12th-14th centuries, judgments were generally not recorded; since they were *in personam* there was perhaps no need to. Some decisions were included in the Year Books. What remain in the Chancery records are petitions, on which the outcome was occasionally noted. This section will consider some of these

petitions, not as a comprehensive review, but rather a few representative examples to see how conscience was used.¹

Great importance was attached to the clerical nature of the Lord Chancellors. The petitions abound with references to God and Christ. One petition asks the Lord Chancellor: ‘May it please your most wise discretion to ordain and make a remedy in these matters; to the honour of our Lord Jesus Christ’.² It highlights the discretionary, flexible nature of equity, and the religious undertones in Chancery. It is important to note the reference to “wise discretion”, which could either be a reference to a learned discretion within the existing moral framework, or equally could simply be an attempt to flatter the Lord Chancellor. Petitions are brought “For God and Charity”, which seem to have been a standard signoff.³ There are numerous petitions brought “for God and Charity” without giving any other reasons or invoking any known equitable doctrines; it was left to the Lord Chancellors using their “wise discretion”.⁴

References to conscience before the 1400s seem rare.⁵ In the petitions published by the Selden Society the earliest dated reference to conscience is from between 1420 and 1422.⁶ In petitions dated between the 1380s and 1410s, there are no references to conscience. This, however, is of little consequence. As seen in the previous chapter, conscience was only beginning to develop in scholastic theology at the time. The focus was on moral reasoning and engagement with the natural law. There are many such references in the petitions, which speak of God, charity, right, reason and justice. One plea asks for judgment ‘as law and right demand’.⁷ Another asks for remedy for an act which was ‘against right and reason’.⁸ This is morality by any other name.

The natural law was referred to as the law of reason.⁹ This is because everyone could rationally identify with its moral precepts. As such, references to “right” or “reason”

¹ For a more comprehensive review of early Chancery cases, see Timothy Haskett, ‘The Medieval English Court of Chancery’ (1996) 14 *Law & History Review* 245

² William Baildon (ed), *Selden Society, Vol 10, Select Cases in Chancery, 1364-1471* (Bernard Quaritch, 1896), Case 91, page 84

³ *Ibid*, Case 124, page 121; see also cases 126, 127, 130; in case 45 the reference is to ‘holy charity’.

⁴ *Ibid*, Case 8, page 9; Case 31, page 35; Case 36, page 40; see Fiona Roughley, ‘The Development of the Conscience of Equity’ in JT Gleeson, JA Watson, RCA Higgins, *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013), 142

⁵ The National Archives refer to one dated Chancery petition from 1385 mentioning conscience, see <http://discovery.nationalarchives.gov.uk/details/r/C9335527> (accessed 22/08/2015)

⁶ Baildon (n 2), Case 121, page 119

⁷ *Ibid*, Case 19, page 23

⁸ *Ibid*, Case 25, page 30; Case 39, page 43; Case 63, page 64

⁹ Thomas Aquinas, *Summa Theologiae* (Timothy McDermott (ed), *Concise Translation* (Methuen, 1989)), 287

do not present something altogether different from “conscience”. The theologian would see no difference between saying that someone acted against “good conscience” or against “reason” or against “what is right”.

Following the 1420s, the term “conscience” became increasingly common and the Chancery became known as the court of conscience. A petition from between 1420 and 1422 alleges that the defendant has acted against ‘law, right and good conscience’ and asked for a remedy as ‘law and conscience demand’.¹⁰ The phrase ‘as good faith and conscience requires’ was used in a petition from somewhere between 1460 and 1465.¹¹ A subsequent petition, similarly dated, states ‘as right and good conscience requires’.¹² The terms right, reason, conscience are used interchangeably and mean the same thing: the defendant has acted against the natural law.

Two petitions are particularly informative. The first refers to Chancery as ‘the Court of Conscience’ and asks that the defendant ‘answer thereto as reason and conscience demand’, since ‘otherwise the said suppliant is and will be without remedy, which God forfend’.¹³ This is important since it links reason and conscience. The second asks that the defendant repays ‘as good faith and conscience requires’. Further, the petition asks that the defendant must ‘answer after the law of conscience, which is law executed in this court for default of remedy by courts of the common law’.¹⁴

By the mid-15th century the Chancery had become known as the court of conscience. The reference to the “law of conscience” signifies that conscience was something more than simply a byword for justice. It clearly points to some objective moral “law” that the Chancellor must apply. The petitions also speak to the purpose of the Chancery, to remedy defaults in the common law courts, and that this is necessary because God (and the natural law) would not permit justice to fail for want of a remedy in the man-made law. At this point, the role of the Chancery had been established.

These petitions are clear in referring to conscience as something objective. The petitions write “as conscience demands”, or “as right demands”, or again “as reason demands”. It is a constant referral to the objective morality found in contemporary society (namely that of the Catholic Church) and it is for the Lord Chancellor to apply

¹⁰ Baildon (n 2), Case 121, page 119

¹¹ Ibid, Case 144, page 151. The original text reads: ‘as gude faith and conscens requyer’.

¹² Ibid, Case 144, page 153. The original text reads: ‘as right and good conscience requiren’.

¹³ Ibid, Case 123, page 121

¹⁴ Ibid, Case 143, page 146. The original text reads: ‘as good feith & consciens requyren’ and ‘answer after the lawe of consciens, whiche ys lawe executory in this courte for defaute of remedy by cours of the common lawe’.

that morality to the facts of the case. The petitions are all alleging that the defendant has somehow fallen below what that objective morality prescribes.

Part 2: Conscience in Reformation equity

Significant changes happened to England during the reign of Henry VIII and these too had an impact on equity. In his early reign, the Chancery was led by two famous Chancellors, Thomas Wolsey, Cardinal-Archbishop of York, and Sir Thomas More. During their Chancellorships, concerns over the subjectivity and arbitrariness of conscience were raised.¹⁵ Wolsey saw conscience as ‘superior to the law’, unsurprising coming from a cleric; however ‘Wolsey appears to have made something new of it by grounding conscience less on canon law than on his own will’.¹⁶ This raised concerns about equity and its conscience; was it that of the natural law or that of the Cardinal himself?

The Chancery became subject to criticism.¹⁷ A crucial treatise on equity was written by St German in 1523, commonly referred to as the *Doctor and Student* dialogue. A reply was written by an anonymous serjeant, followed by another reply from St German. These works were important in cementing the role of conscience and equity.

By the 1530s, three different views on equity had emerged.¹⁸ Wolsey had used the joint authority of King and Church to empower the Chancery at the expense of the common law, which he saw as failing to comply with the dictates of the King’s conscience. Thomas More insisted that equity’s conscience was that of the Church and thus sat above the King. This conscience also bound the common law, giving equity the power to remedy defaults in the common law. St German followed older Greek thinking in arguing that equity was a process of interpreting the King’s law, and the conscience of the King was supreme.

¹⁵ Dennis R Klinck, ‘Lord Nottingham and the Conscience of Equity’ (2006) 67 *Journal of the History of Ideas* 123, 124

¹⁶ Timothy Endicott, ‘The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity’ (1989) 47 *University of Toronto Faculty Law Review* 549, 556; Roughley (n 4), 148; JA Guy, ‘Wolsey, the Council and the Council Courts’ (1976) 91 *English Historical Review* 481, 487

¹⁷ Georg Behrens, ‘An Early Tudor Debate on the Relation between Law and Equity’ (1998) 19 *Journal of Legal History* 143, 144

¹⁸ Endicott (n 16), 567

St German

The *Doctor and Student* dialogue remains one of the most important works on English equity. In detail it runs through the basis of English law and its links to God's law and the law of reason. The book has been influential in determining the scope of Chancery jurisdiction, and has been cited up to modern times as authority on both equity and common law.¹⁹ Much has already been written about St German's view on the proper role of Chancery; this section will focus on his definition of conscience.

The work was first published in 1523 when the Reformation had already begun in Europe. The dialogue, which touches on ecclesiastical questions, such as conscience, could therefore not avoid having some political connotations.²⁰ However, the conception of conscience used by St German is scholastic in nature. This is not surprising; no real alternative version of conscience had yet established itself. Whilst Luther and Calvin set the tone for the Protestant conscience, it was only with later theologians such as Joseph Butler in the 17th century that the subjective conception of conscience was fully fleshed out.

Synderesis asks us to do "good", reason tells us what is "good", and thus conscience is doing "good".²¹ This divide is reminiscent of St Bonaventure. Throughout the work, St German is reverent for reason, the hallmark for the scholastics and strongly questioned by the reformers. St German did not deviate from the scholastic theology.

As a lawyer, however, St German added new observations. Key amongst those is addressing the relationship between conscience and the positive law. Positive law is binding in so far as it is compatible with God's law and the law of reason.²² That said, English law, as a rule, was not declared invalid because of any perceived incompatibility with the law of reason.²³ St German argued that positive law, rather than exclusively the Church, should inform a man's conscience and if 'a human law

¹⁹ The work covered a great extent of English law and has been cited up to modern times; i.e. *Roberts v Swangrove Estates Ltd* [2008] Ch 439, [65] (Mummery LJ); *Williams v Linnitt* [1951] 1 KB 565, 585 (Denning LJ); in one case a legal principle had been identified by Coke and St German, with Page Wood VC saying it thus 'cannot now be disputed', *Rider v Wood* (1855) 1 Kay and Johnson 644, 652; 69 ER 618, 621.

²⁰ Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton (eds), Selden Society, 1974), xi

²¹ *Ibid*, 81 (synderesis), 85 (reason), 89 (conscience)

²² See i.e. Aquinas (n 9), 284; St German (n 20), 111

²³ Georg Behrens, 'Equity in the Commentaries of Edmund Plowden' (1999) 20 *Journal of Legal History* 25, 26

is changed by the competent authority...then the conscience which had been previously founded upon it must change likewise'.²⁴ This is fully predicated on human laws being in accordance with God's law, and one does not have to read in reformist tendencies in this assertion. As seen, St Bonaventure wrote extensively on conscience learning from experience, so there is nothing new in suggesting that changes to human laws can change our conscience. However, it has been argued that this was an attack on the Church, being an argument that the King's law rather than the Church should govern Englishmen's consciences.²⁵ The medieval Lord Chancellors saw conscience differently, arguing that conscience 'adds something' to the law.²⁶

St German reined in the role of equity from the free-wheeling role it previously enjoyed. St German argued, in line with the Ancient Greeks, that equity's role was to interpret and "correctly" apply the positive law.²⁷ He used the phrases well-known today, that 'it is not possible to make any general rule of law but that it shall fail in some cases', that equity 'follows the law', and is an 'exception' in cases where the application of the positive law would produce an outcome contrary to the true intentions of the lawmaker (an outcome contrary to justice).²⁸ If equity purely was a rule of interpretation, Endicott has argued that this in effect would reduce 'the role of conscience to insignificance'.²⁹ However, that is not necessarily so. If equity was limited in this way, one would still need to assess in what situations the strict application of a rule would cause injustice, and where a person might immorally try to take advantage of a strict rule. That said, Chancery never did reduce its role in the way St German supported, and equitable rights and remedies grew up in their own right, keeping the role of conscience open.

St German argued that the conscience of the Chancellor is not arbitrary, but rather is 'grounded upon the law of God, and the law of reason, and upon the law of the realm

²⁴ St German (n 20), 111

²⁵ Ibid, xlvi-xlvii; Sharon Dobbins, 'Equity: The Court of Conscience or the King's Command, the Dialogues of St German and Hobbes Compared' (1991-1992) 9 *Journal of Law and Religion* 113, 124

²⁶ Behrens (n 23), 154

²⁷ Aristotle, 'Nicomachean Ethics' in Richard McKeon (ed), *The Basic Works of Aristotle* (Random House, 1941), 1020; Eric Zahnd, 'The Application of Universal Laws to Particular Cases: A Defence of Equity in Aristotelianism and Anglo-American Law' (1996) 56 *Law and Contemporary Problems* 263, 266; Hessel Yntema, 'Equity in the Civil Law and the Common Law' (1966-1967) 15 *American Journal of Comparative Law* 60, 64; see also *The Earl of Oxford's Case* [1615] 21 ER 485, 487 (Lord Ellesmere)

²⁸ St German (n 20), 97

²⁹ Endicott (n 16), 559

not contrary to the said laws of God nor to the law of reason'.³⁰ This is perhaps the most important point and reiterates that the test for unconscionability is objective; conscience remains scholastic in terms of it being a rational engagement with the law of reason. This accepts the presence of the divine law, which is not the same as accepting that the precepts of the Church should inform conscience. Conscience in equity came to be informed by the rules of equity rather than external religious authorities.

St German's work was the starting point for formalising equity.³¹ This was perhaps necessary given the perceived abuses of various Lord Chancellors, including Wolsey, and because of the changing religious climate in England. Conscience, to St German, was still in the scholastic school. Although the chancery never limited itself in the way envisaged by St German, the chancery did continue to adopt an objective, modified scholastic conception of conscience. It is not the conscience of each individual Lord Chancellor, but a general conscience informed by the natural law. Roughley writes that the 'sustained influence' of St German meant that 'scholastic conscience remained a touchstone of the theories of equity and conscience' well into the 17th century.³² Indeed, beyond that.

Selden's complaint

One of the most well-known comments from the time came from Selden, who remarked that conscience varied with the Chancellor's foot. Selden's argument was that the conscience applied was merely the personal conscience of whoever happened to be Lord Chancellor.³³ Spence says that there was much 'erroneous views as to the nature' of the office of Lord Chancellor during the reigns of Henry VIII to Elizabeth I and suggests that Selden's comments were 'more perhaps in jest than in earnest'.³⁴ This was undoubtedly in no small part due to Wolsey and More. Selden's complaint

³⁰ Christopher St German, 'Little Treatise concerning Writs of Subpoena' printed in JA Guy, *Christopher St German on Chancery and Statute* (Selden Society, 1985), 123

³¹ Endicott (n 16), 558; Mike Macnair, 'Equity and Conscience' (2007) 27 *Oxford Journal of Legal Studies* 659, 662

³² Roughley (n 4), 160

³³ H Jefferson Powell, "'Cardozo's foot': the Chancellor's Conscience and Constructive Trusts" (1993) 56 *Law and Contemporary Problems* 7, 8

³⁴ George Spence, *The Equitable Jurisdiction of the Court of Chancery, Vol 1* (Lea and Blanchard, 1846), 413

is regarded as the ‘classic common-lawyer’s complaint’.³⁵ This is that equity is too discretionary, and conscience too vague, to be useful. Spence, on the other hand, argues that the Chancery ‘never could have been established, if the conscience of the judge had been his only guide’.³⁶ Indeed, Spence goes on to say that ‘nothing is recorded as having been delivered judicially from the bench which can warrant the supposition that the private opinion or conscience of the judge, or what is perhaps equivalent, his whim or caprice, independent of principle or precedent, was a legitimate ground of decision’.³⁷ This second statement is not as clear-cut in some 18th century case law, but the first is more persuasive. It is very doubtful that equity would have succeeded if it truly was based on an individual Lord Chancellor’s own opinion. Though there are some judicial statements where Lord Chancellors refer to their own conscience, those cases should still be read as part of the objective framework that equity presents. The Lord Chancellor taps into the objective conscience. After the Reformation the Chancery strove to become more certain, in an attempt to address the concerns raised about the Chancellors’ capriciousness.³⁸

Part 3: Conscience in post-Reformation equity

The Earl of Oxford’s Case

One of the most important equity judgments is *The Earl of Oxford’s Case*. It has been rightly pointed out that it is less a judgment and more the Lord Chancellor’s treatise on the nature of equity, with Ibbetson lamenting ‘just how theoretically unsophisticated’ the treatise is.³⁹ True, Lord Ellesmere did little but broadly repeat earlier ideas on equity, including drawing on Aristotle and St German.

Lord Ellesmere outlined the two roles for Chancery, namely to correct people’s consciences and to mitigate the rigour of the common law.⁴⁰ In many ways, the two are separate. The first is a general right to correct bad consciences, with Lord

³⁵ Jefferson Powell (n 33), 7

³⁶ Spence (n 34), 414; see also *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, [9] (Deane J)

³⁷ George Spence, *The Equitable Jurisdiction of the Court of Chancery, Vol 1* (Lea and Blanchard, 1846), 415

³⁸ Roughley (n 4), 161

³⁹ David Ibbetson, ‘A House Built on Sand’ in E Koops and WJ Zwallye (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Brill, 2013), 74-75

⁴⁰ *The Earl of Oxford’s Case* (1615) 21 ER 485, 486 (Lord Ellesmere)

Ellesmere citing fraud, breach of confidence, and any other equitable wrong. This role focuses on specific claims against individuals for wrongdoing. These claims would not be recognised at common law. Lord Ellesmere made an interesting comment in respect of defining conscience, especially so since it was only a few decades after the Reformation. Lord Ellesmere said that ‘Equity speaks as the Law of God speaks’.⁴¹ This is strongly reminiscent of equity’s canonical origin.

The second arises from the more general “appellate” nature of equity, of granting *in personam* judgments where the common law in some way has been defective. Of course Chancery was not an appellate court, but the term paints a picture of claimants who had been or would be denied justice at common law. This focused on the interpretation of common law rules and statutes. This second role includes the more substantive areas, such as trusts, rescission of contracts, and equitable remedies such as specific performance. Each of these has arisen where the defendant has in some way taken advantage of the common law. Lord Ellesmere describes this clearly.

‘That when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party’.⁴²

The same point was later made in *Stevens v The Bishop of Lincoln*, where the King’s Bench confirmed that whilst the Chancery cannot interfere with a common law judgment, the Lord Chancellor did have jurisdiction to proceed against a ‘person for a corrupt conscience’ in circumstances where that person had taken ‘advantage of the law against his conscience’.⁴³ It echoes the Aristotelian view of equity, acting as a jurisdiction to fill gaps and step in where a strict application of the common law resulted in an injustice. Later, the Court said that law and equity are to be ‘subservient to the other’, and a Court of Equity can either follow the law, ‘assist’ the law with additional remedies, or give relief against ‘abuse’ or the common law’s ‘rigour’. The discretion of equity was not absolute, but bound within these principles.⁴⁴

⁴¹ Ibid, 486 (Lord Ellesmere)

⁴² Ibid, 487 (Lord Ellesmere)

⁴³ *Stevens v The Bishop of Lincoln* (1627) Het 20, 20; 124 ER 308, 308

⁴⁴ *Cowper v Cowper* 2 P Wms 652 (Sir Joseph Jekyll); cited in *Burgess v Wheate* (1759) 1 Eden 177, 28 ER 652, 666 (the Master of the Rolls)

Both the first and second rationale for equity is based on the concept of conscience, in particular seeking to relieve the conscience of the defendant. These two roles, which have respectively been referred to as “conscience” and “equity” are separate yet have much in common. In both roles, the primary reference is to the specific claim (fraud, breach of fiduciary duty, rescission and so on), where conscience can be used as the determining factor as to wrongdoing. The reference to the law of God suggests an objective conscience, something above the personal opinion of either the defendant or the Chancellor. *The Earl of Oxford’s Case* in this respect is a continuation of the medieval Chancery practice as well as the arguments put forward by St German.

Lord Nottingham and equity’s conscience

Lord Nottingham is widely seen as a crucial judge in the process of formalising equity. Lord Nottingham stated that using conscience as a criterion for justice could lead to arbitrariness.⁴⁵ Lord Nottingham continued by arguing that “equity itself would cease to be Justice if the rules and measures of it were not certain and known” and that conscience must be “dispensed by the rules of science”.⁴⁶ It was a clear statement in favour of an objective conscience, which was known and ascertainable. Lord Nottingham brings in authority from equitable precedent and the common law, which can be expected, but also from notions of universal justice, biblical law, and the ‘social code’ of honour. Klinck writes that Lord Nottingham’s system of equity clearly had ‘permeable boundaries’ as to what amounted to strict rules and precedent since it brings in a range of ‘extralegal factors’.⁴⁷ Nonetheless, it was not based on Lord Nottingham’s personal opinions, but on ascertainable rules.

Lord Nottingham drew a vital distinction between private and public conscience. Lord Nottingham said that ‘With such a conscience as is only *naturalis et interna*, this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures’.⁴⁸ Klinck argues that this reference to

⁴⁵ *Earl of Feversham v Watson* (1678) in D.E.C. Yale (ed), *Lord Nottingham’s Chancery Cases, Vol 2* (Selden Society, 1961), 639

⁴⁶ *Ibid*, 639; *Thornborough v Baker* (1675) 3 Swanston 628, 629; 36 ER 1000, 1001 (Lord Nottingham); cf *Hele v Hele* (1681) 2 Cases in Chancery 87, 93; 22 ER 859, 862 (Lord Nottingham)

⁴⁷ Dennis R Klinck, ‘Lord Nottingham’s “Certain Measures”’ (2010) 28 *Law and History Review* 711, 744-745

⁴⁸ *Cook v Fountain* (1733) 36 ER 984, 990 (Lord Nottingham); see also *Haywood v Cope* (1858) 25 Beav 140, 153; 53 ER 589, 595 (Sir John Romilly MR)

“measures” means rules, namely rules that ‘set standards or criteria’ against which conscience is judged.⁴⁹ This distinction between the conscience where equity will assist and the conscience which equity leaves to the individuals had been noted in earlier decisions.⁵⁰ As such it was not a distinction that Lord Nottingham created, but rather him ‘declaring what had become of the established doctrine of the Court’.⁵¹ This divide existed in the medieval Church. Ecclesiastical claims concerning “conscience” were regulated and heard in two forums: the “internal” (the confessional) and the “external” (the canon law court).⁵² This was based on the doctrine, ‘*de occultis non judicat ecclesia*’, namely that the ‘Church does not judge secret matters’.⁵³ Certain private acts were not the subject matter of the canon law. Only public acts could be heard in the ecclesiastical court. Given the close relationship between the canon law and the medieval Chancery, it is not surprising that the Chancery recognised the same divide.

Klinck rightly queries how the two are to be ‘distinguished’.⁵⁴ To being with, Klinck suggests that instead of being ‘antitheses’ the two overlap. All of conscience counts as private conscience, and Klinck put this as a large circle. Inside is a smaller circle, which consists of that portion of conscience important enough to also be classed as a public conscience.⁵⁵ Klinck has four suggestions for how the distinction can be made.

Klinck’s first suggestion is the division between the “internal” and “external” conscience.⁵⁶ This is essentially the divide taken by the canon law. The internal conscience deals with our private thoughts, feelings, and emotions. The external conscience deals with our actions; words spoken and acts undertaken. A court can only judge the external conscience. Klinck accepts that this division is rather crude, but is a helpful starting point.⁵⁷ Klinck cited the doctrine of notice as one example of its

⁴⁹ Klinck (n 47), 714

⁵⁰ *Anonymous* (1602) Cary 12, 12; 21 ER 7, 7

⁵¹ Spence (n 34), 417

⁵² Joseph Goering, ‘The Internal Forum and the Literature of Penance and Confession’ in Wilfried Hartmann and Kenneth Pennington, *The History of Medieval Canon Law in the Classical Period, 1140-1234* (The Catholic University of America Press, 2008), 380; RH Helmholz, ‘Conflicts between Religious and Secular Law: Common Themes in the English Experience’ (1990-1991) 12 *Cardozo Law Review* 707, 709

⁵³ Henry Ansgar Kelly, ‘Lollard Inquisitions: Due and Undue Process’ in Alberto Ferreiro (ed), *The Devil, Heresy, and Witchcraft in the Middle Ages* (Brill, 1998), 299. The word “occult” has its traditional meaning of something secret, as opposed to its common contemporary usage as referring to something supernatural.

⁵⁴ Klinck (n 15), 126

⁵⁵ *Ibid*, 127

⁵⁶ *Ibid*, 127

⁵⁷ *Ibid*, 132

limitation, where equity makes decisions based on internal knowledge as opposed to external actions.⁵⁸ However, equitable statements such as “wilful ignorance” or “ought to have known” hint at external action (or at least actions that objectively speaking should have happened) capable of judicial intervention.⁵⁹ Thus, one can posit that the distinction is between an abstract thought (which cannot be adjudicated) and a concrete act (which can be adjudicated).

Klinck’s second method is the division between spiritual and civil conscience. The spiritual conscience includes external acts done in the ‘religious sphere’, where equity has no jurisdiction.⁶⁰ Equity is not a spiritual jurisdiction, though occasionally the strict divide was not maintained.⁶¹ Klinck argues that these occasional excursions into spiritual considerations do not undermine this method of distinguishing private and public conscience; the reference to spiritual considerations are understandable considering both equity’s historical origins and contemporary society.⁶²

Klinck’s third method is by looking at “private actions versus public order”.⁶³ This asks whether an act is a purely private one or an act which affects society. Certain private acts, such as honour, do not engage equity.⁶⁴ In *Cowper*, Sir Joseph Jekyll lamented that a different outcome might have been reached if he had been permitted to take into account ‘honour, gratitude, private conscience’.⁶⁵ These factors are not actionable in equity. This division also emphasises the long-held view that the conscience of equity is ‘not the chancellor’s own conscience but a disembodied impersonal conscience that is *per se* public’.⁶⁶ Klinck states that whenever judges speak of conscience, they write “conscience” as opposed to “my conscience”; clearly indicating that equity’s conscience has an ‘independent existence’ from the individual judges.⁶⁷

Klinck fourthly suggests that one can distinguish private from public conscience by looking at “charity versus justice”. Here, charity refers to ‘acts of simple generosity’

⁵⁸ Ibid, 131

⁵⁹ For “knowledge” in equity, see generally *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509, [250] (Peter Gibson J)

⁶⁰ Klinck (n 15), 133

⁶¹ Ibid, 135; see for instance *Nurse v Yerworth* (1674) 3 Swanston 608, 620; 36 ER 993, 997 (Lord Nottingham); *Lord Grey v Lady Grey* (1677) 2 Swanston 594, 598; 36 ER 742, 744 (Lord Nottingham)

⁶² Klinck (n 15), 136

⁶³ Ibid, 136

⁶⁴ Ibid, 138; consider *Re Maddock* [1902] 2 Ch 220, 230 (Cozens-Hardy LJ)

⁶⁵ *Cowper v Cowper* (1734) 2 Peere Williams 720, 734; 24 ER 930, 935 (Sir Joseph Jekyll MR)

⁶⁶ Klinck (n 15), 138

⁶⁷ Ibid, 140

whereas justice refers to acts involving ‘obligations based on some kind of reciprocity’. Klinck accepts that division is an ‘oversimplification’.⁶⁸ The view is that equity cannot enforce the “Golden Rule” and cannot compel people to be charitable.⁶⁹ This is saying that equity’s conscience is only activated where there is reciprocity. It is usually stated that equity will not assist a volunteer.⁷⁰ However, this principle is not strictly applied.⁷¹ As such, this distinction is not as clear-cut as it could have been.

The distinction between the private and public conscience is vital. Equity can only judge that which happens externally to the person, namely acts (or where appropriate, a failure to act). That a trustee dreams of misappropriating trust funds or that a fiduciary longs for bribes is not the business of Chancery. His private conscience should reproach him, but no more. Equity’s conscience becomes activated once a misappropriation takes place or a bribe is received, not before. To this must be added Klinck’s third distinction, namely that only certain acts bear on equity. Take the bona fide purchaser. If a bona fide purchaser acquires a valuable heirloom stolen from a trust, in honour perhaps he should return it to the beneficiary. However, the conscience of equity will not be activated, since he has made the purchase in good faith.⁷² Hopefully these examples will clarify what is meant by an objective conscience in equity. The question is not what the individual Lord Chancellor, or the individual defendant, in his own mind believes to be right or wrong. It is what the equitable principles, collectively known as the conscience of equity, believe to be wrong.

Equity’s conscience in the 18th century

The 18th century saw a continuation of the objective conscience. However, there were a number of judicial statements which suggested that it was the Lord Chancellor’s personal conscience that was the determining factor. Indeed, Macnair suggests that pre-19th century equity is the ‘history of the ideas of the individual Chancellors’ and that ‘it was too easy’ for one Chancellor to reverse an earlier decision.⁷³ It is posited

⁶⁸ Ibid, 140

⁶⁹ Ibid, 142

⁷⁰ *T Choithram International SA v Pagarani* [2001] 1 WLR 1, 11 (Lord Browne-Wilkinson) (PC)

⁷¹ See, for instance, the controversial judgment in *Pennington v Waine* [2002] 1 WLR 2075, [54] (Arden LJ); *Evans v Lloyd* [2013] EWHC 1725, [52] (HHJ Keyser QC)

⁷² The bona fide purchase defence has an ancient origin, *Sir William Basset v Nosworthy* (1673) Reports Temp Finch 102, 103; 23 ER 55, 56 (Lord Keeper Bridgman)

⁷³ Mike Macnair, ‘Arbitrary Chancellors and the Problem of Predictability’ in E Koops and WJ Zwalew (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Brill, 2013), 91

that whilst this might be true in discrete equitable claims, there was continuity in the recognition of an objective test for conscience, which is the only thing this thesis is concerned with.

It is important to think about what those subjective statements mean. There are two broad possibilities. Firstly, the statements can mean that the Lord Chancellor really believed he was judging the case in accordance with his own personal conscience. Given everything already seen, this possibility is very unlikely. After several centuries, it would be strange if the Lord Chancellors suddenly began to think they could decide cases according to personal idiosyncrasies. The second possibility is that the Lord Chancellors meant that they (as the judge) had to apply the conscience of equity. In essence, “what does my conscience say about the established rules of equity”? This would be in accordance with established judicial practice. It is a judge applying the rules. This is what a judge does. The only fault is that the Lord Chancellors used unfortunate language which suggested they were making things up as they went along. The statements around “my conscience” are ambiguous and no clear answer can be given as to what those judges meant. However, given the preponderance of statements on the need for an objective conscience, this second possibility is the most plausible.

In *Binfield v Lambert* an issue arose as to the validity of a will, as only two of the necessary three witnesses could be found. The Master of the Rolls indicated that ‘the will could not be said to be strictly proved, agreeably to the statute; but his conscience being satisfied, as to the proof of it, he would, and he accordingly did, direct the trusts to be performed’.⁷⁴ This suggests that Sir Thomas Clarke referred to his own conscience. The second possibility outlined above is coming through. The outcome is not based on what Sir Thomas Clarke happened to think on that day, but rather him aligning himself with what equity objectively required to be proven, namely that the will was witnessed (equity focuses on substance over form).

Lawley v Hooper concerned a scheme to circumvent the statutes of usury. The Lord Chancellor said that ‘I really believe in my conscience’ that a majority of loan schemes are set up in a particular way to get around the Act.⁷⁵ This statement is potentially misleading. It is more likely that the Lord Chancellor was giving his honest (and rather

⁷⁴ *Binfield v Lambert* (1760) Dickens 337, 337; 21 ER 229, 299 (Sir Thomas Clarke MR)

⁷⁵ *Lawley v Hooper* (1745) 3 Atkyns 278, 279; 26 ER 962, 963

scathing) opinion on how lawyers were constructing loan schemes, as opposed to referring to conscience in an equitable sense.

Other cases are more problematic. In *Scroggs v Scroggs* the Lord Chancellor said that since the Chancery ‘is a Court of conscience, I shall give my opinion, in this case, according to my conscience’.⁷⁶ Similarly, in *Newcoman v Bethlem Hospital* the Lord Chancellor said that ‘I must determine the case according to my own opinion and conscience’.⁷⁷ These two statements are indicative of Selden’s complaint, that Lord Chancellors determine cases based on their personal views, leading to unpredictable, capricious and arbitrary outcomes. How can these statements be squared with the established objective nature of equity’s conscience? These statements could perhaps be written off as anomalies. Alternatively, following the second possibility above, one could suggest that the references are not the Lord Chancellor’s private conscience, but to his judicial conscience, formed and developed as part of his legal training. When determining the case he follows “my own opinion and conscience” *as informed by equity*. Perhaps it is not too much of a stretch to add that proviso?

Either way, the statements seemingly in support of a subjective, personal conscience must be treated with caution. There is no indication that equity somehow took a turn and started following the Chancellor’s foot. It is argued that these statements are those of a judge who is applying the rules of equity. Though it is an unfortunate choice of words, the judges are merely saying “I am applying the rules of equity, and this is what I believe those rules are saying”. As said above, this is a proper exercise of the judicial office. Judges are there to interpret and apply the rules.

In other cases the objective nature of equity is reiterated. These judicial statements are very clear in their explanations of equity, further suggesting that the above subjective statements are anomalies or unfortunate off-the-cuff remarks. In *Ex parte Groome* Lord Hardwicke said that the outcome ‘may have hardships, and I am sorry for it; but, as the law now stands, I cannot determine otherwise’.⁷⁸ On the contrary, in *Primrose v Bromley* Lord Hardwicke cited a previous decision of his own on the same topic, but continued by saying ‘I thought it extremely hard’ and therefore decided contrary to precedent.⁷⁹ Klinck writes that ‘this suggests is that a statement by a judge

⁷⁶ *Scroggs v Scroggs* (1755) Ambler 812, 814; 27 ER 513, 514

⁷⁷ *Newcoman v Bethlem Hospital* (1780) Ambler 785, 787; 27 ER 501, 502

⁷⁸ *Ex parte Groome* (1744) 1 Atkyns 1115, 120; 26 ER 75, 78 (Lord Hardwicke)

⁷⁹ *Primrose v Bromley* (1739) 1 Atkyns 89, 90; 26 ER 58, 59 (Lord Hardwicke)

in a particular case may not in fact be a reliable guide to his general judicial approach'.⁸⁰ The statement in *Groome* was often repeated by later Lord Chancellors, including Lord Eldon. It suggests that the formalisation that was underway since Lord Nottingham had turned equity (and conscience) into something rather clear-cut. The general rule is applied despite hardship; in *Primrose* Lord Hardwicke uses the term "extremely hard" to justify stepping around precedent.

Dudley v Dudley is a case concerning dowager rights under a trust. A trust was set up which included a benefit of certain incomes for 99 years. The beneficiary died and his wife claimed dowager rights. At law, the lady dowager obtained entitlement but with a *Cesset Executio*, a common law stay on enforcement of the judgment, meaning her dowager rights only came into effect at the end of her husband's term (99 years). It was quite obvious the lady dowager would not live that long.

Hence, the Lord Chancellor said 'the remedy at law is vain and illusory ... yet her right is fixed and unfixed by the judgment at law, and right without a remedy is nothing; and therefore I hold the common law to be defective in this case as to the execution, and ought to be assisted by equity'.⁸¹ This statement is clearly reminiscent of the Aristotelian role of equity, namely to assist the law, mitigate its rigour, and provide an alternative outcome where the law has failed to provide justice.

The Lord Chancellor concluded that the claimant was entitled to her share of the trust immediately. He began by giving a rational underpinning to his reasoning.

'My reasoning shall be drawn from the original institution of this court of equity and conscience; and also from the rules and common law principles of that which is regular law, which is bound to rules, to which equity in general may be said to be opposite: for all kingdoms in their constitution ... are with the power of justice, both according to the rule of law and equity. These are the grounds which I shall go upon, and not upon any notions or arbitrary rules of my own'.⁸²

This statement highlights the antithetical nature of law and equity, but also relates how they are interrelated and as a unity form to create justice. This is what has been said, both by Aristotle and St German. The most important point is the last one, namely that

⁸⁰ Dennis R Klinck, 'Lord Eldon on "Equity"' (1999) 20 *Journal of Legal History* 51, FN20

⁸¹ *Dudley v Dudley* (1705) *Precedents in Chancery* 241, 248; 24 ER 118, 121

⁸² *Ibid*, 244; 119

the Lord Chancellor fixes his reasoning on these legal and equitable principles, and not on his own beliefs.

The Lord Chancellor states that a dowager right is a moral as well as a legal right. This is how equity justified intervention. The Lord Chancellor goes on to further explain the nature of equity.

‘Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it’.⁸³

The statement is very clear in its rationalisation of equity and the role of Chancery. It is a clear continuation from *The Earl of Oxford’s Case*, which similarly justified equitable intervention where common law judgments had been obtained through a “hard conscience”. It also gives a very honest and scathing opinion on the cleverness (or deviousness) of common law lawyers in their attempt to exploit every loophole and creatively interpret the rules. That lawyers have a bad reputation is nothing new. The judgment clearly shows that equity is not based on some whim of the Lord Chancellor. Rather, equity is a clearly formulated practice, there to “assist” the common law to achieve true justice.

In *Fisher v Touchett* the Lord Chancellor discussed the nature of proof in Chancery.

‘There is, therefore, I think, sufficient grounds for suspicion; but I sit in a court of conscience, and not in a court of conjecture. I must judge *secundum allegata et probata*; and I know nothing that would be so dangerous to the rights of the subject as for a judge sitting here, to overlook legal evidence, and throw into the

⁸³ Ibid, 244; 119

other scale his own suspicions and conjectures; and the evidence is, that they took these goods *bona fide*, without notice of the insolvency.⁸⁴

Again, it is clear that equity follows quite clear rules on proof (compare to *Binfield v Lambert* above). Matters have to be alleged and proven in Chancery, there is no scope for the judge to make up his mind based on beliefs, or “suspicions” or “conjectures”. Chancery is a court of conscience (Lord Nottingham’s public conscience), and it can only act on acts of conscience which are known and wrong. Nothing else will suffice.

Conscience in 18th century equity remained objective. Though there are subjective statements, they are few. Those statements do not fully explain and rationalise what is being done, and never does a judge say that equity is nebulous and based purely on the private opinion of each successive Lord Chancellor. Tracing conscience through *The Earl of Oxford’s Case*, Lord Nottingham’s public conscience in *Cook v Fountain*, and *Dudley v Dudley* shows there is a clear continuity. With similar exceptions, this continues through to Lord Eldon and beyond.

Part 4: Conscience in modern equity

Lord Eldon

Lord Eldon often spoke of formalisation. In *Jackson v Petrie* Lord Eldon declined a writ of *ne exeat Regno*, accepting that declining to do so ‘may finally operate to create injustice’ but argued that ‘I cannot act otherwise than the rule and principle, practice and usage, of the Court authorize’.⁸⁵ The same point was made in *Ex parte Whitbread* where Lord Eldon felt bound by precedent although accepting that ‘the doctrine now prevailing ought never to have been established’.⁸⁶ It is a clear indication of the high level of formalism that existed in Chancery at the time.

Lord Eldon’s perhaps most famous statement comes from *Gee*.

⁸⁴ *Fisher v Touchett* (1758) 1 Eden 158, 161; 28 ER 644, 645-646

⁸⁵ *Jackson v Petrie* (1804) 10 Vesey Jr 164, 166; 21 ER 807, 807 (Lord Eldon); see also *Cooth v Jackson* (1801) 6 Vesey Jr 12, 35; 31 ER 913, 925 (Lord Eldon)

⁸⁶ *Ex parte Whitbread* (1812) 19 Vesey Jr 209, 210-211; 34 ER 496, 496-497 (Lord Eldon)

‘The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor’s foot’.⁸⁷

It is a direct reference to Selden’s complaint. It is a judicial statement that follows on from Lords Ellesmere, Nottingham, Parker, Hardwicke, and others.

With that said, there is more nuance than one might expect. Equity was not a complete mirror-image of the common law. There was still discretion. In the quote from *Gee*, Lord Eldon does say that the equitable principles should be ‘almost’ as clear as the common law rules, and emphasises the importance of applying them to the particular facts.⁸⁸ In *Gibson v Jeyes* Lord Eldon writes that the test for relief against an unequal bargain, asking whether the terms ‘shocks the conscience of any man’, is ‘loose enough’ yet judges are rather constrained in its application.⁸⁹ Equally, in *White v Damon* Lord Eldon accepts that specific performance is a ‘discretionary’ remedy, but ‘that is not an arbitrary, capricious, discretion’ but rather one which must be ‘regulated upon grounds, that will make it judicial’.⁹⁰ Klinck posits that Lord Eldon gives a ‘sense of a judge who feels considerable unease with criteria that are broad or vague’.⁹¹ Yet, Lord Eldon does not seem to suggest that equitable rules should be absolutely fixed. Klinck posits that it was an objective morality that Lord Eldon refers to, although occasionally his private view appeared in the judgments.⁹² For instance, in *Gordon v Gordon* Lord Eldon said it would be ‘monstrous’ to determine the claim differently.⁹³ In *Wellesley*, a child welfare case, Lord Eldon said he would ‘sooner forfeit my life than permit the girl *Victoria* to go into the company of such a woman’.⁹⁴ On the whole, there are clearly established rules of equity which are applied.

⁸⁷ *Gee v Pritchard* (1818) 2 Swanston 402, 414; 36 ER 670, 674 (Lord Eldon)

⁸⁸ Klinck (n 80), 53

⁸⁹ *Gibson v Jeyes* (1801) 6 Vesey Jr 266, 273; 31 ER 1044, 1048 (Lord Eldon)

⁹⁰ *White v Damon* (1802) 7 Vesey Jr 30, 35; 32 ER 13, 15 (Lord Eldon)

⁹¹ Klinck (n 80), 55

⁹² *Ibid*, 64

⁹³ *Gordon v Gordon* (1821) 3 Swanston 400, 470; 36 ER 910, 919 (Lord Eldon); the same term was used earlier by Lord Hardwicke, see eg *Tolson v Hallett* (1755) Ambler 269, 271; 27 ER 180, 181

⁹⁴ *Wellesley v Duke of Beaufort* (1827) 2 Russell 1, 31; 38 ER 236, 247 (Lord Eldon)

What comes out of these cases is a poorly articulated restatement of how equity operates. There are broad rules. They are to be applied in accordance with the judicial guidance offered. Generally, in the interest of certainty, the rules are to be applied as they are. However, where there is some greater injustice at hand, the rule allows for some discretion and the judge can grant an order contrary to precedent. This would be in accordance with equity's fundamental rationale, namely to relieve a hard conscience and mitigate the rigour of the common law.

The same can be said of conscience under Lord Eldon. Klinck writes that Lord Eldon 'appears to have acquiesced in the centrality of "conscience" to the equitable jurisdiction'.⁹⁵ Conscience appeared regularly in Lord Eldon's judgments.⁹⁶ However, the focus had turned to "equity", namely the established equitable rules (the second rationale for Chancery given in *The Earl of Oxford's Case*). Many equitable rules could be administered without reference to conscience (such as specific performance). Where conscience was referred to, just as it was with the general equitable rules, it was on an objective basis.

After Lord Eldon

The use of conscience continued to recede drastically in the decades following Lord Eldon and past the Judicature Acts of 1873 and 1875.⁹⁷ The approach to equity as embodying flexibility within set rules continued under Lord Eldon's successor, Lord Cottenham. In *Wallworth* Lord Cottenham gave his own memorable statement as to the function of the Chancery. Where Lord Eldon had perhaps been overly formalistic, Lord Cottenham seemed to suggest a return to the slightly more flexible past.

'I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to'.⁹⁸

⁹⁵ Klinck (n 80), 58

⁹⁶ Eg *Pulteney v Warren* (1801) 6 Vesey Jr 73, 89; 31 ER 944, 952 (Lord Eldon); *Gordon v Gordon* (1816) 1 Merivale 141, 151; 35 ER 628, 631 (Lord Eldon)

⁹⁷ The Judicature Acts of 1873 and 1875

⁹⁸ *Wallworth v Holt* (1840) 4 Mylne & Craig 619, 635; 41 ER 238, 244 (Lord Cottenham)

Burns writes, however, that Lord Cottenham was ‘acutely aware of the importance of precedents in the process of judicial decision-making’ and ‘reference to and consideration of earlier precedents dominated many of Lord Cottenham’s judgments’.⁹⁹ This suggests a continuation of Chancery, following established general rules but maintaining some flexibility in their application.

Reference to conscience was about to all but disappear. There are two important judicial statements often cited to this effect, which both came after the merger. The first is by Sir George Jessel MR.

‘This Court is not, as I have often said, a Court of conscience, but a Court of Law; and when a man misappropriates money with a knowledge of all the facts, I cannot allow him to say that he is not liable simply because somebody or other told him that he was not doing wrong, or that somehow or other he convinced himself that he was not doing wrong’.¹⁰⁰

Similarly, in *Pender* Jessel MR questioned whether a ‘court of morality or conscience’ even existed.¹⁰¹ However, in other cases he makes general references to “equity and conscience” in the same way that Lord Chancellors had done before.¹⁰²

The second important and often cited statement comes from *Re Telescriptor Syndicate Ltd* where Buckley J said that the court was ‘not a Court of Conscience’. However, this statement has to be read in context. At this point in his judgment, the judge was considering an argument by two claimants pertaining to their ‘personal integrity’, which, as the judge rightly held, was beyond the competence of the court.¹⁰³ The court cannot address the personal conscience of a claimant.

Both statements by Jessel MR and Buckley J have to be seen in context. Chancery was a court of conscience. It would be somewhat peculiar if Jessel MR could, after five centuries, step in and deny that. Indeed, in *Ewing v Orr*, a post-merger decision of the House of Lords, the Earl of Selborne LC said that the ‘Courts of Equity in

⁹⁹ Fiona Burns, ‘Lord Cottenham and the Court of Chancery’ (2003) 24 *Journal of Legal History* 187, 199

¹⁰⁰ *Re National Funds Assurance Company (No 2)* (1878-79) LR 10 Ch D 118, 128 (Sir George Jessel MR)

¹⁰¹ *Pender v Lushington* (1877) 6 Ch D 70, 75 (Sir George Jessel MR)

¹⁰² *Re Caerphilly Colliery Company* (1877) 5 Ch D 336, 341 (Sir George Jessel MR)

¹⁰³ *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, 195-196 (Buckley J)

England are, and always have been, Courts of conscience, operating in personam and not in rem'.¹⁰⁴ What Jessel MR and Buckley J referred to is that Chancery is not a court of personal conscience. Klinck writes that they were 'using the word "conscience" in the ordinary sense of a person's internal moral disposition'.¹⁰⁵ As seen in the previous chapter, conscience in Victorian England was generally seen as personal and subjective. Jessel MR says that a defendant cannot escape liability simply because he himself did not believe he had acted wrongly. This is a question of personal conscience. Similarly, as said, Buckley J was refusing an application pertaining to personal honour, again a matter of personal conscience. As Lord Nottingham stated two centuries earlier, Chancery only deals with public conscience, not private conscience. Arguably, these two statements have become misunderstood by being taken out of context.

Nonetheless, as noted, references to conscience became fewer. Equitable rules and principles continued without a need to refer to conscience. However, in contemporary equity, conscience has made a comeback.

Part 5: Conscience in contemporary equity

Today, conscience is being used with increasing frequency. However, there is less agreement on whether conscience is meant to be objective or subjective. Klinck writes that in relation to the contemporary judicial use of conscience, there is a lot of 'unreflecting incantation' and 'virtually no new analysis when these formulae are repeated'.¹⁰⁶ Modern judges do not cite Lord Ellesmere or Lord Nottingham. They have been relegated to the past. This is unfortunate since it threatens the continuity and predictability of equity. Again, what follows is not intended to be a comprehensive study on all judicial statements on the nature of conscience, but a cross-section to explore the variety of judicial opinions.

Some cases speak of a subjective approach to conscience. These are, however, rare. In *Carflow Products* Jacob J says that he 'prefer[s] the subjective view' when applying

¹⁰⁴ *Ewing v Orr Ewing* (1883) 9 Appeal Cases 34, 40 (Earl of Selborne LC)

¹⁰⁵ Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005-2006) 31 Queen's Law Journal 206, 210

¹⁰⁶ Dennis R Klinck, 'The Unexamined "Conscience" of Contemporary Canadian Equity' (2000-2001) 46 McGill Law Journal 571, 596

conscience, since ‘equity looks at the conscience of the individual’.¹⁰⁷ This case concerned breach of confidence and Jacob J looked at what the parties themselves believed when entering into an agreement that might amount to a duty of confidence. Similarly in *Criterion Properties* Hart J said that the reference to “unconscionability” in knowing receipt cases can be considered a ‘wholly subjective standard’.¹⁰⁸ However, the unconscionability test in knowing receipt has been resolved in later cases, by applying all five types of *Baden*-knowledge, suggesting that it is not purely subjective.¹⁰⁹ Similarly, an agreement introducing an obligation of confidentiality must be properly interpreted based on the intention of the parties but this does not mean that conscience itself becomes subjective. Some level of wrongdoing must take place before equity intervenes, and equity sets an objective standard as to when that will be. In this respect, Jacob J is both right and wrong; the individual defendant is assessed as to whether he met the objective criteria or not and whether he had the relevant knowledge (which can include whether the defendant ought to have known).

Most judgments speak of an objective test. *Jones v Morgan* concerned relief for an unconscionable bargain. Chadwick LJ said that the ‘enquiry is not whether the conscience of the party who has obtained the benefit of the transaction is affected in fact; the enquiry is whether, in the view of the court, it ought to be’.¹¹⁰ In equity, knowledge can include cases where the defendant ought to have known. As such, it is not purely subjective. The same point was made by Lindsey J in *Gonthier*.

‘[I]n examining the conscience of a party ... it is not only subjective considerations that may be relevant. A defendant could not, for example, escape an estoppel by asserting, even credibly, that his personal subjective conscience was only weakly responsive to the stimuli which others would have recognised and that he had thus failed to detect anything unconscionable in his behaviour. Nor is the information which the Court, in the course of its inquiry, imputes to a person necessarily only that of which that person had actual personal knowledge; it would not assist a defendant, for example, to assert that he had no knowledge

¹⁰⁷ *Carflow Products (UK) Ltd v Linwood Securities (Birmingham) Ltd* [1996] FSR 424, 428 (Jacob J)

¹⁰⁸ *Criterion Properties Plc v Stratford UK Properties LLC* [2001] EWHC 496, [33] (Hart J); overruled on law in [2003] 1 WLR 2108 (CA) and [2004] 1 WLR 1846 (HL).

¹⁰⁹ *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156, [131]-[132] (Stephen Morris QC)

¹¹⁰ *Jones v Morgan* [2001] EWCA Civ 995, [35] (Chadwick LJ)

of information as to which he had deliberately shut his eyes to avoid its acquisition. Unconscionability for these purposes is thus not tested only by reference to the actual subjective state of mind or of information of the defendant concerned'.¹¹¹

Again, the judge is very clear that an objective conscience is used, since the court does not only look at actual knowledge. The judge is clear that the court can “impute” knowledge to a defendant where the defendant should have had this information. Additionally a defendant cannot avoid liability because he personally did not understand the wrongdoing.

Lord Walker in *Pitt v Holt* stated, in no uncertain terms, that the ‘evaluation of what is or would be unconscionable must be objective’.¹¹² This underlines a clear recognition that equity’s conscience cannot be subjective. It cannot refer to either what the defendant personally might have thought, nor to what the judge in his absolute discretion might believe is right.

Next, a few decisions of the Australian High Court will be considered. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, the High Court had to decide whether to award an interim injunction. The judgments elaborate on the role of conscience, and the division between certainty and judicial discretion. That time-honoured strife is not easy to reconcile. Gleeson CJ warns against being led to the ‘misapprehension that the essential function of a court is to decide every case by a discretionary preference for one possible outcome over another’.¹¹³ The law must be based on established rules and principles, the same goes for the concept and use of conscience.

‘The conscience of the [defendant], which equity will seek to relieve, is a properly formed and instructed conscience. The real task is to decide what a properly formed and instructed conscience has to say about *publication in a case such as the present*’.¹¹⁴

¹¹¹ *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [4] (Lindsey J)

¹¹² *Pitt v Holt* [2013] 2 WLR 1200, [125] (Lord Walker)

¹¹³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [20] (Gleeson CJ)

¹¹⁴ *Ibid*, [45] (Gleeson CJ)

The last few words have been italicised, as they can be changed for whatever equitable claim the court is concerned with. It is important not to get confused by the reference to the “conscience of the defendant” (in this case, the appellant). It is not a reference to the defendant’s personal conscience. Gleeson CJ makes this very clear with his reference to a ‘properly formed and instructed conscience’. Though he does not use the term “objective”, in the context it is clear what Gleeson CJ is referring to.

This view of equity’s conscience addresses both concerns with subjectivity. Firstly, the courts are not looking solely at the defendant’s personal conscience or code of morality. Secondly, with an objective conscience, ‘properly formed and instructed’, the courts’ discretion is curtailed and limited within set parameters. The discretion is no greater than that of a common law judge deciding on “reasonableness” in any common law claim. The discretion is no greater than what the courts have when deciding what amounts to “fair, just and reasonable” under the *Caparo* negligence test.¹¹⁵ That limb of the *Caparo* test has recently been criticised for its open-endedness, with Nolan asking whether ‘the blatant tautology will somehow obscure the emptiness of the formula’.¹¹⁶ Indeed, the whole *Caparo* test was referred to by Lord Walker as a ‘set of fairly blunt tools’.¹¹⁷ Judges enjoy wide-ranging discretion in both common law and equity, but that discretion is tamed by the law imposing certain parameters.¹¹⁸ That is not to say that equity has become fixed in time; discretion is still there including the right to develop equity in line with changing times. The Australian judgment in *Lenah Game Meats* emphasise the importance of equity being a living force and responding to new situations. Kirby J said:

‘It is a commonplace that equity is a living force and that it responds to new situations. It must do so in ways that are consistent with equitable principles. If it were to fail to respond, it would atrophy’.¹¹⁹

Kirby J continued by making a specific reference to conscience, saying ‘Australian courts have responded to new circumstances that have involved serious affronts to

¹¹⁵ *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge)

¹¹⁶ Donal Nolan, ‘Deconstructing the Duty of Care’ (2013) 129 LQR 559, 583

¹¹⁷ *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181, [71] (Lord Walker)

¹¹⁸ See for instance the comments by Lord Hoffmann in *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181, [36]

¹¹⁹ *Lenah Game Meats Pty Ltd* (n 113), [168] (Kirby J)

conscience'.¹²⁰ Kirby quotes a judgment by Young J, addressing the position of some commentators that equity has become fixed and incapable of changing and improving. Young J responded, saying:

“[I]t does not mean that when unconscionable situations exist in modern society which do not have an exact counterpart in history, that this Court just shrugs its shoulders and says that as no historical example can be pointed to as a precedent the court does not interfere. This Court still continues both in private and commercial disputes to function as a court of conscience. ... [O]pinions may differ as to where the line of unconscionability is to be drawn, but that does not remove from this Court its responsibility to make a decision as to whether conduct is unconscionable in new commercial situations”.¹²¹

The Australian courts are emphasising the continued possibility for equity to grow and develop in response to new situations. However, such statements should not be taken as evidence that judges have wide-ranging or even unlimited discretion. Equity's developments centre around conscience, however, as is becoming increasingly clear, conscience is not a nebulous notion but rather well-defined legal principle.

In *Tanwar Enterprises Pty Ltd v Cauchi*, the Australian High Court continued its discussion of conscience. This was a case about specific performance for a contract for the sale of land, and whether a vendor could conscionably rescind the contract based on a strict adherence to a “time is of the essence” clause. Focusing on the definable nature of conscience, the plurality emphasised that conscience was used widely in equity and that the terms “unconscientious” and “unconscionable” ‘describe in their various applications the formation and instruction of conscience by reference to well developed principles’.¹²² Breach of trust or breach of fiduciary duty may amount to unconscionable behaviour, but whether it is so ‘is determined by reference to well developed principles, both specific and flexible in character’.¹²³ The emphasis is on ‘well developed principles’, highlighting the more tangible nature of conscience.

¹²⁰ Ibid, [169] (Kirby J)

¹²¹ *Lincoln Hunt Australia Pty Ltd v Willesee* [1986] 4 NSWLR 457, 463 (Young J)

¹²² *Tanwar Enterprises Pty Limited v Cauchi* [2003] HCA 57, [20]

¹²³ Ibid, [20]

True, conscience is discretionary, but, to reiterate the point already made, that discretion is contained within set parameters.

The Australian High Court further discussed conscience in *Kakavas v Crown Melbourne*. This was a case where a gambling addict tried to set aside a casino debt on the basis that the casino had known of his addiction and yet allowed him to continue to gamble; taking unconscionable advantage. The claim was dismissed.¹²⁴ The court confirmed the objective standard of conscience. Kakavas relied ‘upon the standards of personal conduct compendiously described as the conscience of equity’.¹²⁵ This conscience is a ‘construct of values and standards’ against which to judge both a defendant and a claimant.¹²⁶ In support of this the court cited Pomeroy, who emphasised that the conscience used in equity was ‘a juridical and not a personal conscience’.¹²⁷ It is important not to lose sight of the objective standard which equity uses to assess unconscionability.

The same point has been made more recently in English law. Firstly, in commenting on the House of Lords decision in *Thorner v Major*, Lord Neuberger wrote that where some unconscionable conduct had occurred, it is ‘not for the courts to go galumphing in, wielding some Denningesque sword of justice’.¹²⁸ Prior to this, Lord Walker had said that equity is ‘not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, [equitable doctrines] must be formulated and applied in a disciplined and principled way’.¹²⁹ Though both Lord Walker and Lord Neuberger are talking about equity more generally, their comments apply to the notion of conscience. Later in the same case Lord Walker firmly stated that equity’s conscience is objective in nature.¹³⁰ Any equitable discretion is based on established principles, not merely the independent view of the judges.¹³¹

¹²⁴ *Kakavas v Crown Melbourne Limited* [2013] HCA 25, [135]

¹²⁵ *Ibid*, [15]

¹²⁶ *Ibid*, [16]. A claimant must come to equity with clean hands, hence the need to assess the conscience of both parties.

¹²⁷ John N Pomeroy, *A Treatise on Equity Jurisprudence, Vol 1* (5th edn, Bancroft-Whitney, 1941), 74; cited in *Kakavas* (n 124), [15]

¹²⁸ Lord Neuberger, ‘The Stuffing of Minerva’s Owl’ (2009) 68 CLJ 537, 541; see also *Thorner v Major* [2009] 1 WLR 776

¹²⁹ *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, [46] (Lord Walker)

¹³⁰ *Ibid*, [92] (Lord Walker)

¹³¹ See, for instance, *Shedden v Goodrich* (1803) 8 Ves 481, 497; 32 ER 441, 447 (Lord Eldon LC); *Greenwood v Greenwood* [1937] P 157, 164 (Langton J); *Chukorova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, [97]-[98] (Lord Neuberger)

All these comments point to an objective conscience. This is a continuation of what came before. Chancery continues to embody an objective conscience, an objective standard by which the parties are judged. This is the public conscience that Lord Nottingham spoke of.

Part 6: Chancery's objective conscience

The importance of the question

There are two reasons why it is important to establish that equity has an objective conception of conscience.

a. The subjective conscience of the defendant

The first relate to the subjective conscience of each individual. It is arguable that if equity looked to the subjective conscience of the defendant, the purpose of conscience would not be very effective. If a defendant could excuse himself by swearing he had acted according to his own conscience (that is to say, his own moral norms), it is difficult to see how any equitable claim would succeed. This was noted clearly by Jessel MR.

‘...when a man misappropriates money with a knowledge of all the facts, I cannot allow him to say that he is not liable simply because somebody or other told him that he was not doing wrong, or that somehow or other he convinced himself that he was not doing wrong’.¹³²

Similarly, in *Haywood*, a case about the court's discretion to award specific performance, Romilly MR said that ‘what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised’.¹³³ The legal system could not function if it was directed solely by what each individual believed to be right.

¹³² *Re National Funds Assurance Company (No 2)* (1878-79) LR 10 Ch D 118, 128 (Sir George Jessel MR)

¹³³ *Haywood v Cope* (1858) 25 Beav 140, 151; 53 ER 589, 594 (Sir John Romilly MR)

A possible reason for believing this is equity's conscience is the frequent judicial references to the "conscience of the defendant". However, as was explained in *Lenah Game Meats*, the conscience of the defendant means a "well-informed" conscience, namely the objective conscience of equity.¹³⁴ The question is whether the defendant has acted according to the dictates of equity, which will be discussed in later chapters.

b. The subjective conscience of the judge

The core criticism is that the use of conscience gives excessive discretion to the judges. For instance, Birks argues that 'strong remedial discretion' would result in 'unjust settlements based on guesswork as to the operation of the discretion'.¹³⁵

Birks attacked the use of conscience as purely discretionary, an 'intuitive' understanding of right and wrong. Birks goes on to ask the question, what do we mean by conscience? Is it 'the intuitive understanding of the difference between good and evil' or is it 'the taxonomised and systematised understanding of that same difference, as taught by St Thomas Aquinas, reinforced by the authority of the church, and still expounded by serious natural lawyers such as John Finnis?'¹³⁶ Birks notes that very 'few' conscience proponents are in 'the Aquinas-Finnis camp'.¹³⁷ It is at this stage that Birks goes off on what appears to be a misunderstanding of the Aquinas-based conscience.

'Conscience, undisciplined by the apparatus of reason, is an alias for the will of those in power. They have only to believe that what they are doing is right, and conscience will justify them, at the same time blinding them to the possibility of error'.¹³⁸

He goes on to defend his earlier reference to how prominent Nazis used the fact that they followed their conscience as an excuse during the Nuremberg trials. An intuitive conscience, where the judge has absolute discretion, is not equity's conscience (and

¹³⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [45] (Gleeson CJ)

¹³⁵ Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1, 23

¹³⁶ Peter Birks, 'Equity, Conscience and Unjust Enrichment' (1999) 23 Melbourne University Law Review 1, 20-21

¹³⁷ *Ibid*, 21

¹³⁸ *Ibid*, 21

Birks rightly says there is no historical basis for an intuitive conscience). It is the 'taxonomised and systematised' conscience, informed by reason, which has the historical basis to be regarded as equity's conscience. It is not clear why Birks believes that this conscience is 'undisciplined' by reason, or why it would automatically be 'an alias' for the state. Certainly the scholastic conscience was based on the morality of the Church, but that does not mean that equity's conscience reflects either the 'will' of the Church or the 'will' of the state. Keane argues that it is 'possible to accept that the standards enforced by equity have evolved since the 14th century without acceding to the view that the conscience of equity is no more than the subjective view of the individual judge as to what is fair or reasonable in any given case'.¹³⁹

Though there are some peculiarities in what Birks' is arguing, his fundamental points are true and valid. Equity's conscience cannot be solely the discretionary view of whatever judge happens to hear a case. Conscience cannot be subjective in that way. Such an approach would undermine the integrity of the judiciary and equity as a whole. Certainty and predictability in the law are important. The objective conscience ensures that, provided, of course, that it is clearly defined.

Conclusion

The conscience used by Chancery is objective. This means that there is an objective standard by which all parties are judged. If the defendant falls short, a remedy will be available. Equally, if the claimant falls short, there is no remedy. It is important to carefully consider the statements that suggests that equity's conscience is subjective. At first glance, they might suggest that the judge genuinely believed it was for him to personally decide if any wrongdoing had taken place. However, it is easy to misunderstand the judge. The statements can be explained (granted, some more easily than others) as judges applying the established rules. They range from perhaps being a poor choice of words to being taken out of context. In the end, these few statements do not present a convincing argument that Chancery is or has ever used a subjective conscience. Klinck rightly questions whether anyone today 'would maintain that the

¹³⁹ Patrick Keane, 'The Conscience of Equity' (2010) 10 Queensland University of Technology Law and Justice Journal 106, 114

criterion is the actual moral sensibility of the party in question or the judge'.¹⁴⁰ The answer must be no.

¹⁴⁰ Klinck (n 105), 212

Chapter 5

The Role of Conscience

The scholastic conception of conscience was discussed in chapter three, alongside a historical outline of the origins of the Chancery court and its links with the medieval Church. The chapter showed how the scholastic conscience, an objective engagement with the law of reason, was challenged by later theological, philosophical and psychological conceptions of conscience, which see conscience as a subjective engagement with the individual's personal morality. Carl Gustav Jung, through his work on the collective unconscious, straddles the two, and shows that objective ideas of right and wrong exist in our psyche, and other modern philosophers have similarly argued that objective morality can and does exist. Chapter four traced these ideas into English equity, and explored a range of primary sources to demonstrate that equity uses an objective notion of conscience that is based on medieval, scholastic theology and which has been judicially developed since.

This chapter will continue by addressing the thesis's second question, namely what role does conscience have in equity. This will entail returning to the law of reason and its role in English law. The thesis will demonstrate that the law of reason underpins both the common law and equity, and whilst the two systems have moved in different directions, there are similarities. A similarity is the role that "reason" plays; namely as an objective standard of socially acceptable behaviour. In the common law, it turns on the notion of reasonableness, often embodied in the reasonable person test; in equity, it turns on the test of unconscionability.

Ineluctably this leads to the question of whether the common law and equity should be substantively (as opposed to procedurally) merged. The thesis, as noted, will stay away from the normative evaluation of what the law should be, and will simply outline the historical and current similarities and differences between the two systems. Arguments for and against merger are inherent in such a description, but the question will not be addressed head on. Importantly, the thesis is not arguing that the common law reasonableness test and equity's unconscionability test are the same, merely that they have a common origin.

Part one of the chapter will look at the law of reason, to see what it is and what role it has in English law. Part two will consider the differences between the common law

and equity. Part three will look at what role the test of unconscionability has in English equity. The chapter will show that the test is an objective standard of moral behaviour as well as the linchpin around which equity develops, expands and adapts existing principles to new circumstances.

Part 1: Reason, conscience and the reasonable person: the elephant in the courtroom

Equity's test of unconscionability broadly mirrors the common law's concept of the reasonable person (formerly the "reasonable man"¹), and that the two share a common origin in the law of reason. The section will look at what the law of reason is and its role in English law.

The four laws

Firstly, it is important to place the law of reason in context. Medieval jurists recognised four categories of law: the *lex aeterna*, *lex divina*, *lex naturalis* and *lex humana*.² The eternal law is, in essence, God's framework for the universe. The divine law is God-given law which ensures eternal peace of the soul (thus not all Biblical laws are divine laws, since most are designed to ensure community life on earth).³ The natural law comes in two parts; the "general", which governs and orders all life and the "specific", which governs only humans as rational beings. Human laws are laws created by human authorities. They are necessary to explain and clarify the natural and divine laws.

The focus in this chapter, as well as in the subsequent chapters, is on the specific natural law, also known as the law of reason. It consists of moral precepts which all humans rationally conceive of without the need for external legislation.⁴ As discussed in chapter three, scholastic theology posits that certain moral precepts are 'inborn' but accept that others are 'acquired', including through Church teachings.⁵ Importantly,

¹ John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563, 563

² John Coughlin OFM, *Canon Law: A Comparative Study with Anglo-American Legal Theory* (OUP, 2010), 32-33; Thomas Aquinas, *Summa Theologiae* (Timothy McDermott (ed), *Concise Translation* (Methuen, 1989)), 281; Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton (eds), Selden Society, 1974), 7

³ St German (n 2), 21

⁴ *Bowman v Secular Society Ltd* [1917] AC 406, 469 (Lord Buckmaster)

⁵ St Thomas Aquinas, *Disputations, XXII de Veritate, 2, ad 1; Disputations, II de Malo, 4*, cited in Thomas Gilby, *St Thomas Aquinas – Philosophical Texts* (OUP, 1951), 215; 281

Jung has given psychological support to the idea that key moral precepts are inborn.⁶ What these moral precepts are will be explored in chapter six, since they provide a fundamental idea of what amounts to unconscionability. At its heart, the law of reason holds that ‘good is to be done and pursued and evil avoided’.⁷ It aims for peace and communal harmony.

The law of reason and English law

English law, at its core, is based on the law of reason. Lord Coke wrote that the common law ‘was grounded on the law of God’.⁸ Both equity and the common law share this origin.⁹ Pollock writes that the law of reason has since medieval times been a ‘principal or influential factor’ in developing equity as well as the Law Merchant.¹⁰ Another important statement can be taken from an early Chancery report.

‘Conscience never resisteth the law, nor addeth to it, but only where the law is directly in itself against the law of God, or the law of Reason; for in other things, Equitas sequitur legem’.¹¹

Equity will not intervene unless the common law is seen as contrary to the law of God or the law of reason. It shows that the law of reason had an important role in the early development of English law, both equity and the common law.¹²

St German discussed the foundations of English law, positing that it is based on six core concepts, first amongst which is the law of reason.¹³ St German gives various examples, such as peaceful coexistence in the community, which is not based on any human, positive law. Positive laws are needed, however, to explain the consequences

⁶ See also Eyal Zamir, *Law, Psychology, and Morality: The Role of Loss Aversion* (OUP, 2014), 196

⁷ Aquinas (n 2), 287

⁸ Lord Coke, cited in Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (4th edn, MacMillan and Co, 1918), 291

⁹ Theodore Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown and Co, 1956), 682

¹⁰ Frederick Pollock, *The Expansion of the Common Law* (Stevens & Sons, 1904), 113

¹¹ *Anonymous* (1602) Cary 11, 11; 21 ER 6, 6; *Glover v Portington* (1664) 1 Cases in Chancery 51, 53; 22 ER 690, 691

¹² Certain principles were linked to “natural justice”, such as repayment under the old doctrine of quasi-contract; see JH Baker, *An Introduction to English Legal History* (4th edn, OUP, 2007), 376; *Moses v Macferlan* (1760) 2 Burrow 1005, 1008; 97 ER 676, 678 (Lord Mansfield)

¹³ St German (n 2), 31

of breaching this precept, such as the criminal offence of breaching the peace. Another example is the idea of property and private ownership; whilst the man-made law regulates the incidents of ownership, there is no positive law that lays down the idea itself.¹⁴ St German suggests that all English laws can be proven by reference to the law of reason, albeit that English law has adopted different terminology.¹⁵ However, St German acknowledges that knowledge of the law of reason would not equate to knowledge of the English law; statutes and customs fill in to clarify the details.¹⁶

Another example of the natural law basis of English law is found in the medieval constitutional framework. It seems that prior to the Reformation it was technically possible for the courts to void (or at least refuse to enforce) any statute that was contrary to the law of reason.¹⁷ In *The Earl of Oxford's Case*, Lord Ellesmere doubted that proposition.¹⁸ It is not clear whether those powers did exist and, if so, whether they were actually used.¹⁹

Nevertheless, these medieval debates reveal that the law of reason was present and indeed fundamental in legal thought. The precepts of the law of reason were found in English law, and it is argued that the core concepts have stayed through to today, using adapted terminology. These moral precepts, of what is acceptable societal behaviour, are found in the equitable test of unconscionability and the common law “reasonable person” test.

Unconscionable behaviour and the reasonable person

The medieval English kings engaged in power struggles with the Church. This had an impact on how the common law developed. Whilst the common law was based on the law of reason it dropped the theological natural law references and instead adopted terminology around reason and reasonableness.²⁰ Most famous of these is the

¹⁴ Ibid, 35; consider the Law of Property Act 1925, ss.1, 4. The natural law idea of ownership was written down as being presented by God in Genesis, 1:26-30. Today, consider Protocol 1 of the European Convention on Human Rights 1950.

¹⁵ St German (n 2), 37

¹⁶ Ibid, 73

¹⁷ For a discussion of the meaning of “void” in this context, see *Ian Williams, ‘Dr Bonham’s Case and “Void” Statutes’* (2006) 27 *Journal of Legal History* 111-128

¹⁸ *The Earl of Oxford's Case* (1615) 21 ER 485, 488 (Lord Ellesmere)

¹⁹ *British Railway Board v Pickin* [1974] AC 765, 782 (Lord Reid); Baker (n 22), 210-212

²⁰ Pollock (n 10), 113; Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP, 2004), 157

“reasonable person”, the fictional person on whose behaviour common law fault is assessed. As with unconscionability, some have argued that too little has been written about who the reasonable person is.²¹ Some works have been written and the case law, if culled, will provide much of the answer.

Pollock suggested that reason meant a common lawyers’ common sense.²² This is not very helpful in defining reasonableness but there is some merit in the assertion. Consider this quote from a tribunal judgment.

Courts and tribunals are used to considering objectively and deciding questions of reasonableness such as what a reasonable person, the man on the Clapham omnibus, the officious bystander, a reasonably competent professional, or a reasonably careful driver should reasonably have been aware of and what he or she ought reasonably to have done or refrained from doing, or how a fair minded and informed observer would view a particular situation. ... Normally, the Court would make its own objective evaluation on a properly informed basis against the background circumstances. The Tribunal would not hear evidence from an individual offered as a candidate for the role of hypothetical officer.²³

The tribunal accepted that sometimes it is appropriate to hear expert evidence, but as a rule, it is the judges who objectively determine what reasonable behaviour is. Using reason, common sense, and experience, judges can and do make decisions as to what is reasonable behaviour.²⁴ Pollock was thus arguably right in suggesting that reasonableness refers to a common lawyers’ common sense. Beyond this, the law paints the picture that the reasonable person is an ordinary person, which suggests that reason is for everyone and not the preserve of judges.²⁵ In trying to find a more

²¹ Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP, 2003), 2; Christopher Jackson, ‘Reasonable Persons, Reasonable Circumstances’ (2013) 50 *San Diego Law Review* 651

²² Duxbury (n 20), 158; see also Harold Berman, ‘Toward an Integrative Jurisprudence: Politics, Morality, History’ (1988) 76 *California Law Review* 779, 791; Robert Prentice and Jonathan Koehler, ‘A Normality Bias in Legal Decision Making’ (2003) 88 *Cornell Law Review* 583, 592

²³ *Pattullo v The Commissioners for Her Majesty’s Revenue & Customs* [2014] UKFTT 841 (TC), [65] (J Gordon Reid QC)

²⁴ *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728 (Lord Radcliffe); *Healthcare at Home Ltd v The Common Services Agency (Scotland)* [2014] UKSC 49, [2]-[3] (Lord Reed)

²⁵ *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, 224 (Greer LJ); *Bourhill v Young* [1943] AC 92 (SC), 110 (Lord Wright)

scientifically sound basis for the reasonable person, it has been suggested that psychology can add new insight.²⁶

The reasonable person and his friends represent an objective standard of behaviour which is determined by the judges, using their common sense, and drawing what help they can from the case law. Much legal theory has been written about what factors judges do, should, or should not engage with. Hart argued that the law was a series of rules.²⁷ In this sense it is appropriate for a judge to only apply those rules, without reference to any extra-legal factors. Dworkin argued this was a problematic description of law, because it could lead to gaps, ‘so that if someone’s case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by “applying the law”’.²⁸ Dworkin argued instead that the law consisted of rules as well as broader principles.²⁹ As such, for a judge there was always a legal fall-back position if the rules did not point to a clear answer. Those underlying principles arguably are remnants of the natural law philosophy underpinning the law. To Dworkin, this also means that the law is not isolated from politics, economics, or other societal forces. Dworkin accepts that his view of judging, seeing the law as ‘embedded in a much larger system’ of societal political thinking, shows ideas of natural law theory.³⁰ The reasonable person arguably fits better into Dworkin’s theory; he is not a legal rule but an embodiment of broader societal ideas of what is right and appropriate.³¹

It is interesting that the common law owes much to the law of reason and that the reasonable person seemingly is not much more than the judges’ common sense inspired not just by the rules but on broader societal thinking. It throws new light on the common law criticism of equity and its conscience, exposing perhaps a misunderstanding of the common law itself or even a degree of hypocrisy. Conscience has received much criticism for being vague, open-ended, and giving too much discretionary powers to judges.³² A notable critic was Birks, who argued that the use

²⁶ Jenny McEwan, ‘Breaking Down the Barriers’ in Belinda Brooks-Gordon and Michael Freeman (eds), *Law and Psychology* (OUP, 2006), 24

²⁷ Herbert Hart, *The Concept of Law* (2nd edn, OUP, 1994), 81

²⁸ Ronald Dworkin, *Taking Rights Seriously* (Duckworth & Co, 1977), 17

²⁹ *Ibid*, 37

³⁰ Ronald Dworkin, ‘“Natural” Law Revisited’ (1982) 34 *University of Florida Law Review* 165, 166

³¹ Consider also Gardner (n 1), 564

³² Jamie Glister and James Lee, *Hanbury & Martin: Modern Equity* (20th edn, Sweet & Maxwell, 2015), [1-006]

of conscience was unacceptable since conscience can be used to justify any atrocity; Birks caused controversy by employing the Nazi atrocities (which the perpetrators justified using their own consciences) as an example of such misuse of conscience.³³ Rickett argued that unconscionability is a ‘category of meaningless reference’ which should not be used since it is ‘likely’ to ‘mislead judges’.³⁴ Following the same argument, Watt argued that the role of conscience should be limited so as to preserve predictability in the law.³⁵ These attacks seem foolish given the enthusiastic use of the reasonable person.³⁶

The common law has embraced other vague terms, which, to quote Rickett, could be classed as categories of meaningless reference, unless filled out by judges using their discretion and engagement with broader principles. A recent addition is the use of “good faith” clauses in contracts. In *Petromec*, the Court of Appeal stated that the ‘traditional objections to enforcing an obligation to negotiate in good faith’ included ‘that the obligation is ... too uncertain to enforce’.³⁷ The definition of good faith remains unclear and a variety of terms have been used, including ‘fair and open dealing’, ‘playing fair’ and ‘putting one’s cards face upwards on the table’.³⁸ However, Leggatt J argued that there is ‘nothing unduly vague or unworkable about the concept’ of good faith, and likened it to any other aspect of the process of contractual interpretation.³⁹ It suggests that the concept, though originally vague, can be clarified through judicial discussions and decisions.

Though the test for interpreting commercial contracts is now established, it is another example of common law vagueness. The Supreme Court held that when interpreting ambiguity the court should ask what makes ‘commercial common

³³ Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1, 17. Despite strong criticism, Professor Birks defended his use of the Nazi analogy in Peter Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23 *Melbourne University Law Review* 1, 22

³⁴ Charles Rickett, ‘Unconscionability and Commercial Law’ (2005) 24 *University of Queensland Law Journal* 73, 73

³⁵ Gary Watt, ‘Unconscionability in Property Law: A Fairy-Tale Ending?’ in Martin Dixon and Gerwyn Griffiths (eds), *Contemporary perspectives on property, equity and trusts law* (OUP, 2007), 118

³⁶ Peter Watts, ‘Tests of Knowledge in the Receipt of Misapplied Funds’ (2015) 131 *LQR* 511, 514; Joachim Dietrich, ‘Giving Content to General Concepts’ (2005) 29 *Melbourne University Law Review* 218, 229

³⁷ *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891, [116] (Longmore LJ); see *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner)

³⁸ *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [17] (Lord Bingham); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, 439 (Bingham LJ)

³⁹ *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 CLC 662, [153] (Leggatt J)

sense'.⁴⁰ The guidance was asking what a reasonable businessman, knowing all the facts and being well-versed in the law, would make of the contract. As one would expect, the test caused a problem once business common sense supported both sides.⁴¹ Vos J defended the use of the reasonable person, saying that the court could hardly find the true subjective intentions of the parties, seeing as at trial both parties would be 'swearing blind that they had subjectively "intended" the meaning for which they were now contending'.⁴² An objective test makes sense, but it still begs the question what a "reasonable person" means.

It is fair to ask why many lawyers readily accept reasonableness but so easily reject unconscionability. There must be reasons why this hypocrisy exists. Certainly at the time of the Judicature Acts in the 1870s, the predominant legal theory was positivism and formalism. The positivist school had Hobbes as an early member, with Bentham and Austin after him. Strict rules and absolute certainty were the keywords. As Kessler explains, 'Bentham in his fanaticism, and the whole school of analytical jurisprudence, really strove to make the legal system as reliable as a timetable'.⁴³ Kagan notes that a problem with both Roman law, and early English law, was in their 'archaic concepts of justice' and their adherence to the view 'that law could only have a strong validity when the rules and regulations are certain and therefore the law must be strict and uniform'.⁴⁴ The same argument could be levied against the Enlightenment jurists. Only certainty was acceptable. Handley writes that towards the end of the 17th Century, 'Lord Nottingham LC began to establish general principles, and by the time of Lord Eldon LC most cases in the Court were decided in accordance with established principles and references to conscience and unconscionability were rare'.⁴⁵ Kessler continues by writing that the:

'fetish of legal certainty and the fear of the subjectivity of notions of justice account for the attempt of many positivists to work out a pure theory of law, to

⁴⁰ *Rainy Sky SA v Kookmin Bank* [2011] 3 WLR 2900, [21] (Lord Clarke)

⁴¹ *Aston Hill Financial Inc v African Minerals Finance Ltd* [2012] EWHC 2173, [25], [31] (Eder J) (upheld on appeal); *Mirador International LLC v MF Global UK Ltd* [2012] EWCA Civ 1662, [62] (Rix LJ)

⁴² *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [62] (Vos J)

⁴³ Friedrich Kessler, 'Theoretical Bases of Law' (1941-1942) 9 *University of Chicago Law Review* 98, 107

⁴⁴ K Kahana Kagan, *Three Great Systems of Jurisprudence* (Stevens & Sons, 1955), 175

⁴⁵ KR Handley, 'Unconscionability in Estoppel: Triable Issue or Foundational Principle?' (2007) *Queensland University of Technology Law and Justice Journal* 477, 477

separate rigidly the “is” and the “ought”, and to treat all economic, political, and ethical considerations bearing upon legal institutions as metalegal’.⁴⁶

Conscience, together with references to “morality” and any inherent sense of right and wrong, were deemed inappropriate. Even equity downplayed the role of conscience. The jurisprudential theories that underpinned the creation of modern English law during the Victorian era will probably have a role in explaining the hostility to conscience.⁴⁷ However, strict positivism began to fall out of favour after the Second World War. Though Birks criticised conscience because the Nazis used it to justify their actions, others began questioning the amorality of law.⁴⁸ It is also in more recent decades that there has been an increasing use of conscience in equity in many equity jurisdictions, including England, Australia and Canada.

Strict formalism is not very plausible. It is not pragmatic and fails to take into account the infinite complexity of human behaviour. No single law could possibly hope to do so. Hence the common law also, out of necessity, adopts broad, vague concepts, which are mouldable to new circumstances. Laycock argues that the classic divide between law as certain and equity as flexible is ‘exaggerated’ since the common law is typically praised for its ‘flexible stability and its capacity for growth within a tradition’.⁴⁹ Powell notes that today there is ‘discretion and moral choice’ also in the common law.⁵⁰ The common law has certainly changed from the time when it was, apparently, formalistic. Atiyah argues that “reasonableness” is an ‘outstanding example’ of the modern law’s ‘tendency to be more pragmatic and less principled’.⁵¹ It has come to recognise that formalism does not work. The call to arms was given by Lord Denning who addressed the legal community in one of his early books.

⁴⁶ Kessler (n 43), 107

⁴⁷ Chantal Stebbings, ‘Benefits and Barriers: The Making of Victorian Legal History’ in Anthony Musson and Chantal Stebbings, *Making Legal History: Approaches and Methodologies* (CUP, 2012), 82

⁴⁸ For an early debate, see Lon Fuller, ‘The Case of the Speluncean Explorers’ (1948-1949) 62 *Harvard Law Review* 616 – 645; for a positivist defence see HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593 – 629; for the role of morality see, e.g., Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press, 1969) and John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP, 2011)

⁴⁹ Douglas Laycock, ‘The Triumph of Equity’ (1993) 56 *Law and Contemporary Problems* 53, 71

⁵⁰ H Jefferson Powell, “‘Cardozo’s foot’: the Chancellor’s Conscience and Constructive Trusts’ (1993) 56 *Law and Contemporary Problems* 7, 9

⁵¹ Patrick Atiyah, ‘From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law’ (1979-1980) 65 *Iowa Law Review* 1249, 1256

‘May I ask you also in your progress in the law, not to rely over much on legality – on the technical rules of law – but ever to seek those things which are right and true; for there alone will you find the road to justice’.⁵²

Lord Denning stayed true to his words, and whilst not always popular, it has opened up new thinking about legal realism, pragmatism and flexibility.

The reasonable person and unconscionability stem from the same origins, the law of reason. The common law went into opposition to the Church and thus the idea of reason developed in a particular way. The reasonable person is an objective standard of behaviour, determined by the judges. Unconscionability is the same. It seems the factors underpinning them both were originally the same and remains similar. It is not plausible to decry unconscionability as vague, subjective and too reliant on judicial discretion and at the same time embrace the reasonable person and legal principles such as good faith. To common lawyers, conscience might be the elephant in the courtroom.

Part 2: Differences between the common law and equity

Whilst both the common law and equity have a common origin in medieval natural law thinking, and equity in particular being based upon the canon law, the two systems are not the same. It will be recalled from chapter three that whilst the Norman Kings developed the common law, aggrieved parties could find alternative justice in the ecclesiastical courts. The process of seeking grace from a common law decision gradually transferred to the Chancery, as Kings sought to limit the power of the ecclesiastical courts. As the common law developed in one direction, English equity developed in another direction as a counterbalance. By contrast, in civil law systems, positive law and equitable principles have since Roman times been substantively merged and form a coherent whole. For some reason, that did not transpire in England.

Undoubtedly one reason was that the common law insisted on particular procedural rules, which were deemed inferior to the procedural rules of the canon law, which were the rules that the Chancery court adopted.⁵³ Importantly, Baker writes that ‘we

⁵² Lord Denning, *The Road to Justice* (Stevens, 1955), 6

⁵³ William Holdsworth, *A History of English Law, Volume 2* (4th edn, Methuen, 1936, reprinted 1966), 346-347; see eg *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [20] (Lord

cannot properly understand anything of the earlier common law unless we understand the dominance of form and procedure'.⁵⁴ Even if the substantive rules were based on natural justice, justice could be hard to obtain. The typical example is of the man who repaid a loan without getting a written acquittance. The common law only accepted the acquittance as evidence of repayment, meaning a debtor could be forced to repay the loan a second time because he could not prove the first repayment. This necessitated a suit in Chancery to stop a second repayment being ordered.⁵⁵ This is because Chancery would accept other forms of evidence, such as oral testimony. This suggests that a dual system might have been avoided had the common law been more willing to adopt the existing procedural and evidential rules of the canon law.

Despite reasonableness and unconscionability having joint origins, the common law substantive rules also developed in a particular direction. The common law developed rights which the claimant could enforce for compensation where that right had been infringed by the defendant. The jurisprudential view that private law is about rights and duties between two people has been challenged as 'too narrow'.⁵⁶ Private law has to be seen as broader than just enforcing duties.⁵⁷ However, the common law has developed in a way which broadly mirrors right-enforcement between two parties. A seeks to enforce or redress a legal right against B and it is A's responsibility to prove the claim. B is liable if he has breached a positive duty but may also be liable for inadvertently causing harm to A. The common law remedy is to compensate the claimant for any loss, and generally to restore both parties to their pre-dispute situation. The role of reasonableness, present in many (but certainly not all) common law claims, is to establish whether B's actions can be justified; i.e. were B's actions socially justified in that context? There is no express reference to morality, but that is inherent in the equation, since the law asks what a reasonable person should have done in that situation.

The common law can find itself in trouble when more than two parties are involved in a dispute. Contract law, for instance, is built up around bilateral agreements, and

Sumption) (on rules of evidence); *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 476 (Lord Diplock) (the medieval common law gave no remedies for fraud, whether criminal or civil)

⁵⁴ Sir John Baker, 'Reflections on "Doing" Legal History' in Anthony Musson and Chantal Stebbings, *Making Legal History: Approaches and Methodologies* (CUP, 2012), 9

⁵⁵ *The Earl of Oxford's Case* (1615) 1 Chancery Reports 1, 9; 21 ER 485, 487 (Lord Ellesmere)

⁵⁶ Peter Jaffey, 'Duties and Liabilities in Private Law' (2006) 12 *Legal Theory* 137, 137

⁵⁷ Andrew Halpin, 'Rights, Duties, Liabilities, and Hohfeld' (2007) 13 *Legal Theory* 23, 25

the privity of contract is closely adhered to. Legislative change, described as ‘long overdue’, was necessary to allow third-parties to seek compensation for any loss they suffered because of a breach of contract, and then only in limited circumstances.⁵⁸ Another example is unjust enrichment, where the Court of Appeal recently highlighted the unresolved issue of when restitution claims can succeed if the benefit has not passed directly from the claimant to the defendant.⁵⁹ Whilst the common law is not exclusively binary, there are conceptual difficulties with the involvement of multiple parties.

In this respect, it is possible to describe the common law as being “claimant-focused”, since it is the claimant who is enforcing a right, and there has to be a relatively narrow connection between the claimant and the defendant. Equity had to develop more flexible rules in response to this approach taken by the common law, to allow a wider range of claims to be brought against a defendant by a wider range of potential claimants. In this respect, it is possible to call equity “defendant-focused”, however, this is a bit of a simplification. This broader approach allows for multiparty actions, such as under a trust, which the common law would not recognise. Another example is fiduciaries, who can owe duties to a wide range of parties, which go above and beyond bilateral contractual obligations. None of this is to suggest that the common law could not recognise multiparty actions or the idea of split ownership, indeed it does, but it is simply a recognition that the common law developed its rules in a particular fashion that necessitated an equitable counterbalance.

Perhaps the clearest difference lies in equity’s scrutiny of all parties, not just the reasonableness of the defendant’s actions. Equity adopts a number of maxims, including “he who seeks equity must do equity” and “he who seeks equity must come with clean hands”, though any wrongdoing on the part of the claimant must relate to the equity he seeks to enforce.⁶⁰ In this respect, Lord Ellesmere famously wrote that

⁵⁸ Contracts (Rights of Third Parties) Act 1999, s.1; see *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] 2 CLC 1097, [1] (Colman J); also *Avraamides v Colwill* [2006] EWCA Civ 1533, [18] (Waller LJ)

⁵⁹ *Relfo Ltd (in liquidation) v Varsani* [2014] EWCA Civ 360, [96] (Arden LJ), [104] (Gloster LJ), [113]-[114] (Floyd LJ); Richard Nolan, ‘The Administration and Maladministration of Funds in Equity: Making a Coherent Set of Choices’ in Peter Turner (ed), *Equity and Administration* (CUP, 2016), 22 (author’s copy, pre-publication)

⁶⁰ *Dering v Earl of Winchelsea* (1787) 2 Bosanquet and Puller 270, 271; 126 ER 1276, 1277 (Lord Eyre CB); *Moody v Cox* [1917] 2 Ch 71, 87-88 (Scrutton LJ); *Day v Tiuta International Ltd* [2014] EWCA Civ 1246, [27]-[28] (Gloster LJ); *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049, [1124] (Hildyard J)

‘when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party’.⁶¹ A common law claimant can enforce his legal rights even when doing so would, objectively, be socially wrong or cause undue hardship to the defendant.⁶² In this vein, as noted in chapter one, Harding has argued for the continued use of unconscionability as a counterbalance, because society may lose respect for the law if legal rules are strictly applied even where the outcome would be intrinsically unjust or where claimants are allowed to exploit the strict application of the rules for personal gain at the expense of weaker or innocent parties.⁶³

In sum, it is not suggested that the common law and equity are radically different. One might argue that equity’s approach is broadly similar to the common law, namely a claimant (or group of claimants) enforcing a right which the defendant has violated.⁶⁴ Given their shared philosophical origins, it is clear that the common law could have chosen to develop in a particular direction which would have cancelled the need for a separate Chancery court. However, for various reasons, it did not. This is not a historical study into the medieval common law, and the thesis will simply note that equity developed as a counterbalance to the way the common law developed. In the process, some differences became more solidified, such as the availability of multiparty relationships and regulating claimants so that they cannot unreasonably enforce rights where to do so would cause undue hardship.

Part 3: The role of conscience in equity

Having identified the shared origin of the common law and equity and how they have developed in slightly different directions, the thesis will now look more specifically at the role of conscience and how the test of unconscionability has been used.

Conscience plays two important and interrelated roles in equity. The first is to serve as an objective standard of behaviour. A defendant who falls short of this can have a remedy imposed upon them. Similarly, a claimant can be denied a remedy if they fall

⁶¹ *The Earl of Oxford’s Case* (1615) 1 Chancery Reports 1, 10; 21 ER 485, 487 (Lord Ellesmere)

⁶² There are specific exceptions, such as contributory negligence; Law Reform (Contributory Negligence) Act 1945

⁶³ Matthew Harding, ‘Equity and the Rule of Law’ (2016) 132 LQR 278, 298

⁶⁴ Sarah Worthington, ‘Integrating Equity and the Common Law’ (2002) 55 Current Legal Problems 223, 230-231

below this standard. The second role is as a linchpin around which equitable principles can develop and adapt in light of new circumstances, where written rules might not as quickly keep up with social developments. Before looking at these two circumstances in more detail, the section will start by discussing the role that conscience does not have.

Unconscionability is not a cause of action in its own right. Despite this, the question has caused much debate. The discussions have mainly been about judicial discretion and the fear of subjective and capricious outcomes. Equitable remedies would be too freely available if all a claimant had to do was point to some alleged unconscionable behaviour and then claim a remedy. The concerns have been fuelled by unhelpful case law, where some judges have suggested that showing unconscionability would suffice to obtain redress. One well-known statement comes from Lord Denning in *Hussey v Palmer*, where his Lordship combines resulting and constructive trusts, and goes on to say that they are imposed whenever ‘justice and good conscience require it’.⁶⁵ Such a broad approach to constructive trusts was rather quickly reined in by the House of Lords.⁶⁶ The concern over whether unconscionability is a cause of action should be alleviated by the judicial statements saying it is not.⁶⁷

Unconscionability as a cause of action was discussed in *Tanwar*. The High Court of Australia acknowledged that the term “unconscionable conduct” could be misleading. The Court said it ‘encourages the false notions’ that unconscionability was either a ‘distinct cause of action’ or an ‘equitable defence’ whenever the other party had acted unconscionably.⁶⁸ The Court emphatically denied that conscience is a cause of action.

Rather, the cause of action must be a recognised equitable claim, where the role played by conscience is demonstrating liability. In this respect, as has been argued above, conscience serves a similar function that the “reasonable person” serves in many common law claims. Acting unreasonably is not a common law cause of action, but it is a standard used to determine whether a claim is proven. So it is with conscience; it is the baseline against which to judge behaviour.⁶⁹ In *Cobbe v Yeoman’s Row*, Lord Walker explained that conscience is an ‘objective value judgment on

⁶⁵ *Hussey v Palmer* [1972] 1 WLR 1286, 1290 (Lord Denning MR)

⁶⁶ *Lloyd’s Bank Plc v Rossett* [1991] 1 AC 107, 132-133 (Lord Bridge); see further *Jones v Kernott* [2012] 1 AC 776, *Geary v Rankine* [2012] EWCA Civ 555, [20] (Lewison LJ)

⁶⁷ See for instance *Uren v First National Home Finance Ltd* [2005] EWHC 2529, [18] (Mann J)

⁶⁸ *Tanwar Enterprises Pty Limited v Cauchi* [2003] HCA 57, [24], see also *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 Qd R 231, 258-259

⁶⁹ Graham Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP, 2006), 608

behaviour.⁷⁰ It clearly demonstrates that conscience is not a cause of action, but is used as an objective moral baseline against which to judge behaviour.

An example can be provided. A party makes a mistaken payment, perhaps misinterpreting their legal authority to act, or failing to spot that previous authority to make a money transfer has been revoked. Can the original legal owner of the money recover the money from the unintended recipient? This question has been addressed in many notable court judgments.⁷¹ The test was articulated by Lord Hope in *Kleinwort Benson* as being: ‘(1) Was there a mistake? (2) Did the mistake cause the payment? And (3) did the payee have a right to receive the sum which was paid to him?’⁷² In these situations, it is possible for the original owner to recover the money through a constructive trust. In essence, what has to be proven is that it is unconscionable for the recipient to retain the money.⁷³

In *Chase Manhattan Goulding J* said that ‘a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of the other is subjected to a fiduciary duty to respect his proprietary rights’.⁷⁴ This was changed, or developed, in *Westdeutsche*, where Lord Browne-Wilkinson said that ‘mere receipt’ after a factual mistake does not raise a constructive trust, however, ‘the retention of the money after the recipient bank learned of the mistake’ could raise a constructive trust.⁷⁵ The same applies if the parties have made a mistake as to the law.⁷⁶ This gives greater clarity on what has to be shown. The cause of action is mistaken payment, whether from a factual or legal mistake. Unconscionability is what the claimant must show.

Following *Westdeutsche*, unconscionability for this cause of action must be shown through actual knowledge on the part of the defendant.⁷⁷ With that said, where a defendant has reason to believe that a mistaken payment has been made (as opposed

⁷⁰ *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, [92] (Lord Walker); consider *Bailey v Angove’s PTY Ltd* [2016] UKSC 47, [28] (Lord Sumption)

⁷¹ *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, the position of which was clarified in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; *Pitt v Holt* [2013] 2 WLR 1200

⁷² *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349, 407 (Lord Hope)

⁷³ *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] QB 985, [152] (Clarke LJ)

⁷⁴ *Chase Manhattan Bank* (n 71), 119 (Goulding J)

⁷⁵ *Westdeutsche* (n 71), 715 (Lord Browne-Wilkinson); see also *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2013] EWCA Civ 1679, [19] (Tomlinson LJ)

⁷⁶ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 375 (Lord Goff)

⁷⁷ For instance, a “bona fide change in position” is a defence in restitution, see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 579-580 (Lord Goff)

to actual knowledge of the mistake), *Jones v Churcher* posits that such a defendant has a ‘good faith’ obligation to make inquiries before disposing of the money.⁷⁸ Other decisions have debated whether constructive notice or imputed knowledge would be sufficient to satisfy liability for restitution, but no firm conclusion seems to have been reached.⁷⁹ The decisions seem to lean towards allowing constructive notice or imputing knowledge. This would be staying true to the idea that conscience is an objective moral standard of behaviour and is not strictly limited to actual knowledge.

Burrows has criticised the use of conscience in this context, on the basis that terms such as ‘inequitable’ or ‘unconscionable’ are vague.⁸⁰ Indeed, to use the terms without ‘further articulation’ would bring the law ‘back to the dark ages’.⁸¹ This view is, however, arguably premised on a lack of understanding of equity’s conscience. It seems to suggest that conscience is subjective and can freely be used as a cause of action. This, of course, is not the case, as demonstrated in the previous two chapters. As the following chapters will demonstrate, conscience has a clearer meaning than is perhaps immediately obvious.

Having seen that unconscionability is not a cause of action, it is necessary to look at its primary role as an objective standard of behaviour. It was identified in chapter four that equity draws a distinction between the private conscience and the public conscience.⁸² Equity only deals with the public conscience, namely external acts. As was said, a fiduciary dreaming of a bribe is privately unconscionable but not publically so. Where a defendant has done something publically wrong, his public conscience is affected. The role of equity, echoing its canon law origins, is to ensure that the defendant does “penance”, some act which assuages the troubled conscience.

Simpson has opined that conscience in medieval equity ‘connoted what we now call the moral law *as it applied to particular individuals for the avoidance of peril to the soul through mortal sin*’.⁸³ Intervention in the ecclesiastical courts was warranted to relieve a troubled conscience to save the soul from damnation. The secular Chancery

⁷⁸ *Jones v Churcher* [2009] EWHC 722 (QB), [46] (HHJ Havelock-Allan QC); adding a new element to what amounts to a “bona fide change in position”.

⁷⁹ See, for instance, *Papamichael v National Westminster Bank plc (No 2)* [2003] EWHC 164, [209] (HHJ Chambers QC); *Jones v Churcher* [2009] EWHC 722 (QB), [89] (HHJ Havelock-Allan QC)

⁸⁰ Andrew Burrows, ‘Clouding the issues on change of position’ (2004) 63 CLJ 276, 278

⁸¹ *Ibid*, 280

⁸² *Cook v Fountain* (1733) 36 ER 984, 990 (Lord Nottingham); see also *Haywood v Cope* (1858) 25 Beav 140, 153; 53 ER 589, 595 (Sir John Romilly MR)

⁸³ AW Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (OUP, 1975), 398

did not go quite that far, but the role of conscience in equity was similar; intervention is warranted because a person has acted contrary to established societal mores. That said, Chancellor and Archbishop Morton in one case stated that unless restitution was paid the defendant would be ‘damned in Hell’ and that ordering restitution was done in ‘accordance with conscience’.⁸⁴ It further underlines the relationship between the canon law and the Chancery, linked by the clerical Chancellors. This highlights another key difference between the common law and equity. Whilst the common law seeks to give redress to the claimant, and compensate for losses caused by the defendant, equity is designed around the defendant’s conscience. Simpson writes further that equity’s primary concern ‘was not with the petitioner but with the respondent and of the good of his soul’.⁸⁵ This is the basis of *in personam* judgments against the defendant, to ‘look after the losing party who has done some wrong or proposes to do wrong’.⁸⁶ The judgments did not seek to establish wider principles, but were personally tailored to deal with the defendant. Thus, in *The Earl of Kildare v Sir Morris Eustace*, counsel for the claimant said that Chancery ‘proceedings are to reform the conscience of the party’, namely the defendant.⁸⁷ More recently, Prescott QC explained that the Chancery ‘ordered the defendant to behave as a righteous man would have done in that particular situation’.⁸⁸ Equity’s conscience, being an objective standard of behaviour, allows the court to deal with each case on its own facts and to award remedies based on what has transpired.

In this respect, the common law (generally as of right) awards compensatory damages. The aim is to redress the claimant, not to regulate the defendant’s actions or, going back to canonical terms, “saving his soul”. Equity has, in seeking tailored outcomes, developed a wider arsenal of remedies. As such, whilst it now can grant equitable compensation, it can also, amongst other things, grant injunctions (to act or not to act), specific performance for contracts, and reallocate proprietary interests through implied trusts. This is in line with Baker’s proposition that the Chancery was

⁸⁴ Yearbook 7 Henry VII (1491) f 10 p 2; cited in Dennis R Klinck, ‘Lord Nottingham and the Conscience of Equity’ (2006) 67 *Journal of the History of Ideas* 123, 135; quoted as “well done according to conscience” in Charles Keigwin, ‘The Origin of Equity: Part III’ (1929-1930) 18 *Georgetown Law Journal* 215, 225, who also gives the year as 1489.

⁸⁵ Simpson (n 83), 399

⁸⁶ *Ibid*, 399

⁸⁷ *The Earl of Kildare v Sir Morris Eustace* (1686) 1 *Vernon’s Cases in Chancery* 405, 405; 23 *ER* 546, 546

⁸⁸ *R Griggs Group Ltd v Evans* [2005] Ch 153, [39] (Peter Prescott QC)

the ‘temporal counterpart of the confessional’.⁸⁹ Just as a confessor can tailor penance around the specific sin, and as the ecclesiastical court can do the same for actionable sins, the Chancery now did the same. This demonstrates a clear difference between common law and equitable remedies, which remains to this day.⁹⁰

The primary role of unconscionability is to be an objective standard of behaviour against which all parties are judged, and where a party has acted unconscionably, within the parameters of the established equitable claim, a remedy can be imposed. In being defendant-focused, and trying to relieve a troubled conscience, equity has developed a wider range of remedies, as opposed to the claimant-focused common law which predominantly seeks to financially compensate the claimant’s loss.

The second role that conscience plays in equity is to help develop new equitable rights and to adapt existing ones to new contexts. Judges have noted the importance of keeping equity flexible and adaptable to new circumstances, where conscience can be the guiding principle.⁹¹ Lord Evershed stated that new equitable principles have not been ‘invented’ in modern times but that judges have had the opportunity to ‘refine’ existing principles.⁹² In this context it has often been said that “equity is not past the age of childbearing”.⁹³ The argument was posited by Lord Denning in his justification for expanding the constructive trust to aid deserted wives.⁹⁴ As later chapters will show, equitable principles have adapted to new circumstances, in response to unconscionable behaviour. In the past few decades, this has been particularly important in expanding equity’s scope in commercial disputes.⁹⁵ The development of the so-called “deserted wife’s equity” will be looked at in chapter eleven, and is a great example of how unconscionability can always be identified even though the substantive law has not yet caught up. This secondary role of conscience is thus an extremely important one.

⁸⁹ J H Baker, *An Introduction to English Legal History* (4th edn, OUP, 2007), 106

⁹⁰ Samuel L Bray, ‘The System of Equitable Remedies’ (2016) 63 *UCLA Law Review* 530, 535

⁹¹ *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1, 9 (Millett J); *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372, 397 (Chadwick LJ)

⁹² Raymond Evershed, ‘Equity is Not to be Presumed to be Past the Age of Childbearing’ (1953-1955) 1 *Sydney Law Review* 1, 7

⁹³ *Ibid*, 1; attributed to Harman J, but may first have been said by Lord Mansfield.

⁹⁴ *Eves v Eves* [1975] 1 WLR 1338, 1341 (Lord Denning MR); the “new model” constructive trust was later disapproved by the House of Lords; consider Margaret Halliwell, ‘Equity as Injustice: the Cohabitant’s Case’ (1991) 20 *Anglo-American Law Review* 500, 501

⁹⁵ Consider Deirdre Ahern, ‘Directors’ Duties, Dry Ink and the Accessibility Agenda’ (2012) 128 *LQR* 114, 134; Editorial, ‘Commercial Equity’ (1993) 14 *Company Lawyer* 42, 42; TT Arvind, ‘Contract Transactions and Equity’ in Larry DiMatteo, Qi Zhou, Séverine Saintier, Keith Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP, 2013), 166-167

Conclusion

The previous two chapters demonstrated that equity uses an objective conscience, that conscience is an aspect of moral reasoning, and is a process shared by all parties. Equity does not seek the subjective, individual opinions of each party or the judge. It seeks to engage with an objective morality.

This chapter has explored the role played by conscience in equity. There are clear links to the canon law. The Church was concerned with conscience because acting unconscionable was a sin, and there was a need for a sinner to seek redemption and do penance to avoid damnation. Chancery is of course a secular court, but its rationale was similar. Unconscionable acts have to be remedied. Equity has developed specific claims, such as breach of fiduciary duty, each of which has specific requirements, but underlining them all is the notion of unconscionability. It is an objective moral baseline against which to judge socially acceptable behaviour, as well as the linchpin around which existing equitable claims can develop and adapt to new circumstances.

Having clearly established the role conscience has in equity, as an objective standard of behaviour, it is now necessary to continue to the third question. What is that objective standard of socially acceptable behaviour? What does equity deem to be unconscionable?

Chapter 6

Defining Unconscionability – The Law of Reason

The thesis has shown that equity's conscience developed out of the medieval canon law and is based on the scholastic understanding of conscience as moral reasoning though engaging with the law of reason. The previous chapter showed that the law of reason underpins English law, both the common law and equity, and that the test of unconscionability shares a similar function to the common law reasonableness test, namely as an objective standard of behaviour against which parties' actions are judged. Unconscionability, nor reasonableness, is a cause of action in its own right. Rather, it is used to assess whether a given equitable claim has been proved. The chapter also showed that unconscionability is a linchpin around which the existing equitable claims can develop and adapt to new circumstances, as society continually changes.

This chapter will begin to address the third question. Unconscionability is an objective standard of behaviour, but the case law has not provided a detailed explanation of what that standard is. The thesis will now proceed to uncover the indicia of unconscionability. This chapter will begin with a quick summary of the overall findings, which will then be elaborated upon in chapter twelve. The focus of this chapter then is begin the top-down study of unconscionability, by remaining on the law of reason. The chapter will look at what moral precepts the law of reason is said to consist of, which provides some fundamental ideas of what conduct equity seeks to remedy. The chapter will then proceed to trace those moral precepts into equity, by looking at the so-called equitable maxims.

Chapter seven will continue the top-down study of unconscionability by looking at how unconscionability has been treated in other modern academic works. Together with the findings in this chapter, these two chapters will provide the theoretical grounding to the indicia of unconscionability. As said in chapter two, such a theoretical grounding is appropriate in equity, since, as the 1852 Chancery Commission noted, equity 'administers justice according to the principles of the Civil Law'.¹ The subsequent chapters, eight to eleven, will continue with the bottom-up study of

¹ Chancery Commission, Copy of the First Report of Her Majesty's Commissioners appointed to inquire into the Process, Practices, and System of Pleading in the Court of Chancery, (W. Clowes & Sons, 1852), 1

unconscionability. By looking at different equitable claims, and studying a range of case law, the thesis will show how the theoretical fundamentals of unconscionability have been applied judicially, as well as teasing out how additional indicia of unconscionability have been created through the case law. Whilst the overall findings will be summarised below, the indicia will be brought together and presented in chapter twelve.

Part 1: The indicia of unconscionability

This section will very briefly summarise the indicia of unconscionability that this and the subsequent chapters will posit. The indicia are discussed fully in chapter twelve. The purpose of setting out the conclusions at this stage is to make it easier to navigate the voluminous data presented in these chapters.²

The thesis will argue that the definition of unconscionability is a moral idea that promotes communal harmony. Importantly, equity ensures that individuals cannot take undue advantage of another by reason of some superiority, be that having a legal right, or by having some social, economic, or psychological advantage. As the thesis will demonstrate, defending against an abuse of power is the key idea which permeates the equitable claims.

In developing that idea, the thesis will posit that the indicia of unconscionability can be divided into three categories. They relate to the equitable claims, which are premised on a recognised wrong having been committed. The first category includes the factors which are antecedent to the recognised wrong: these indicia exist a priori and are present even if a wrong is not actually committed. The most important factor is the relevant context of the dispute, namely did the dispute arise in a private or commercial context. The second category includes the factors which are related directly to the recognised wrong itself. The third category includes the factors which arise following the recognised wrong, including laches and acquiescence.

The academic views considered in chapter seven predominantly focus on the second category, namely indicia around the claim itself. This includes the issue of knowledge, namely what does a defendant have to know before he can be said to be acting unconscionably, and specific duties such as honesty and loyalty. However, the thesis

² Peter Butt, 'Judgment Writing: An Antipodean Response' (2013) 129 LQR 7, 8

argues that unconscionability cannot simply be seen in such a narrow way, but that any definition of unconscionability have to also include the first and third categories.

These chapters, leading up to chapter twelve, will therefore be looking for unconscionability indicia relating to each of the three categories. The equitable maxims, considered later in this chapter, relate to all three categories. The principles of the law of reason, considered next, mainly relate to the first category; they are general principles of morality which were in play when English equity first emerged, and speak to its fundamental rationale. Such general statements of morality are insufficient, in themselves, to understand how equity works and what amounts to unconscionable conduct. They are, however, the foundation stone.

Part 2: Defining unconscionability through the law of reason

Starting in chapter three, it has been noted that equity is based upon the jurisprudential idea of the law of reason, which was developed, inter alia, by the medieval scholastics. They understood that moral reasoning, namely engaging with the objective law of reason, was done through conscience. St Thomas Aquinas posited that conscience was the duality of *synderesis*, which rationally understood the moral precepts, and *conscientia*, which rationally applied those precepts to future, current, or past actions. Chapter four showed that the medieval Chancery petitions spoke of reason before developing the still-used terminology around conscience. Chapter five showed how the law of reason underpins both the common law and equity. This section will look at how the law of reason can be used to define unconscionability in equity. This is the appropriate starting point, given the fundamental role of the law of reason in English law, and, as Roughley writes, the pre-Reformation clerical Chancellors drew on ‘ecclesiastical doctrine and natural law philosophy’.³

What then are the moral precepts which form the law of reason? Potts writes that it ‘is one of the most remarkable features of the medieval treatment of conscience’ that ‘no serious attempt’ was made to establish what the ‘basic deontic propositions’ of *synderesis* were.⁴ However, if one is to properly understand the scholastics, one has to see the law of reason in its wider context: it was ever present in the teachings of the

³ Fiona Roughley, ‘The Development of the Conscience of Equity’ in JT Gleeson, JA Watson, RCA Higgins, *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013), 158

⁴ Timothy Potts, *Conscience in Medieval Philosophy* (CUP, 1980), 60

Church, including the scriptures and the Magisterium. Beyond that, the precepts had to be clarified through other means, which justifies human laws.⁵

The starting point to understand the law of reason is an important proposition made by Aquinas, who wrote that the first principle of reason is that ‘good is to be done and pursued and evil avoided’.⁶ This is sometimes shortened to “do good and avoid evil”, but that is a simplification.⁷ The importance of Aquinas’ full phrase is the exhortation to actively pursue good, not merely doing good whenever one is compelled to actually act. Aquinas writes further that every person ‘has a natural urge towards complete goodness’.⁸ As such, the call to pursue the good should not be too taxing.

Beyond this fundamental principle of reason, there are a number of so-called primary principles of reason. These include promoting family and community life; following on there are secondary principles which derive from the primary.⁹ Secondary principles include preserving ‘human life’, opposing death and promoting community, including ‘avoiding ignorance and not offending those we live with’.¹⁰ Newman writes that the ‘vision of brotherhood of the Prophets of the Old Testament was carried by Jesus into Christianity as the doctrine of charity, which meant love and concern for one’s fellow men’.¹¹ The Christian conscience is deeply rooted in community and compassion, and these ideas are evident also in English equity.

These are all principles of reason, perhaps inborn as the scholastic argued, or at least taught by the Church. It must be conceded, however, that understanding these principles in practice can be difficult.¹² The scholastics, perhaps anticipating and answering this doubt, gave primacy to reason, and said that we should train our conscience and then follow it; no doubt people found it comforting that an honest

⁵ Thomas Aquinas, *Summa Theologiae* (Timothy McDermott (ed), *Concise Translation* (Methuen, 1989)), 290; see also Lisa Cahill, ‘The Catholic Tradition: Religion, Morality, and the Common Good’ (1987) 5 *Journal of Law and Religion* 75, 76

⁶ Aquinas (n 4), 287; Terence Irwin, *The Development of Ethics: Volume 1: From Socrates to the Reformation* (OUP, 2007), Ch 21, 22

⁷ However, see Psalm 37:27 (NRSVACE) which reads “Depart from evil, and do good”

⁸ St Thomas Aquinas, *Disputations, XXII de Veritate*, 7, cited in Thomas Gilby, *St Thomas Aquinas – Philosophical Texts* (OUP, 1951), 280

⁹ Aquinas (n 5), 288; Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton (eds), Selden Society, 1974), 15

¹⁰ Aquinas (n 5), 287

¹¹ Ralph Newman, ‘Equity in Comparative Law’ (1968) 17 *International and Comparative Law Quarterly* 807, 808

¹² Cahill (n 5), 76

misunderstanding of God's law was not a sin. Similarly, equity can excuse honest and reasonable mistakes and misunderstandings.¹³

As such, it is possible to link the precepts of the law of reason to unconscionability in equity. Precepts around private ownership, personal autonomy and doing to others what you would have them do to you resonate in the equitable principles. That said, it is, in Turner's words, 'curious' why there is so little judicial guidance on the meaning of unconscionability.¹⁴ A reason might be judicial hesitation with explaining questions of morality, as noted in chapter two.¹⁵ Klinck writes that 'the courts are reluctant to contemplate full-blown casuistical inquiry, or to venture unreservedly into the "moral realism" that probably must underlie any objective theory of conscience'.¹⁶ The thesis posits that if the courts are comfortable defining the reasonable person (who originates in the law of reason) then the courts should be equally comfortable defining unconscionability, as the thesis now seeks to do.

Private ownership and entitlement underpins the concept of the trust. The origin of the trust is often presented through the story of a knight who went on the crusades. Such a knight would have to pass legal control of his estate to someone else, who would manage the estate in the knight's absence. The common law decided simply to recognise the transfer of the legal title. When the knight returned, however, he would need some mechanism to get his property returned to him, in case the manager refused to transfer the title back. For some reason, the common law could not conceptualise this. The law insisted that title was absolute and once transferred it could not be returned through operation of law. The law of reason recognises ownership as well as community and peaceful co-existence. If a manager was given legal title on an interim basis (all parties intending that to be the case), reason dictates that the knight's ownership interest must continue to be recognised and in the interest of harmonious community living the law similarly must prevent people from claiming property they know is not theirs. It is not surprising that the use, and later the trust, was created by the Lord Chancellors. Conscience could not countenance an infringement of ownership rights.

¹³ Trustee Act 1925, s. 61; Companies Act 2006, s. 1157

¹⁴ David Turner, 'Relief Against Forfeiture of a Proprietary Interest: When Will Equity Come to the Rescue?' (2004) 23 University of Queensland Law Journal 464, 473

¹⁵ See, for instance, *R (on the application of Nicklinson) v Secretary of State for Justice* [2014] UKSC 38, [2014] 3 WLR 200, [207] (Lord Sumption)

¹⁶ Dennis R Klinck, 'The Unexamined "Conscience" of Contemporary Canadian Equity' (2000-2001) 46 McGill Law Journal 571, 613

Equitable claims such as undue influence and the rules around fiduciaries similarly link back to the law of reason precepts of community, brotherhood and the Golden Rule. A person cannot unduly pressure another or take advantage of a position of power since it undermines community cohesion and in effect authorises others to do the same to them. For instance, undue influence is focused on protecting ‘the vulnerable from economic harm’.¹⁷ The ideas of community and peaceful co-existence are clearly demonstrable.

The precepts of the law of reason help explain the meaning of unconscionability on a broad basis. Equity is equality.¹⁸ In this we see the idea of community, cooperation and fairness. People are to be treated equally; people are not to be judged or shown bias; the Golden Rule must be observed; rights and entitlements, such as ownership of property, must be respected. These ideas tell us much about unconscionability and, as a jurisdiction of conscience, inform the equitable principles themselves.

Some of the principles the medieval Chancery operated under resonate in modern equitable rights. Spence, for instance, argues that the Medieval Chancery was based on ‘Conscience, Good Faith, Honesty, and Equity’.¹⁹ Simpson says that the reference to honesty ‘seems hard to support in the period under discussion’.²⁰ However, Simpson is probably incorrect, and honesty would fall under the concept of conscience (it would certainly fall under the Golden Rule and Kant argued that lying was categorically wrong). Macnair similarly argues that equity’s conscience has ‘particular overtones of “honesty”’.²¹

Spence goes on to say that conscience ‘appears to have embraced the obligations which resulted from a person being placed in any situation as regards another, that gave to the one a right to expect, on the part of the other, the exercise of good faith towards him’.²² Spence seems to suggest that conscience is tantamount to the exercise of a fiduciary obligation. Simpson argues that this definition of conscience is incorrect;

¹⁷ *Lawrence v Poorah* [2008] UKPC 21, [20] (Lord Walker); *Godden v Godden* [2015] EWHC 2633, [86] (Andrew Simmonds QC)

¹⁸ Schmucl Shilo, ‘Equity as a Bridge between Jewish and Secular Law’ (1990-1991) 12 *Cardozo Law Review* 737, 737; Helen Silving, ‘The Jurisprudence of the Old Testament’ (1953) 28 *NYUL Rev* 1129, 1138

¹⁹ George Spence, *The Equitable Jurisdiction of the Court of Chancery, Vol 1* (Lea and Blanchard, 1846), 407

²⁰ AW Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (OUP, 1975), 397 (FN3)

²¹ Mike Macnair, ‘Equity and Conscience’ (2007) 27 *Oxford Journal of Legal Studies* 659, 660

²² Spence (n 19), 410

positing that whilst conscience ‘included’ the concept of good faith, the term itself did not ‘connote some principle of injurious reliance or good faith’.²³ Simpson seems to be correct, though it is not clear that Spence intended to say that conscience simply meant good faith. Conscience goes well beyond good faith. The concept of good faith was fleshed out in a medieval petition to Chancery. The petition refers to ‘what right and good faith demand, so that no such extortion nor deceit be suffered’.²⁴ Obtaining benefits through deceit or extortion would be in bad faith.

Understanding what moral precepts equity is based upon might appear more difficult than it really is. The courts have, in recent times, maintained that the question of identifying morally correct behaviour is not too taxing. Lord Nicholls posited that in ‘most situations there is little difficulty in identifying how an honest person would behave’.²⁵ The Court of Appeal later said that the question of whether a defendant has been dishonest ‘may not be an easy question to answer, but it is the sort of question that judges and juries throughout the country answer every day without needing to analyse a large number of authorities’.²⁶ It is more difficult than adding two and two, but it is not impossible.

The law of reason lays down moral precepts which are deemed to be universally known. It is important to stress that equity does not consider personal morality. For instance, in proving “equitable fraud” the courts have held that there is no need for ‘moral turpitude’, merely unconscionability.²⁷ Turpitude is difficult to define but means an act which is contrary to the duties owed to the community.²⁸ Unconscionability in equity does not mean actual moral wrongdoing in the sense that the defendant knows he is acting immorally (equity has an objective conscience). What is required is objective wrongdoing as defined by the principles of unconscionability. Thus, Hollingworth J said that for ‘the conduct to amount to unconscionable conduct in equity, it must involve a high level of moral obloquy’.²⁹ Obloquy means public outcry. It suggests that equity’s conscience remains linked to communal morality. One might argue there is an inconsistency between Lord Denning saying no need for

²³ Simpson (n 20), 398

²⁴ William Baildon (ed), *Selden Society, Vol 10, Select Cases in Chancery, 1364-1471* (Bernard Quaritch, 1896), Case 71, page 69

²⁵ *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389 (Lord Nicholls)

²⁶ *Mortgage Express Ltd v Newman & Co (No 2)* [2001] PNLR 86, 100 (Aldous LJ)

²⁷ *Applegate v Moss* [1971] 1 QB 406, 413 (Lord Denning MR)

²⁸ The phrase is used in US law and thusly defined, see e.g. *Re Craig* (1938) 12 Cal 2d 93, 97 (Waste CJ); *Chadwick v State Bar* (1989) 49 Cal 3d 103, 110

²⁹ *Mete v Fiasco* [2013] VSC 460, [252] (Hollingworth J)

turpitude and Hollingworth J saying there must be moral obloquy, but in the context of the above findings, the thesis argues that what must be shown is a wrong that goes against the broad moral precepts of equity, and that it is not necessary for the defendant to be personally aware that he is acting immorally. This is because, as Bowen LJ said, you ‘cannot look into a man’s mind’, but you can assess whether he was indifferent to the truth, an indifference which is described as a ‘moral obloquy’.³⁰ It is breaching the objective moral precept that makes an action unconscionable.

Part 3: The equitable maxims

Introduction

The moral precepts in the law of reason have been crystallised in equity in the form of the equitable maxims. The maxims are broad ‘guidelines’.³¹ Hudson writes that the maxims ‘appear to be a collection of vague ethical statements’ that fundamentally argue that ‘people should behave reasonably towards one another’.³² This is not far from the primary principle of reason, namely that ‘good is to be done and pursued and evil avoided’.³³ Despite their general nature, *Snell’s Equity* suggests that one merit of the maxims is providing a ‘fall back’ position whenever there is uncertainty about the application of an existing equitable claim.³⁴ Nonetheless, the maxims do not operate as causes of action in their own right, but serve to underpin and explain existing claims.³⁵ A close reading of the maxims provide an insight into the meaning of unconscionability, making them very valuable to the current study.

The law has long recognised the value of fundamental principles. Lord Hardwicke remarked that ‘the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty’.³⁶ The maxims, and what they reveal about unconscionability, have

³⁰ *Angus v Clifford* [1891] 2 Ch 449, 471 (Bowen LJ); *Bray v Ford* [1896] AC 44, 48 (Lord Watson); *Madoff Securities International Ltd (in liquidation) v Raven* [2013] EWHC 3147, [177] (Popplewell J)

³¹ Graham Virgo, *The Principles of Equity & Trusts* (2nd edn, OUP, 2016), 27; *Corin v Patton* (1990) 169 CLR 540, 557 (Mason CJ and Hughes J); *Pitt v Holt* [2013] UKSC 26, [2013] 1 AC 108, [136] (Lord Walker)

³² Alastair Hudson, *Equity and Trusts* (8th edn, Routledge, 2015), 28

³³ Aquinas (n 5), 287

³⁴ John McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell, 2014), [5-100]

³⁵ *HR Trustees Ltd v Wembley Plc (in liquidation)* [2011] EWHC 2974, [59] (Vos J)

³⁶ *Jones v Randall* (1774) 1 Cowper 37, 39; 98 ER 954, 955 (Lord Mansfield)

remained fairly static, as the case studies will demonstrate. This brings the discussion back to Jung's theory of the collective unconscious.³⁷ Certain fundamental principles of life and morality are inborn and are shared by all people, cutting across societal, religious and cultural boundaries.³⁸ These principles were captured in the law of reason. It is emphasised that this is not a religious construct but a psychological reality.

There are numerous maxims and there is no definitive list. *Snell's Equity* identifies twelve maxims which have some "official" standing; additionally, this chapter will consider maxims suggested by Professors Hudson and Virgo.³⁹ This chapter will focus on the maxims which directly speak towards the definition of unconscionability; others are primarily procedural and will only be considered in outline.

Maxims and unconscionability

This section will look at those maxims which point towards the meaning of unconscionability. They will not be considered individually; rather they will be discussed under two broad headings: moral statements leading towards community cohesion and equity's opposition to using legal entitlements as vehicles for fraud.

a. Morality and community

Some of the equitable maxims are statements of morality and urge us towards what is good (or at least what equity decrees to be good). Perhaps the closest link between the maxims and the law of reason is a maxim proposed by Virgo, namely that "equity protects the weak and vulnerable".⁴⁰ This maxim echoes the moral precepts that the medieval Chancery would have adopted from Christian theology.⁴¹ The maxim provides a wealth of information regarding the meaning of unconscionability, stemming from the recognition that society comes with numerous forms of imbalances of power. The imbalance can be one of gender, social or economic status, legal

³⁷ Carl Gustav Jung, *The Archetypes and the Collective Unconscious* (2nd edn, Routledge, 1959, tenth printing 1991), 4

³⁸ Carl Gustav Jung, *Psychological Types* (H.G. Baynes and R. F. C. Hull (trans), Routledge, 1991), 212

³⁹ *Snell's Equity* (n 34), chapter 5; Hudson (n 32), 28-29; Virgo (n 31), 28-29

⁴⁰ Virgo (n 31), 39

⁴¹ Luke 4:18; Isaiah 61:1

entitlements, or psychological state of mind. These imbalances will become clear in the forthcoming case studies.

The maxim explains that it is wrong to exploit others. This will clearly be seen in chapter eight when discussing undue influence and unconscionable bargains. The doctrines ‘share a common root—equity’s concern to protect the vulnerable from economic harm’.⁴² The principle also applies in other equitable claims. All beneficiaries to a fiduciary relationship are in a weaker position and are protected by equity despite being volunteers. The maxim also applies when equity recognises a constructive trust over shared property, where there is only one legal owner. At law, the legal owner can easily exclude the other from the property, which is a position of considerable power.

Virgo also posits that “equity is cynical”.⁴³ This cynicism is clearly seen in *Bray v Ford* where Lord Herschell justified the strict liability rules for fiduciaries, which were deemed necessary, not because of some ‘principles of morality’ but because ‘human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect’.⁴⁴ The scepticism about altruism and duty seep through. The maxim suggests that whereas equity wants people to act nicely, equity also maintains a realistic outlook on human behaviour. Selfish motives can easily overtake. This also explains implied trusts over the family home and the position that contributions to the purchase price or to improving the property were not meant as gifts to the legal owner.⁴⁵ On the breakdown of a relationship it would be easy for the legal owner to kick the other out and keep the financial benefit in the property, but equity protects the weak and is cynical about financial gifts. The cynicism against fiduciaries is a somewhat negative outlook on human behaviour, but the cynicism in favour of non-legal owners’ financial contributions to property actually serves to help them.

The thesis posits that balance of power is a key unconscionability indicium. A part of this is the prohibition on exploitation, and that anyone in a stronger position (however defined) must not abuse that position. Equity protects the weak and

⁴² *Lawrence v Poorah* (n 64), [20] (Lord Walker)

⁴³ Virgo (n 31), 40

⁴⁴ *Bray v Ford* [1896] AC 44, 51 (Lord Herschell)

⁴⁵ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776, [17], [46] (Lady Hale and Lord Walker); *Geary v Rankin* [2012] EWCA Civ 555, [20] (Lewison LJ)

vulnerable through a range of remedies, such as rescission of contracts or gifts, or the imposition of a constructive trust. As noted in the previous chapter, the remedies are designed to clear the troubled conscience of the stronger party.

Another maxim which points towards good community living is that “equity imputes an intention to fulfil an obligation”. Equity works on the assumption that any person who is under an obligation has an intention to fulfil it.⁴⁶ It would be unconscionable to try to sidestep that obligation. In *Snowden v Snowden*, a husband promised to pay the trustees of his marriage settlement some £2000, which they would use to purchase freehold land, and from the rent thereof pay an annuity to the wife. On their death the freehold was to be sold and apportioned to the children of the marriage. The husband did not make the payment but bought his own freehold. On his death, the freehold passed to his son. His daughter brought a claim arguing that the freehold should be treated as being on trust for them both, with which the court agreed.⁴⁷ The unconscionability indicia that will be discussed in chapter twelve is that agreements have to be followed and that the public conscience insists that they are fulfilled.

Another strong indicator is the maxim “equality is equity”, which means that in the absence of formal agreements, equity will provide equality to the parties.⁴⁸ Without any agreement to the contrary, this is the fair outcome. The maxim has a broad application across equity, and some examples can be given.

Martin Rogers invested in a life assurance bond that consisted of 20 individual policies. The law allows a person to annually withdraw 5% of the original sum without incurring tax liability.⁴⁹ Rogers withdrew more than 5%. His tax liability would differ significantly depending on whether he withdrew partially (but more than 5%) from all policies or completely surrendered some policies and left the others intact. The terms of the insurance policy were unclear. The tax tribunal applied the maxim and ruled that there had been an equal, partial surrender from each of the 20 policies.⁵⁰

⁴⁶ Hudson (n 32), 33

⁴⁷ *Snowden v Snowden* (1785) 1 Brown’s Chancery Cases 582, 583; 28 ER 1311, 1311 (Sir Lloyd Kenyon)

⁴⁸ *Jones v Kernott* [2011] 1 AC 776, [51] (Lord Walker and Lady Hale); *Re Baden’s Deed Trust (No 1)* [1971] AC 424, 443 (Lord Hodson); *Re Planet Benefit Building and Investment Society* (1872) LR 14 Eq 441, 452 (Lord Romilly MR); *Halpin v Revenue and Customs Commissioners* [2011] UKFTT 512 (TC), [34]; *Hampton v Minns* [2002] 1 WLR 1, [58] (Kevin Garnett QC); *Newton v Chorlton* (1853) 10 Hare 646, 651; 68 ER 1087, 1089 (Page Wood VC)

⁴⁹ *Rogers v Revenue and Customs Commissioners* [2011] UKFTT 791 (TC), [3]; Income Tax (Trading and Other Income) Act 2005, Part 4, Chapter 9

⁵⁰ *Ibid*, [117]

Re Dickens concerned the apportionment of money accrued by Lady Dickens when, in the 1930s, as the executrix of Charles Dickens' last surviving son, published a manuscript written by Charles Dickens. The physical document had passed to Charles Dickens' sister and then to his son. The copyright, however, had always remained with the estate of Charles Dickens.⁵¹ There were two groups claiming interest in the proceeds of the publication; Charles Dickens' estate and the children of his son, of whom Lady Dickens was trustee. Applying the maxim, the Court of Appeal granted half the proceeds to the estate and the other half to Lady Dickens' children.⁵²

In *Jones v Maynard* a husband and a wife had a joint bank account. They both paid their earnings into the account and withdrew money as necessary. Money was also used by the husband to make investments. They later divorced and the husband closed the account and withdrew the balance. The ex-wife brought a claim for half the value of the account as of the day it was closed, including half the value of the investments made. Vaisey J wrote that 'the principle which applies here is Plato's definition of equality as a "sort of justice": if you cannot find any other, equality is the proper basis'.⁵³ The ex-husband held half the value of the account and the investments which were live at the time the account was closed on trust for his ex-wife.

These short examples show that the maxim is a practical fail-safe. If there is no agreement to the contrary, equity will go for equality. The unconscionability factor is trying to insist on an unequal outcome without the backing of a valid agreement. This will be looked at further in chapter eleven when considering the common intention constructive trust. The equality maxim branches out into two others, namely "when there are equal equities, the first in time shall prevail" and "where there is equal equity, the law shall prevail". The former is a straight-forward issue of time. The latter is a question of resolving competing equities, and that in disputes the law will be followed.⁵⁴ This question arises where several parties, for instance, have in good faith purchased goods from a fraudster, or where equally diligent parties have lost money because of a third-party fraud.⁵⁵ Each of these maxims are an indication of the importance of equality and the unconscionability of seeking to deny it.

⁵¹ *Re Dickens* [1935] Ch 267, 288 (Lord Hanworth MR)

⁵² *Ibid*, 290 (Hanworth MR), 300-301 (Romer LJ), 309 (Maugham LJ)

⁵³ *Jones v Maynard* [1951] Ch 572, 575 (Vaisey J)

⁵⁴ Hudson (n 32), 30

⁵⁵ *Ancher v The Governor and Company of the Bank of England* (1781) 2 Douglas 637, 639; 99 ER 404, 405 (Lord Mansfield); *Sinclair v Brougham* [1914] AC 398, 442 (Lord Parker)

b. Fraud and pragmatism

A number of maxims show that equity's flexible rules are necessary to avoid unconscionable outcomes based on fraud. They continue the theme of harmonious community living. One maxim proposed by Hudson is that "equity will not permit statute or common law to be used as an engine of fraud".⁵⁶ There comes a point where it would be unconscionable to enforce a legal or statutory rule.

One example is equity's recognition of secret trusts.⁵⁷ Such dispositions are not enforceable at law.⁵⁸ In law, all dispositions of a person's estate must be recorded in the will or they pass on intestacy. The recognition of secret trusts is an example of equity enforcing the genuine intent as opposed to the written word; if the recipient refuses to carry out the wishes of the testator he is committing fraud.⁵⁹

This also brings in another maxim, namely that "equity looks to the intent rather than the form". It is unconscionable to insist on the strict letter of the law where doing so would produce an outcome which was clearly not intended. In addition to secret trusts, this maxim underpins equity's willingness to set aside sham trusts.⁶⁰ Similarly, the courts can rectify written agreements which do not reflect the true intention of the parties.⁶¹

A key example is *Rochefoucauld v Boustead*. It concerned an imperfectly recorded trust. The Court of Appeal held that the requirement that a disposition of an interest in land must be in writing cannot be used as a defence by a trustee, who knows he takes land on trust, but there is insufficient written evidence to that effect.⁶² Equity will not

⁵⁶ Hudson (n 32), 34

⁵⁷ John Ross Martyn, Mika Oldham, Alexander Learmonth, Charlotte Ford (eds), *Theobald on Wills* (17th edn, Sweet & Maxwell, 2013), [6-001]; *Re Freud (Deceased)* [2014] EWHC 2577, [16]-[17] (Richard Spearman QC); *Davies v Revenue and Customs Commissioners* [2009] UKFTT 138 (TC), [27]; *Blackwell v Blackwell* [1929] AC 318, 341 (Lord Warrington); *Re Gardener* [1920] 2 Ch 523, 529 (Lord Sterndale MR)

⁵⁸ Wills Act 1837, s. 24

⁵⁹ *Re Snowden (deceased)* [1979] Ch 528, 537 (Megarry VC)

⁶⁰ *Pankhania v Chandegra* [2012] EWCA Civ 1438, [2013] 1 P & CR 16, [20] (Patten LJ); *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Lord Diplock)

⁶¹ *Wilson v Wilson* [1969] 1 WLR 1470, 1473 (Buckley J); *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [33]-[34] (Peter Gibson LJ); *Wills v Gibbs* [2007] EWHC 3361, [25] (Rimer J); *Vaughan-Jones v Vaughan-Jones* [2015] EWHC 1086, [43] (HHJ Hodge QC)

⁶² *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 (Lindley LJ); then the Statute of Frauds 1677, s. 7; now the Law of Property Act 1925, s. 53; consider *Singh v Anand* [2007] EWHC 3346, [144(h)] (HHJ Norris QC)

permit strict adherence to statute or a common law rule where such adherence would amount to fraud.

It shows that equity takes a flexible and pragmatic approach to the parties' behaviour. Equity looks, as far as possible, to the true intentions behind the parties' actions. A statute should not be allowed to defeat those intentions, if that would amount to fraud. The common law's objection would be that the parties could simply follow the law, which is a general expectation in society, but equity recognises the intricacies of human behaviour and rightly adopts this more flexible approach. The unconscionability indicia that stem from these maxims is the knowledge of the parties, which point to their true intentions, and the agreements actually reached. In striving for a just outcome, equity takes a pragmatic approach to prevent fraud.

Procedural maxims

The other maxims speak to how equity operates and when remedies will be imposed. Some of the procedural maxims do contain the genesis of unconscionability indicia, so they are worth considering.

The most fundamental maxim is that "equity acts *in personam*", which confirms that equity acts on the conscience of the parties.⁶³ A further maxim is that "equity will not suffer a wrong without a remedy". Hudson suggests that the maxim underpins the flexibility of equity and how it allows remedies to be tailored to new circumstances.⁶⁴ Acting *in personam*, this explains, for instance, how equity, unlike the common law, gave itself the right to make orders against parties who are in foreign jurisdictions.⁶⁵ In modern times, injunctions, constructive trusts, and other equitable remedies to be considered later, has expanded in the light of new challenges.⁶⁶ Virgo argues that this maxim is 'liable to deceive' and should be 'rejected'.⁶⁷ This is on the basis that equity no longer allows the free-wheeling medieval approach of fashioning new remedies whenever the common law is deemed ineffective. Virgo cites Lindley LJ who said that

⁶³ Virgo (n 31), 44; *Ewing v Orr Ewing* (1883) 9 App Cas 34, 40 (Lord Selbourne)

⁶⁴ Hudson (n 32), 29

⁶⁵ *Re Carapiet's Trusts* [2002] EWHC 1304, [36] (Jacob J); *R Griggs Group Ltd v Evans* [2004] EWHC 1088, [2005] Ch 153, [66] (Peter Prescott QC); *Comes Arglasse v Muschamp* (1682) 1 Vernon's Cases in Chancery 75, 77; 23 ER 322, 322 (Lord Nottingham)

⁶⁶ *Mercedes Benz AG v Leiduck* [1996] AC 284 (PC), 308 (Lord Nicholls); *The Mareva* [1980] 1 All ER 213; *AM v SS* [2014] EWHC 2887, [24] (Coleridge J)

⁶⁷ Virgo (n 31), 28

‘it is an old mistake to suppose that because there is no effectual remedy at law, there must be one in equity’.⁶⁸ However, Lindley LJ does go on to write that ‘Courts of equity proceeded upon well-known principles capable of great expansion; but the principles themselves must not be lost sight of’.⁶⁹ The maxim thus gives the courts broad authority to expand existing principles to meet new circumstances.⁷⁰

Despite this objection, Virgo proposes similar maxims. The first is that “equity is discretionary”, which noted that equitable remedies are awarded at the court’s discretion.⁷¹ Virgo similarly posits that “equity is imaginative”.⁷² As noted, equitable rules and remedies continue to develop to meet new social circumstances.

Other maxims include that “equity follows the law”. Virgo suggests that the maxim really is that “equity recognises the common law”.⁷³ It means that equity recognises common law rules; as noted above regarding fraud, equity ensures that the common law is not exploited.⁷⁴ Another is that “equity looks on as done that which ought to have been done”. This is evident in the last act doctrine; where a person has done all that he has to do, by way of formalities, and then passes away, equity will complete any outstanding practicalities.⁷⁵ The maxim “equity abhors a vacuum” explains where property goes in the absence of a clear owner, generally by way of a resulting trust or ultimately to the Crown.⁷⁶ Another maxim is that “equity will not assist a volunteer”. It explains that the public conscience only becomes engaged when the parties have a sufficiently close relationship; generally where consideration has been given. The general exception is beneficiaries under a fiduciary relationship, who despite being volunteers are protected by virtue of their precarious situation in the relationship. The courts have also adopted the maxim that, despite not assisting volunteers, within the

⁶⁸ *Holmes v Millage* [1893] 1 QB 551, 555 (Lindley LJ)

⁶⁹ *Ibid*, 555 (Lindley LJ)

⁷⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 696-697 (Lord Browne-Wilkinson)

⁷¹ Virgo (n 31), 29-31; see *Wall v Collins* [2009] EWHC 2100, [39] (HHJ Hodge QC); *Breakspear v Ackland* [2008] EWHC 220, [2009] Ch 32, [52] (Briggs J); *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, [54] (Lord Walker)

⁷² Virgo (n 31), 40-41

⁷³ Virgo (n 31), 41

⁷⁴ *The Earl of Oxford’s Case* (1615) 1 Chancery Reports 1, 10; 21 ER 485, 487 (Lord Ellesmere); *Graf v Hope Building Corp* (1930) 254 NY 1, 9 (Cardozo CJ)

⁷⁵ *Milroy v Lord* (1862) 4 De Gex, Fisher & Jones 264, 274; 45 ER 1185, 1189 (Turner LJ); *Re Rose* [1949] Ch 78, 89-90 (Jenkins J); *Re Rose* [1952] Ch 499, 512 (Evershed MR); *Pennington v Waine* [2002] 1 WLR 2075, [64] (Arden LJ); *Zeital v Kaye* [2010] EWCA Civ 159, [40] (Rimer LJ)

⁷⁶ *Hudson* (n 32); *Re Vandervell’s Trust (No 2)* [1974] Ch 269, 319 (Lord Denning MR); *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 317 (Lord Upjohn) 508; *Re Trusts of the Abbott Fund* [1900] 2 Ch 326, 331 (Stirling J)

last act doctrine, the court ‘will not strive officiously to defeat a gift’.⁷⁷ The search is for a happy middle ground; hence, equity is discretionary.

The final maxims will be considered in more detail in chapter twelve. They relate to events following an equitable wrong taking place. The first is that “delay defeats equity”, which means that equity will dismiss claims which are brought after an unnecessary delay.⁷⁸ The two additional maxims is that “he who seeks equity must do equity” and “he who comes into equity must come with clean hands”. These maxims are an important reminder that equity not only considers the conscience of the defendant but also the conscience of the claimant. Equity will not allow a claim brought by someone who has acted unconscionably.⁷⁹ The “must do equity” rule imposes requirements on the claimant, even if they are successful at trial. A good example is that fiduciaries should be reimbursed for their costs and potentially even remunerated.⁸⁰ The maxims demonstrate that equity’s conscience is not solely focused on the defendant but looks at all parties involved.

Conclusion

The law of reason presents a range of moral precepts, which according to Jung have some standing as being universal statements of morality. Some of these precepts have been translated into the equitable maxims. Others clearly make themselves felt in the case law. The first principle of reason is that “good is to be done and pursued and evil avoided”. The key word is pursued. It is not necessarily conscionable to sit at home navel-gazing. Fiduciaries, for instance, need to stay active. Trustees have to actively manage the trust fund. Company directors have to look after their companies. It explains why equity recognises the concept of constructive knowledge, based on the premise that the defendant ought to have made enquiries (i.e. a positive obligation).

The golden rule, do to others what you would have them do to you, also comes in as a general proposition. Do not exploit others. Do not insist on the written word when you know that will cause hardship to another. It is important to view these maxims

⁷⁷ *T Choithram International SA v Pagarani* [2001] 1 WLR 1, 11 (Lord Browne-Wilkinson)

⁷⁸ *Fernandes v Fernandes* [2015] EWHC 814, [62] (Kevin Prosser QC); *Fresh Trading Ltd v Deepend Fresh Recovery Ltd* [2015] EWHC 52, [56] (Robert Englehart QC)

⁷⁹ *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049, [1124] (Hildyard J)

⁸⁰ *Brudenell-Bruce v Moore* [2014] EWHC 3679, [236] (Newey J); *Re Berkeley Applegate (Investments Consultants) Ltd* [1989] Ch 32, 50 (Edward Nugee QC); *Re Duke of Norfolk’s Settlement Trust* [1982] Ch 61, 79 (Fox LJ)

through an objective lens, because, for instance on the breakdown of a long-term romantic relationship with all the emotions that entails, the parties may well consider that exploitation and insisting on the written word is really the right thing to do. Equity then is perhaps right to be cynical, but importantly, as discussed above, equity must consider the context, the type of relationship, and the relevant psychological factors, such as the breakup of a romantic relationship.

The maxims of equity do have a role to play. They are pleaded in court in support of arguments, such as when parties are seeking to expand existing principles or have a remedy applied in new circumstances. Some of the maxims help explain unconscionability, but as noted, others simply speak to the fundamental purpose of the equity jurisdiction itself. Even so, they help point in the right direction. It is surprising that so many say that unconscionability is vague, when a careful reading of the maxims reveal a great deal.

Having now given some meaning to the moral precepts of the law of reason, and how they play out in English equity, the thesis will proceed to look at other academic works on the definition of unconscionability.

Chapter 7

Defining Unconscionability – Theoretical Approaches

The previous chapter began the top-down study of the meaning of unconscionability, by looking at the law of reason and its moral precepts. As Roughley noted, this is what the clerical Chancellors would have considered as the Chancery established itself in the centuries prior to the Reformation.¹ This chapter will continue the top-down study by looking at a range of theoretical arguments as to the meaning of unconscionability.

It has been argued that unconscionability has no independent meaning, but simply means what the Chancery does.² Unconscionability on this basis is inexorably linked to the specific equitable claims. Based on the discussions in chapters five and six, the thesis posits that this is false, conscience is separate from the specific claims. It has also been argued that unconscionability is defined by the judges and thus has no particular theoretical grounding.³ Again, the thesis maintains that conscience does have an independent meaning, beyond individual claims and judgments. The previous chapter began to explore that theoretical basis to unconscionability.

This chapter will begin by looking at the argument that conscience simply means the knowledge of the defendant. The chapter will then look at the five themes of unconscionability identified by Klinck, one of the few equity jurists to have explored unconscionability in any detail. Finally, the chapter will explore the role that psychology can have in defining unconscionability, including how Behavioural Decision Theory can help explain why people make decisions and how that process can be exploited. These points will be picked up on in the following chapters exploring unconscionability through the case law.

¹ Fiona Roughley, 'The Development of the Conscience of Equity' in JT Gleeson, JA Watson, RCA Higgins, *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013), 158

² Consider Mike Macnair, 'Equity and Conscience' (2007) 27 *Oxford Journal of Legal Studies* 659, 680; Roughley (n 1), 146

³ Paul Bennett Marrow, 'The Unconscionability of a Liquidated Damages Clause: A Practical Application of Behavioural Decision Theory' (2001) 22 *Pace Law Review* 27, 29; consider US UCC § 2-302; § 2A-108 (2002)

Part 1: Knowledge and unconscionability

The thesis will begin by looking at the role of knowledge in equity. Knowledge, as it is defined and used in equity, is an unconscionability indicium in its own right. The role of knowledge and the definition of knowledge is, however, subject to debate.

The starting point is furthering the discussion in chapter five on the role of conscience in equity. It was posited that the role of conscience is to be an objective standard of behaviour. Klinck accepts this, calling it the ‘substantive role’ of conscience. Klinck also posits a procedural role for conscience, linked to knowledge, writing that Chancery will examine the conscience of the defendant and thereafter ‘make orders affecting how that party may exercise his or her legal rights’.⁴ The procedural role is arguable a subset of the substantive role. The court will investigate the conscience of the parties, which in essence means, asking what they knew about relevant facts.

The procedural role stems from common references in case law to the “conscience of the court”. The statement means that judges can examine the parties under oath. The true and full facts has to come out in order for the judge to make a decision on the unconscionability of a particular act. In one case, for instance, the claimant was permitted to call new witnesses after he had presented his case, as the Chancery report states.

*‘Witnesses examine after publication, ad informandum conscientiam judicis. Upon affidavit made by the plaintiff, that since publication granted he had divers witnesses, setting down their names, come to his knowledge, which formerly he had not knowledge of; therefore ordered, he may examine them before the examiner, ad informandum conscientiam judicis’.*⁵

This is a recurring statement.⁶ Each speaks of equity’s conscience being more than the knowledge of any particular party, but a full and frank assessment of the facts (as best as they can be objectively stated) and then a determination of what is right or wrong

⁴ Dennis R Klinck, ‘Lord Eldon on “Equity”’ (1999) 20 *Journal of Legal History* 51, 57

⁵ *Anonymous* (1603) Cary 58, 58; 21 ER 31, 31

⁶ *Gartside v Isherwood* (1783) Dickens 612, 613; 21 ER 410, 410; *Smith v Earl of Pomfret* (1770) Dickens 437, 437; 21 ER 339, 339

in the circumstances. Lord Eldon said that ‘in equity the conscience is ransacked’, that is to say, probed as to the facts of the matter.⁷ Lord Eldon also said that ‘Equity attaches upon his conscience’, suggesting that equity is some objective force that the defendant’s conscience must abide by.⁸ Unconscionability therefore is, as shown in chapter five, based on broader moral precepts and is not merely private knowledge of particular facts.

However, it has been argued that unconscionability merely refers to the defendant’s knowledge. On this basis, unconscionability is a question of facts rather than moral precepts. Macnair argues that conscience in the Middle Ages referred to the ‘knowledge or belief of legally relevant facts which were *not* appropriately pleaded and proved’ according to the strict rules on procedure and evidence at common law.⁹ The common law’s insistence on those strict rules has already been discussed, including how equity became a necessary counterbalance. Macnair uses the example of the person who took out a loan. The common law insisted on a written acquittance, otherwise technically the debtor could be forced to repay a second time. However, in Chancery, the lender was barred in conscience from accepting a second repayment. Thus, Macnair suggests that conscience meant the private knowledge of the defendant and additionally the private knowledge of the judge.¹⁰ The question is what the defendant knew, and this was tested in examination under oath in court. Macnair says that ‘this is clearly not an examination of the defendant’s conscience in the sense of what he honestly believes to be morally right, or of his faculty of moral reasoning as applied to particular facts. It is an examination of what facts he knows or believes to be true’.¹¹ It is not a scholastic conscience.

One can take issue with Macnair’s conclusion. Conscience is not limited in this way, but relates to moral precepts about right and wrong. Of course, the knowledge of the defendant is very important. However, as seen in chapter four, equity looks not only at what the defendant knew but also to what he ought to have known. That examination of his knowledge is not an end in itself. It leads on to the bigger question of what is right or wrong. Is it “morally” appropriate to ask for a second repayment? The answer is no. In this particular instance, it might only be unconscionable to demand a second

⁷ *Ex parte Greenway* (1802) 6 Vesey Junior 812, 813; 31 ER 1321, 1322 (Lord Eldon)

⁸ *Wright v Simpson* (1802) 6 Vesey Junior 714, 736; 31 ER 1272, 1283 (Lord Eldon)

⁹ Macnair (n 2), 674

¹⁰ *Ibid*, 675

¹¹ *Ibid*, 676

repayment if the lender had knowledge of the first repayment, but this does not mean that unconscionability is equated with knowledge. From the judicial statements available, it is unlikely that conscience means the private knowledge of the defendant, or at least, it is unlikely that conscience exclusively means the knowledge of the defendant.

This leads on to the question of what equity actually means by knowledge. The concept of “knowledge” is wide-ranging. It amounts to both actual and imputed knowledge. From the case law it emerges that there are five types of knowledge in equity, though not all are applicable for every equitable cause of action. These have a wide use when the courts need to determine whether a defendant has knowledge of relevant facts.¹² The five types are as follows.¹³

- (i) actual knowledge;
- (ii) wilfully shutting one’s eyes to the obvious;
- (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
- (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
- (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

Actual knowledge, in the sense of being consciously aware of a fact or state of affairs, is thus only one type of knowledge. The other types do not depend on the defendant actually knowing relevant facts. Instead, the courts impute knowledge where the defendant knowingly turned a blind eye or where the facts are such that a reasonable party is put on inquiry, which is to say, where a reasonable person would have started asking questions.¹⁴ The application of the *Baden*-categories of knowledge will be

¹² Consider *Traditional Structures Limited v H W Construction Limited* [2010] EWHC 1530, [33] (HHJ David Grant), concerning knowledge and rectifying a contract for unilateral mistake.

¹³ *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509, [250] (Peter Gibson J); also *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, 267 (Buckley LJ); *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 1 WLR 1555, 1590 (Ungoed-Thomas J)

¹⁴ *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13, [33] (Lord Sumption); *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [22] (Lord Hoffmann); *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] 2 WLR 170, 179 (Lord Hobhouse); *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389 (Lord Nicholls)

looked at in chapter ten, when considering accessory liability for breach of fiduciary duty.

This explanation of knowledge shows that it is a broad concept. It shows that ignorance is not always a defence, and in many situations, a party has to start asking questions. Turning a blind eye to wrongdoing is in many ways as bad as actively participating in wrongdoing, since the outcome will be the same. Knowledge as an unconscionability indicium is thus not just about what the parties knew but also what, in the circumstances, they should have known.

Part 2: Klinck's five "themes" of unconscionability

Klinck has written about equity's conscience, both from a general English and historical perspective but particularly from the Canadian perspective. Klinck has argued for the 'ongoing vitality' of conscience; there are no reasons why equity should abandon it despite the aforementioned criticism.¹⁵ He recognises the need to better define conscience.¹⁶

One way to define unconscionability is to look to available judicial guidance as to what is "not" unconscionable.¹⁷ For example, in relation to undue influence and unconscionable bargains, the courts have stated that a contractual term will not be deemed unconscionable merely because it is "unreasonable" or that the bargain is "bad" or "harsh".¹⁸ Something further is required. On the other hand, the courts have declared that some things 'exceed' what is required.¹⁹ There is no need for 'moral turpitude' when proving equitable fraud.²⁰ There has to be an objective wrong but there is no general need for intentional immorality. Indeed, whilst there is a general link between conscience and what is morally wrong, Klinck highlights that there are exceptions, such as the power of equity to pre-emptively intervene.²¹ An example is the strict rules applying to fiduciaries, where equity can intervene on 'consciences

¹⁵ Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005-2006) 31 Queen's Law Journal 206, 207

¹⁶ Ibid, 207

¹⁷ Ibid, 213

¹⁸ See, for instance, *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110 (Browne-Wilkinson J); *Deakin v Faulding* (2001) 98(35) LSG 32, [86] (Hart J)

¹⁹ Klinck (n 15), 213

²⁰ *Applegate v Moss* [1971] 1 QB 406, 413 (Lord Denning MR)

²¹ Klinck (n 15), 214

completely innocent in every way'.²² This pre-emptive intervention also apply to injunctions granted to prevent future actions. Klinck also says that conscience has been equated with dishonesty, though Klinck argues (correctly) that what is morally wrong can go beyond dishonesty, and can also be equated to general fairness and justice.²³ There is no automatic and necessary link between conscience and dishonesty.

Klinck argues there are drawbacks to this approach, as the comparative terms can also 'be vague' or 'merely figurative'.²⁴ Other terms are used inconsistently.²⁵ Klinck argues that these other terms can at best give 'rough approximations' for the meaning of conscience.²⁶ The argument between moral turpitude and moral obloquy, mentioned in the previous chapter, is a good example of vague terms being used in a seemingly inconsistent manner.

Klinck argues that the better way of understanding unconscionability is by examining the case law. One can build up a picture of unconscionability by looking at factually similar cases.²⁷ Klinck has identified five "themes" that he argues explain unconscionability; namely "mutuality", "leverage", "confidence", "candour", and "awareness".²⁸ The five themes will be considered in turn, noting that they are not mutually exclusive.

There is nothing wrong with Klinck's findings. However, the themes are not conclusive in showing what amounts to unconscionability, as will be demonstrated in chapter twelve. The above discussion of the law of reason and its moral precepts adds new dimensions to the definition of unconscionability, beyond Klinck's five themes. These precepts can also be used to add greater clarity to Klinck's themes, which carry the burden of being general terms.

Mutuality

The first theme is mutuality. There are two broad circumstances that Klinck includes in this theme and they relate to whether a party has not received something they are

²² *Boardman v Phipps* [1967] 2 AC 46, 123 (Lord Upjohn)

²³ Klinck (n 15), 215; see, for instance, *Steeds v Steeds* (1889) 22 QBD 537, 540 (Wills J); *Mildred v Maspons* (1883) 8 Appeal Cases 874, 890 (Lord Fitzgerald)

²⁴ Klinck (n 15), 216

²⁵ *Ibid*, 216

²⁶ *Ibid*, 216

²⁷ *Ibid*, 216

²⁸ *Ibid*, 216

contractually entitled to or has received something they were not entitled to.²⁹ Inherent is the idea of fairness and good faith. In a contractual relationship, where consideration has passed, failing to provide what has been agreed to affects the conscience of the defaulting party. Outside contractual relationships, property can pass without consideration to a party who is not entitled to receive it, and thus the recipient's conscience is affected.

When it comes to enforcing promises, equity insists on consideration.³⁰ This is based on the maxim that equity will not assist a volunteer.³¹ Where a person has received the benefit under a contract, it is a 'matter of conscience for the court to see that he now performs his part of it'.³² Without consideration, where one party is a volunteer, the defaulting party's conscience is not affected by non-performance. This might seem like a break from the law of reason's precepts of community. However, it comes from the distinction between a private and a public conscience.³³ As Klinck writes, a promise 'which might require A to be charitable, loving, merciful, caring or grateful toward B' is not enforceable in equity, though the private conscience may well be engaged.³⁴ Failing to honour a non-contractual agreement with a volunteer is undoubtedly unconscionable in a private sense, but not unconscionable in an equitable sense. It is in these details that one sees how equity, as a formalised jurisdiction, starts to break away from the overarching precepts of the law of reason. Klinck goes on to link the requirement for consideration to the word "ought" the maxim that "equity regards as done that which ought to be done".³⁵ This however does not seem absolute given that the maxim is applied also to voluntary dispositions, such as in the so-called last act doctrine.³⁶ However, Klinck is right in saying that equity definitely will enforce contracts where consideration has passed, as it "ought to be done".

The second instance is where a person receives property without giving consideration. In some circumstances it is unconscionable for the recipient to retain

²⁹ Ibid, 217

³⁰ *De Hogton v Money* (1865-1866) LR 1 Eq 154, 159 (Sir James Romilly MR); *Re McArdle* [1951] Ch 669, 677 (Jenkins LJ)

³¹ *T Choithram International SA v Pagarani* [2001] 1 WLR 1, 11 (Lord Browne-Wilkinson) (PC)

³² *Beswick v Beswick* [1968] AC 58, 89 (Lord Pearce)

³³ *Cook v Fountain* (1733) 36 ER 984, 990 (Lord Nottingham); see also *Haywood v Cope* (1858) 25 Beav 140, 153; 53 ER 589, 595 (Sir John Romilly MR)

³⁴ Klinck (n 15), 217

³⁵ Klinck (n 15), 218; see *Tailby v Official Receiver* (1888) 13 App Cas 523, 546 (Lord MacNaughten); *McLaughlin v Duffill* [2010] Ch 1, [25] (Morritt C)

³⁶ *Zeital v Kaye* [2010] EWCA Civ 159, [40] (Rimer LJ); *Curtis v Pulbrook* [2011] EWHC 167, [43] (Briggs J)

the property.³⁷ Lord Mansfield wrote that an action ‘lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances’ because in these situations the recipient cannot with a ‘safe conscience’ retain it.³⁸ This neatly captures a whole host of equitable wrongs, such as undue influence which will be looked at in the next chapter. Similar comments were made in early unjust enrichment decisions.³⁹ More ‘onerous consequences’ follow when the recipient is a fiduciary.⁴⁰ This is due to the relationship of trust and confidence, where the conscience is perhaps more sensitive to being affected.

The idea of mutuality is ensuring a fair and equal relationship between two or more parties. Though there are specific rules on when equity will intervene, it is clear how this idea links back to the law of reason. There is harmony when contractual agreements are honoured. There is harmony when gifts are freely given. Unconscionability arises where consideration is taken but the exchange is not given (or vice versa), which leads to specific performance. Unconscionability also arises where value is wrongly received, whether through mistake, undue influence or breach of fiduciary duty. Rescission, account of profit and constructive trusts are equitable remedies which can arise here. One can safely conclude that mutuality, an equal and fair relationship, is an appropriate theme of conscience.

Leverage

The second theme is leverage. This looks at the balance of power between the parties. This shows that equity is equality and is a practical application of the Golden Rule. If one person unjustly abuses a position of power or influence, his conscience becomes affected. Klinck says this can also be called “disproportionate power”.⁴¹ Although “mutuality” and “leverage” are closely connected, Klinck writes that the former focuses on ‘outcomes’ and the latter on the ‘process’:

³⁷ Klinck (n 15), 224

³⁸ *Moses v Macferlan* (1760) 2 Burrow 1005, 1012; 97 ER 676, 681 (Lord Mansfield)

³⁹ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61 (Lord Wright)

⁴⁰ Klinck (n 15), 224

⁴¹ *Ibid*, 229

‘Mutuality asks: where is the value, and has anything been given for it? If so, the conscience of the recipient is clear; if not, at least prima facie, the conscience of the recipient is affected. Leverage asks how the value got from A to B: what problematic psychological pressures might have influenced the transfer?’⁴²

If a person receives property after exercising undue pressure it is unconscionable to retain that property. The mention of psychology is very important, although Klinck does not engage with law and psychology as an interdisciplinary study. The thesis will look more closely at law and psychology in the next section.

The idea of leverage comes up in many equitable claims. Again, undue influence is one. Any contract or benefit resulting from such influence can be rescinded by the court, with account of profits and constructive trusts being other applicable remedies. Similarly, the whole law around fiduciary relationships can clearly be associated with leverage and the need to prevent an abuse of power. A fiduciary is a person who holds a position of ‘trust and confidence’.⁴³ ‘Loyalty’ is the ‘distinguishing feature’.⁴⁴ This position can easily be misused.

The concept of leverage looks for a fair, equal and honest relationship between two or more parties. Equity recognises that sometimes a party is in a position of power, for instance by exercising an office of trust and confidence, or through exercising psychological dominance. If the balance of power is affected, equity can intervene. Abusing a position of influence or exercising dominance is unconscionable.

Confidence

Klinck writes that confidence is found in many relationships where there is reliance of some sort by one party on the other.⁴⁵ Klinck argues there are two sides to “confidence”; where there is a particular relationship involving trust and reliance (such as trustee-beneficiary), or where one party “acts” in a particular way (such as estoppel where one party relies on the other to uphold a promise).⁴⁶ In these situations equity

⁴² Ibid, 230

⁴³ *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millet LJ)

⁴⁴ *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in Administration)* [2012] Ch 453, [35] (Lord Neuberger); *Mothew* (n 43), 18 (Millet LJ)

⁴⁵ Klinck (n 15), 234

⁴⁶ Ibid, 235

can impose a duty of keeping confidence. Klinck further argues that there are two categories of confidence, namely the ‘explicit and implicit reposing of confidence’.⁴⁷ Explicit, or direct, includes express trusts, where the trustees must act in accordance with the ‘requirements of conscience...in accordance with the confidence that the settlor reposed in them’.⁴⁸ However, mere powers (as opposed to trusts) do not bind the conscience of the donee.⁴⁹ Klinck writes that such ‘observations are significant because they draw a line between the kind of confidence that will engage conscience and the kind that will not’.⁵⁰ Klinck argues that it is difficult to fully understand the difference, suggesting one difference is that of “positive” obligation (trustees must act, donees have a choice), another difference is that donees do not have property rights.⁵¹ An example of the “implicit” creation of confidence is laches.⁵² Another example is estoppel and constructive trusts, especially the “common intention” variety.⁵³ Here the parties act in a way that the other party has confidence in a particular state of affairs. With laches, for instance, there is a confidence that a claim would not be brought at a much later stage.

There is an overlap between “confidence” and “leverage”, especially in cases concerning fiduciaries.⁵⁴ For fiduciaries there is always an obligation of confidence.⁵⁵ This is the nature of the relationship. An example of that is the strict obligation not to make an unauthorised profit out of the fiduciary office.⁵⁶ Information gained within a fiduciary or other relationship with an obligation of confidentiality, or, as appropriate, a contractual relationship at times must be kept in confidence.⁵⁷

Breach of confidence is in itself an equitable right of action and can be traced back to Sir Thomas More.⁵⁸ The modern doctrine stems from *Prince Albert v Strange*, where the Prince successfully obtained an injunction to prevent the publication of

⁴⁷ Ibid, 236

⁴⁸ *Re Locker’s Settlement* [1977] 1 WLR 123, 1325 (Goulding J)

⁴⁹ *Re Crawshaw (No 2)* [1947] Ch 356, 367 (Vaisey J)

⁵⁰ Klinck (n 15), 239

⁵¹ Ibid, 239-340

⁵² *Hughes v Metropolitan Railway Company* (1876) 1 CPD 120, 134 (James LJ)

⁵³ *Grant v Edwards* [1986] Ch 638, 656 (Browne-Wilkinson VC); *Gillett v Holt* [2001] Ch 210, 225 (Robert Walker LJ)

⁵⁴ Klinck (n 12), 236; *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41, [55] (Dawson J)

⁵⁵ Klinck (n 15), 236

⁵⁶ *Boardman v Phipps* (n 22), 103 (Lord Cohen), 107 (Lord Hodson)

⁵⁷ *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419 (Megarry J)

⁵⁸ Sir Thomas More quoted in *ibid*, 419 (Megarry J); see also *Concerning the Jurisdiction of the Extraordinary and Unlimited Court in Chancery, Proceeding According to Equity* (1744) 1 Equity Cases Abridged 129, 130; 21 ER 934, 935

private etchings done by members of the royal family.⁵⁹ The duty developed into one of keeping confidences, and gave legal protection to an individual's privacy through the granting of injunctions. There is no requirement that the parties are infringing property rights or that they have a contractual relationship, it is a much wider equitable right.⁶⁰ Where a party obtains confidential information, knowing that it is of a confidential nature, that person's conscience is affected, or at least becomes affected the moment that person discovers that the information in fact is confidential.⁶¹ Confidential information is information which is not 'public property or public knowledge'.⁶² The question whether the information is confidential is objective.⁶³ Indeed, returning to the joint origin of conscience and the reasonable person, Megarry J has suggested using the reasonable person test for whether a person would realise that the information is confidential.⁶⁴

Klinck is right in saying that confidence as a theme of unconscionability is much broader than the equitable duty of confidence. Misusing private information can amount to a breach of fiduciary duties, breach of trust, or be an aspect of other equitable wrongs. It is right for equity to step in and prevent an abuse of that confidential information or to award compensation if the breach has already occurred. This serves to protect the integrity of those legal relationships.

Candour

The fourth theme is candour, namely the requirement of honesty. Klinck writes that he 'prefers' the term "lack of candour" over fraud on the basis that 'many forms of what equity considers "fraud" do not involve deception'.⁶⁵ The concept of candour, honesty and openness applies in many situations. It underpins, for instance, equity's right to set aside contracts for "unilateral mistake".⁶⁶ There must be clear agreement from both sides and conscience cannot allow a contract to stand if important

⁵⁹ *Prince Albert v Strange* (1849) 1 Hall & Twells 1, 24; 47 ER 1302, 1311 (Lord Cottenham C)

⁶⁰ *Argyll v Argyll* [1967] Ch 302, 322 (Ungoed-Thomas J)

⁶¹ *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, [25] (Lord Neuberger)

⁶² *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 (Lord Greene MR)

⁶³ *Primary Group (UK) Ltd v The Royal Bank of Scotland Plc* [2014] EWHC 1082, [211] (Arnold J)

⁶⁴ *Coco* (n 57), 420-421 (Megarry J); *Primary Group (UK) Ltd v The Royal Bank of Scotland Plc* [2014] EWHC 1082, [223] (Arnold J)

⁶⁵ Klinck (n 15), 245; *Nocton v Lord Ashburton* [1914] AC 932, 954 (Viscount Haldane LC)

⁶⁶ *Deputy Commissioner of Taxation v Chamberlain* [1990] FCA 71, [33] (Wilcox J)

information has been withheld. The same applies for equitable liability for “suppressing” or “hiding” the truth, thus allowing another to suffer a loss under a mistake which was known to the defendant.⁶⁷ Such a loss would be recoverable. Loss is also recoverable in situations where a defendant should have known a particular fact (and thus acted upon it), or did know the fact but forgot to act on it.⁶⁸ Central to this is the concept of good faith, but equity will intervene also in situations where, still in good faith, facts have been forgotten or not revealed.

Awareness

This last theme relates to the level of knowledge or “awareness” of the ‘salient facts that is necessary before equity will bind a person’s conscience’.⁶⁹ This, for example, explains the bona fide purchaser defence.⁷⁰ Klinck rightly notes that this theme closely interacts with the other four themes.⁷¹ The five themes that Klinck presents conclusively shows that unconscionability cannot be defined as merely relating to the defendant’s knowledge; however, in most instances knowledge is a prerequisite alongside the other themes.

The five themes

Klinck is correct in the five themes that he has identified. However, there are concepts which Klinck misses out on, perhaps because of the broadness of the terms. Klinck, for instance, does not mention “good faith” as a theme of unconscionability, though this would have been appropriate. Good faith is however present in other themes, such as candour. A key part of good faith is equity’s requirement of bilateral fairness. As seen in the previous chapter, two maxims of equity are “he who seeks equity must do equity” and “he who seeks equity must come with clean hands”. Whilst Klinck talks about mutuality, he frames that theme much more narrowly. Another concept is

⁶⁷ *Thomas Bates and Son Ltd v Wyndham’s (Lingerie) Ltd* [1981] 1 WLR 505, 515 (Buckley LJ)

⁶⁸ *Peek v Gurney* (1871-72) LR 13 Eq 79, 122 (Lord Romilly MR), upheld on appeal (1873) LR 6 HL 377

⁶⁹ Klinck (n 15), 250

⁷⁰ *Ibid*, 250

⁷¹ *Ibid*, 253

loyalty, which the courts have said is central to fiduciary duties.⁷² This concept can be found in the themes of confidentiality and leverage, but could have been expanded upon.

Moving forward, this chapter will consider another discipline which Klinck mentions but does not fully engage with; the psychological factors of unconscionability.

Part 3: The psychology of unconscionability

Chapter three looked at various psychological theories of conscience and moral reasoning. Psychology can also help explain the meaning of unconscionability. This thesis is not an interdisciplinary study into law and psychology and would not pretend to write authoritatively on psychology. It is however an important field to bring up as an area for future study. This section will look briefly at how psychology can help determine unconscionability.

Psychology and unconscionability in equity

The role of psychology in equity and determining unconscionability has not been widely written about. One exception is an article by Marrow which assesses whether Behavioural Decision Theory can be used to explain how US courts define contractual unconscionability.⁷³ With an obvious comparison to undue influence and unconscionable bargains, the Uniform Commercial Code allows courts to vitiate contracts that are unconscionable.⁷⁴ The Code does not define unconscionability. Marrow argues that psychological factors can help the judges to determine whether a contract is unconscionable. As noted in chapter two, psychology does not say what is or is not morally correct; rather, the law can take note of the behavioural traits that human have, and then determine whether, as a matter of legal policy, exploiting those traits should be considered to be wrong. The thesis will suggest that equity has already used psychology in this way.

⁷² *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administration)* [2012] Ch 453, [35] (Lord Neuberger MR)

⁷³ Marrow (n 3), 31. (This study looks at contractual unconscionability in the US UCC where the meaning of unconscionability differs from its English meaning).

⁷⁴ UCC § 2-302; § 2A-108 (2002)

When people act or make decisions there is a host of unconscious factors that have an influence. Marrow mentions a few, but this is not a complete list. They include “self-serving bias”, “unrealistic optimism”, “overconfidence”, need or a drive for “fairness” and a willingness or need to “cooperate” and maintain a “status quo”.⁷⁵ Each of these factors can be exploited and raise issues of potential unconscionability if, for instance, a contract is formed. Such manipulation is ‘something less than fraud or deceit’ but nonetheless raises questions about the probity of a contract or agreement.⁷⁶ Optimism about the future can cause a person not to write a watertight contract, or in a different context, not sign an ante-nuptial agreement. None of these are legal requirements for forming a valid contract or marriage, but if there are later complications there might be cause for complaint if one party unduly exploited the other’s “optimism” or naivety.

The role of psychology has been noted by judges for far longer than psychology has been an independent school of science. An interesting example, discussed further in the next chapter, is the undue influence case of *Nottidge v Prince*. In the 1840s, Louisa Nottidge joined a religious sect led by Prince. Prince made claims of being God incarnate and demanded absolute obedience. Stuart VC made the following statement in his judgment.

To rational minds it may seem surprising that any human being could be found with an understanding so weak and degraded as to submit to the influence and guidance of a person who thus speaks of himself.⁷⁷

The point is well made. The rational mind, perhaps the “reasonable person”, could not understand why a person would join a sect based on such delusions. The psychological factors are all too evident. Louisa’s mind was “weak”, in the sense that it was suggestible, perhaps gullible, and did not or could not engage in a rational examination of the claims. This case shows that psychological factors play a crucial part in determining whether a position of influence has been abused.

Another example, also discussed in the next chapter, is *Kakavas v Crown Melbourne*. Kakavas had a gambling addiction which the casino knew about. Despite

⁷⁵ Marrow (n 3), 57

⁷⁶ Ibid, 70

⁷⁷ *Nottidge v Prince* (1860) 2 Giff 246, 267; 66 ER 103, 112 (Stuart VC)

this they permitted him to gamble and rack up a large debt. The claim was for relief from this debt on the grounds that the casino had taken unconscionable advantage of Kakavas.⁷⁸ Gambling addiction is a recognised form of addiction. In this instance the claim was dismissed, but psychological factors are nonetheless present. A party with any form of addiction or substance abuse can be more suggestible or prone to a particular type of behaviour, which can be exploited.

Holmes, in his early work linking law to psychology, argued for objective standards in the law because of the inherent ‘unknowability of human motivation’.⁷⁹ The same point would be made by Jung, who posits that we cannot necessarily control the impact of the archetypes and other forces of the collective unconscious.⁸⁰ It presents a psychological argument for objective standards of behaviour, simply because the courts cannot understand all the subjective forces at play inside a person’s psyche. Nonetheless, whilst maintaining an objective standard against which to assess behaviour, certain subjective characteristics should be considered (this does not make the test subjective, in that the same characteristics are looked for in each case).

The courts should consider the emotional vulnerability of the party alleging it has been subjected to unconscionable behaviour. This includes considering the possibility of exploitation in close relationships, such as within families or relationships.⁸¹ Conversely, the court should consider the emotional maturity of the defendant. Prince, for instance, must have been charismatic and had strength of character. He might have been manipulative and deceitful. By way of example, the court has referred to a defendant as ‘manipulative’ and that he ‘pushed through key decisions through sheer force of personality and without regard to niceties’.⁸² Such personalities will have a different impact on different people, in part depending on their emotional maturity. The courts should consider any mental or psychological disorders that either party has, such as addictions.⁸³ This point was made in an undue influence case in Hong Kong,

⁷⁸ *Kakavas v Crown Melbourne Ltd* [2013] HCA 25, [5]-[6]

⁷⁹ Anne C Dailey, ‘Holmes and the Romantic Mind’ (1998-1999) 48 *Duke Law Journal* 429, 439; see e.g. Oliver Wendell Holmes, ‘The Path of the Law’ (1896-1897) 10 *Harvard Law Review* 457, 459; Oliver Wendell Holmes, *The Common Law* (Little, Brown & Co, 1881), 38, 76

⁸⁰ Carl Gustav Jung, *The Archetypes and the Collective Unconscious* (2nd edn, Routledge, 1959, tenth printing 1991), 21, 27, 178

⁸¹ Consider *Lloyd’s Bank Ltd v Bundy* [1975] QB 326

⁸² *Roadchef (Employee Benefits Trustee) Ltd v Hill* [2014] EWHC 109, [73] (Proudman J); see also e.g. *Jordan v Robert* [2009] EWHC 2313, [160] (Bompas QC); *Koulias v Makris* [2005] EWHC 526, [88] (Williamson QC); *McCulloch v Fern* [2001] NSWSC 406, [61] (Palmer J)

⁸³ This would include any disorders falling short of the Mental Capacity Act 2005

where the judge advocated for the law to consider the ‘condition’ of the defendant and claimant, and the ‘quality’ of the defendant’s action and the ‘quality of the impact of the action of the oppressor on the victim’; the judge argued that such an assessment would lead to ‘a more coherent set of principles ... as to guide the determination of whether the action in question was illegitimate pressure or merely acceptable commercial pressure’.⁸⁴ These psychological questions will help assess what is socially acceptable behaviour and what the law conversely deems to be unconscionable.

These psychological factors will become clearer as the case law is explored in the following chapters. It is hoped that this short section has opened up the role that psychology can play in determining unconscionability in equity. It is an interdisciplinary field that must be studied to a greater extent. Although such psychological factors will be fact dependent, they add to the objective understanding of unconscionability, in that lawyers and judges will know what to look for.

Conclusion

This and the previous chapter have looked at some theoretical approaches to understanding unconscionability in equity. The previous chapter started by looking at the law of reason and how the natural law underpins English law (both common law and equity). Those moral precepts about seeking the good, not just for yourself as an individual but for the greater community, gives an insight into what equity deems to be unconscionable. Some of those moral precepts have been summarised by Klinck in his five themes of unconscionability. Klinck’s themes are an important contribution to the debate, given the overall lack of judicial or academic engagement with the meaning of unconscionability, but they do not cover unconscionability in its entirety. The final section in this chapter looked at the role that psychology can bring to understanding unconscionability and that this is still a new and emerging field of study.

As noted at the start of chapter six, the thesis will posit that the indicia of unconscionability can be grouped into three categories, namely indicia antecedent to a claim, indicia directly relating to that claim, and indicia posterior to the claim. The

⁸⁴ *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Banking Corporation Ltd* [2005] HKCFI 573, [2005] 3 HKLRD 358, [130] (Waung J)

discussions in this chapter, around the role of knowledge and Klinck's themes, mainly relate to the second category. It is necessary to build on this theoretical grounding, given its gaps, and as such the thesis will now continue to look at specific equitable claims and the related case law to understand how unconscionability works in practice. This will allow for an application of the theoretical basis identified, for the gaps in the theory to be closed, and for other specific unconscionability indicia to be identified.

Chapter 8

Unconscionability in Undue Influence and Unconscionable Bargains

The previous two chapters started to look at the definition of unconscionability, and noted that it emerged from the medieval Chancery's engagement with the law of reason. As outlined at the start of chapter six, the thesis posits that the unconscionability indicia fall into three categories, namely indicia antecedent to a claim, directly relating to a claim, and posterior to a claim.

Starting with this chapter, the thesis will proceed to look at the case law to further uncover the indicia. The cases will highlight the theoretical definitions already discussed in the previous chapters, as well as present new indicia, some of which are more specifically associated with a particular claim. None of the case-comment chapters thus provide a holistic understanding of unconscionability, which instead will be presented in chapter twelve.

This chapter will look at two related equitable claims, namely undue influence and unconscionable bargains. The chapter will start with a summary of the law and what unconscionability indicia are present, before considering a series of cases for each claim.

Part 1: Undue influence/unconscionable bargains – an overview

Undue influence and unconscionable bargains are two equitable claims which can be used to rescind or vary contracts or gifts where it would be inequitable to maintain the status quo. Chapter five discussed that equity arose as a necessary counterbalance to the common law, and these two claims are examples of equity's intervention in contract law, where it has been deemed necessary to protect vulnerable people from the strict application of common law rules.

The common law is rather adamant that agreements freely entered into must be upheld.¹ If they are not performed, damages must be paid. The common law does

¹ *Murray v Leisureplay plc* [2005] EWCA Civ 963, [29] (Arden LJ), [106] (Clarke LJ)

recognise various claims to vitiate a contract, including duress, but the common law claims are stringent and few and far between.²

To offset this, equity began to vitiate contracts where any type of equitable fraud was present.³ One type of fraud was making ‘unequitable and unconscientious bargains’ which ‘no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other’. This is known as unconscionable bargains. Another type was circumstances where a person had taken ‘surreptitious advantage of the weaknesses’ of another person, ‘which knowingly to do is equally against the conscience as to take advantage of his ignorance’. It is important to note that there is a distinction between fraud and unconscionable bargains.⁴ Undue influence and unconscionable bargains turn on conscience, not fraud; ‘unconscionability’ is the doctrine at the heart of both claims.⁵ If either claim is successful, a contract or gift can be set aside or varied.⁶

It is important to consider the correct question to ask, based on the differences that have emerged between equity and the common law, as discussed in chapter five. The question is *not*, are there reasons of conscience why the claimant should be able to reclaim her property? This is the wrong question, and this will perhaps become most clear when looking at the case of *Allcard v Skinner*. The correct question is: are there reasons of conscience why the defendant should not be allowed to retain the property?⁷ In most cases, the two questions may lead to the same answer. However, in some instances the answers may be different. Equity focuses on the conscience of the defendant. Hence, the correct question must be asked in order to understand these two claims.

² *IBM United Kingdom Holdings Ltd v Dalgleish* [2015] EWHC 389, [86] (Warren J); *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534, [71] (Lord Phillips); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, [6] (Lord Nicholls)

³ *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 155-156; 28 ER 82, 100 (Lord Hardwicke LC)

⁴ *Fineland Investments Ltd v Pritchard* [2011] EWHC 113, [72] (Alison Foster QC)

⁵ James Devenny and Adrian Chandler, ‘Unconscionability and the taxonomy of undue influence’ [2007] *Journal of Business Law* 541, 560

⁶ AH Angelo and EP Ellinger, ‘Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States’ (1992) 14 *Loyola of Los Angeles International and Comparative Law Review* 455, 460

⁷ *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810, [29] (Bryson J)

Undue influence

In a claim for undue influence the claimant must show that it is unconscionable for the recipient to retain a gift or the benefit under a contract. This does not necessarily mean that the defendant has acted wrongfully, but simply that the circumstances affects his conscience. It has been argued that, despite the lack of judicial references to conscience, a ‘manifest requirement of unconscionability remains in the doctrine of undue influence’.⁸ References to conscience do occasionally appear in judgments.⁹

The law recognises two types of undue influence: actual and presumed. The difference is one of proof.¹⁰ The categorisation stems from *Allcard v Skinner*. Lindley LJ spoke first of what is required for actual undue influence, citing ‘some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor’.¹¹ It speaks of overt pressure being placed on another, usually within the confines of a close and personal relationship. This amounts to unconscionable behaviour on the basis of taking advantage of a position of power. This was the case in *Whyte v Meade* where a nun was overtly pressured into handing over property. This was proved in part by the fact that the nun was not permitted to see her brother-in-law and only saw her sister whilst supervised by another nun. Pennefather J said that the isolation within the closed confines of a nunnery was a situation where ‘undue influence is more likely to be exercised than in any other’ and was quick to grant relief.¹²

For presumed undue influence the claimant must firstly show that he was in a relationship which amounted either to a relationship of trust and confidence or that the other party gained an ascendancy or dominance. The claimant must secondly show that the transaction is one that calls for an explanation. At this point it becomes the defendant’s duty to prove that the gift was freely given and not as an outcome of undue influence.¹³ The principle protects people from being ‘forced, tricked or misled in any

⁸ Devenny and Chandler (n 5), 567

⁹ *National Westminster Bank v Morgan* [1985] AC 686, 709 (Lord Scarman); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, [6] (Lord Nicholls)

¹⁰ *Hart v Burbidge* [2013] EWHC 1628, [37] (Sir William Blackburne)

¹¹ *Allcard v Skinner* (1887) 36 Ch D 145, 181 (Lindley LJ)

¹² *Whyte v Meade* (1840) 2 Ir Eq Rep 420, 422 (Pennefather J)

¹³ *Re Smith (deceased)* [2014] EWHC 3926, [72] (Stephen Morris QC); *Allcard v Skinner* (n 11), 181 (Lindley LJ); *Huguenin v Baseley* (1807) 14 Ves Jr 273, 299; 33 ER 526, 536 (Lord Eldon)

way by others into parting with their property’, and thus has a broad application; not least when considering that the doctrine has ‘developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud’.¹⁴ These are strong but accurate sentiments. Again, looking at unconscionability, terms such as “tricked” or “misled” points us to understanding the wrongful act. The courts can look for covert, surreptitious pressure. Lindley LJ continues by saying that not all gifts will be set aside, but that the court will consider the size and content of the gift, to see whether it can be ‘reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act’.¹⁵ The courts are not necessarily looking for actual wrongdoing; this is a lingering misunderstanding.¹⁶ What the courts look for is whether the transaction, within the given relationship, can be readily explained. Of course, wrongdoing, such as deceit or trickery, makes this factually easy to demonstrate, but cases such as *Allcard* shows that it can be unconscionable to retain a gift even without actual wrongdoing.

Unconscionable bargains

In a claim for relief from an unconscionable bargain, the claimant must show that it is unconscionable for the recipient to retain the benefit for reasons of both harsh contractual terms and wrongful conduct on the part of the defendant.¹⁷ The doctrine of unconscionable bargain now also applies to gifts.¹⁸ The terms of the agreement must be imposed in a ‘morally reprehensible manner’, itself a reference to unconscionability.¹⁹ Lord Millett showed willingness to infer “morally reprehensible” conduct where the terms were unjustifiably one-sided but as a general rule the two are separate factual issues for the claimant to prove.²⁰

¹⁴ *Allcard v Skinner* (n 11), 183 (Lindley LJ)

¹⁵ *Allcard v Skinner* (n 11), 185 (Lindley LJ); *Hartigan* (n 8), [37] (Bryson J)

¹⁶ *Niersmans v Pesticco* [2004] EWCA Civ 372, [20] (Mummery LJ)

¹⁷ *Minder Music Ltd v Sharples* [2015] EWHC 1454, [25], [37] (Amanda Michaels, Deputy Enterprise Judge)

¹⁸ *Evans v Lloyd* [2013] EWHC 1725, [52] (HHJ Keyser QC)

¹⁹ *Credit Lyonnaise Bank Nederland NV v Burch* [1997] CLC 95, 102 (Millett LJ); *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110 (Browne-Wilkinson J)

²⁰ *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87, 95 (Peter Millett QC)

Unconscionability indicia

What indicia of unconscionability arise from these two claims?

In the first category, antecedent factors, the thesis posits that context is a key indicia. In what situation did the dispute arise? The context precedes the dispute, and indeed, the context remains even if no dispute actually arises. In many ways, the key contextual difference is between commercial and private disputes. Undue influence mainly arises in private contexts, including, as the cases will show, disputes within families and disputes within religious communities. Relief from an unconscionable bargain is mainly claimed in a commercial context, namely relief from a contract between two profit-seeking business entities. A further indicia is the nature of the relationship between the parties. The cases will show that disputes within religious communities have proved problematic given the close, spiritual connection between the parties. Equity, as a matter of policy, is more hesitant to interfere in commercial disputes, where the parties generally expect each other to act in self-interest. The threshold for unconscionable conduct is correspondingly higher.

In the second category, indicia relating to the claim, the cases will show that the key factor is the balance of power between the parties.²¹ This follows on from context and the type of relationship, but rather than being antecedent, this indicia asks whether a defendant has a dominant standing and has, in some way, abused it. This brings in a number of psychological factors, as discussed in the previous chapter. It echoes equity's origins in Christian morality, namely protecting the weak and the vulnerable.²² In this respect, in *Louth v Diprose*, Deane J said that the 'intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness' but rather 'to prevent his victimisation'.²³ Equally, the Privy Council said that both doctrines 'share a common root—equity's concern to protect the vulnerable from economic harm'.²⁴ Turning to unconscionable bargains, in *Fry v Lane*, Kay J explained that 'where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity

²¹ *Earl of Aylesford v Morris* (1872-1873) LR 8 Ch App 484, 491 (Lord Selborne LC); *Boustany v Pigott* (1995) 69 P & CR 298, 303 (Lord Templeman)

²² *Evans v Lloyd* [2013] EWHC 1725, [39] (HHJ Keyser QC)

²³ *Louth v Diprose* [1992] HCA 61; (1992) 175 CLR 621, [14] (Deane J)

²⁴ *Lawrence v Poorah* [2008] UKPC 21, [20] (Lord Walker)

will set aside the transaction'.²⁵ It is a question of balance of power and how that balance can be abused, legally and psychologically.

In the third category, posterior indicia, the cases show that the claimant cannot unreasonably delay in bringing a claim. Independent to the common law rule on limitation, equity developed a set of rules around laches and acquiescence. A claim will be disallowed if it is brought too late, or if it can be said that the claimant has previously, in some way, accepted the existing state of affairs.

Having summarised the key indicia that the cases will show, the chapter will now consider a series of cases dealing first with undue influence. The facts of the cases will be outlined to demonstrate what the unconscionable conduct was and how the court decided the claim.

Part 2: Unconscionability and undue influence

a. Norton v Relly (1764) 2 Eden 286; 28 ER 908

This first case is one of the oldest that will be considered. The case concerned an alleged Methodist preacher, Mr Relly, who obtained money and an annuity from a congregant, Miss Norton. Norton's successful claim was to set those agreements aside on the basis of what is today known as undue influence.

Relly was a preacher (dissenting from the Anglican Church) who convinced Norton to become a member of his congregation. From her he obtained gifts amounting to £150, and finally a deed of gift promising him an annuity of £50.²⁶ Shortly after, Norton changed her mind, and sought relief from the annuity. Relly's defence was that the money and the annuity were not gifts but were given in consideration for his time and spiritual work.

The Lord Chancellor described Relly as a "fanatic".²⁷ In *Nottidge v Prince*, counsel posited that the 'language of the judgment is violent, and not in accordance with that calm and dispassionate tone that ought to characterise a judicial decision'.²⁸ This much is true. From this description of Relly, it is not surprising that the annuity was set aside.

²⁵ *Fry v Lane* (1888) 40 Ch D 312, 322 (Kay J); *Cresswell v Potter* [1978] 1 WLR 255, 257 (Megarry VC)

²⁶ *Norton v Relly* (1764) 2 Eden 286, 286; 28 ER 908, 908

²⁷ *Ibid*, 288; 908

²⁸ *Nottidge v Prince* (1860) 2 Giff 246, 263; 66 ER 103, 110 (Mr Bacon for the defendant)

The Lord Chancellor continued with an exposition of equity and conscience.

‘And shall it be said that this court cannot relieve against the glaring impositions of these men? That it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex? It is by no means arguing agreeably to the practice and equity of this court, to insist upon it. This court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Yes, this court can extend its hands of protection: it has a conscience to relieve, and the constitution itself would be in danger if it did not’.²⁹

The comments by the Lord Chancellor paint a clear picture of equity’s “conscience”. The description of women as the weaker gender must be seen in its historical context. The fundamental ideas of undue influence, however, remain true.

A number of unconscionability factors are present in this case. The context is one of a religious congregation, though not a closed community as the next two cases which will be considered. The relationship between the parties is important. Though not a fiduciary one in the strictest sense, it was a relationship of trust and confidence.³⁰ Indeed, the courts today presume undue influence between a spiritual advisor and a penitent.³¹ Norton undoubtedly trusted Relly. Though Relly might have had honest intentions behind asking for money, it was clearly done in an inappropriate manner. From the facts however (or at least the facts accepted by the Lord Chancellor), Relly did not have honest intentions. The Lord Chancellor said that the ‘deed was obtained on circumstances of the greatest fraud, imposition and misrepresentation that could be’.³² As a spiritual advisor Relly held a position of trust which he abused for personal financial gain. This shows an abuse of a position of power, in this case spiritual dominance.

²⁹ *Norton v Relly* (n 26), 288; 909

³⁰ *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41, [30] (Gibbs CJ). When giving spiritual advice, the courts have said that clergy act in a fiduciary capacity: *Clark v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [1996] QSC 255, [27] (Williams J); *Brunninghausen v Glavanics* [1999] NSWCA 199, [87]

³¹ *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL), 1230 (Lord Penzance); *Parfitt v Lawless* (1869-72) LR 2 P&D 462, 468 (Lord Penzance)

³² *Norton v Relly* (n 26), 291; 910

b. *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103

This case centres on a sect which was based in Somerset, known as Agapemone. This is Greek for “Abode of Love”.³³ Agapemone was a controversial and socially disliked place.³⁴ The sect was led by Henry Prince, who was described by Knight Bruce VC as a ‘fanatic or pseudo-fanatic preacher, styling himself “The Servant of the Lord”’.³⁵ Stuart VC said that it was not clear whether Prince was a victim of his own ‘disordered imagination’ or merely adopted the persona with sinister intent.³⁶

In 1842, Prince met the Nottidge family.³⁷ Four of the Nottidge sisters joined the sect, with varying success. Agnes ended up in a child custody dispute and was expelled from the sect.³⁸ Agnes attempted to dissuade her sister Louisa from joining, but she was unsuccessful. Louisa joined in 1846. One of Louisa’s brothers, a brother-in-law and a police officer went and (in the end forcibly) removed Louisa. At the brother-in-law’s house, Louisa declared her firm desire to return and remain with Prince, who in Louisa’s view ‘was the Almighty in the form of a man, and had the power of conferring immortality’.³⁹ Louisa was, based on these beliefs, certified as insane and placed in an asylum. Louisa successfully appealed to the Lunacy Commission and was released.⁴⁰ Louisa returned to Agapemone, where she died intestate in 1858.

Louisa’s administrator brought a claim against Prince to set aside two annuities and reclaim dividends already paid since 1845. The claim alleged that the gifts had been granted through undue influence. Unsurprisingly, the claim was successful, not least since Prince in the witness box had repeated that he was God incarnate.

As discussed in the previous chapter, Stuart VC said that it defied reason why anyone would join a sect. The judge, in a forward-thinking, psychological assessment, wrote about the impact of spiritual influence.

³³ Sol Steinmetz, *Semantic Antics: How and Why Words Change Meaning* (Random House, 2008), 2

³⁴ Joseph Bristow, ‘Respecting Respectability: ‘Victorian Sexuality’ and the Copulatory Imagination - *The Making of Victorian Sexuality* by Michael Mason’ (1996) 41 *History Workshop Journal* 286, 289; Christina Banman, ‘The Study of Religion: Nineteenth Century Sources and Twentieth Century Misconceptions’ (1989) 1 *Method & Theory in the Study of Religion* 160, 167

³⁵ *Thomas v Roberts* (1850) 3 De Gex & Smale 758, 765; 64 ER 693, 696 (Knight Bruce VC)

³⁶ *Nottidge v Prince* (n 28), 269; 113 (Stuart VC)

³⁷ Joshua John Schwieso, “‘Religious Fanaticism’ and Wrongful Confinement in Victorian England: The Affair of Louisa Nottidge’ (1996) 10 *Social History of Medicine* 159, 160

³⁸ William Cornish, ‘Family Law, Family Authority’ in William Cornish *et al* (eds), *The Oxford History of the Laws of England, Vol XIII* (OUP, 2010), 725; *Thomas v Roberts* (1850) 3 De Gex & Smale 758, 773; 64 ER 693

³⁹ *Nottidge v Prince* (n 28), 246; 103 (headnote)

⁴⁰ Schwieso (n 37), 167

‘The strength of religious influence is far beyond that of gratitude to a guardian, trustee or attorney, and the same ground of public utility which requires this Court to guard against such influences has its most important application to that influence which is the strongest’.⁴¹

The judgment highlights the difficult task of drawing a line between genuine religious belief which may lead to charitable donations, and donations which appear to have been freely given but were in fact the product of some unconscionable imposition. The answer in this case was rather clear, even if one removes societal biases. Stuart VC said that the ‘grossness of the imposture in the present case has put it far beyond mere spiritual influence’.⁴² Prince was in the wrong and preyed on weak-willed women. This is not the case of a priest suggesting donations or even encouraging the devout to donate. Prince built up a community based on his insistence that he spoke the will of God. In this context it is clear that it would be unconscionable for Prince to retain the money he had received.⁴³

c. *Allcard v Skinner* (1887) 36 Ch D 145

The facts of this case again arise out of a religious context. In this case the influence is less pronounced and indeed the court said that the defendant had not committed any wrongdoing, but is nonetheless unconscionable.

Reverend Nihill was a vicar in east London.⁴⁴ He was associated with a sisterhood known as the Sisters of the Poor, whose Mother Superior was Miss Skinner, later to be the defendant. Miss Allcard became involved with the Sisterhood in 1868 and took final vows in 1871. As part of these vows Allcard made a promise of poverty, and got the choice of handing over her property to her family, or to the poor, or to Skinner to be held on trust for the benefit of the sisterhood. The documents provided to Allcard clearly favoured the third option. The rules also stated that if a sister was to leave the

⁴¹ *Nottidge v Prince* (n 28), 270; 113 (Stuart VC)

⁴² *Ibid*, 269; 113 (Stuart VC)

⁴³ *Ibid*, 267; 112 (Stuart VC)

⁴⁴ Rene Kollar, ‘A Death in the Family: Bishop Archibald Campbell Tait, the Rights of Parents, and Anglican Sisterhoods in the Diocese of London’ (2003) 27 *Journal of Religious History* 198, 210; *Allcard v Skinner* (n 11), 155 (Kekewich J)

sisterhood, she would not be able to get her property back. Over the course of a few years Allcard handed over two cheques totalling £1050 and various shares totalling about £5,800. Allcard was involved in spending some of that money on various projects. In 1879, Allcard decided to leave the sisterhood. In 1885, Allcard brought a claim to reclaim her property, arguing, amongst other things, that the property had been handed over after undue influence on the part of Skinner.

Once Allcard had joined the sisterhood as a postulant, whilst free to leave at any time, she came under the direct influence of Skinner. As with Stuart VC before, the judgments show deep psychological insight. Kekewich J calls this an ‘influence which is known to be powerful and seldom loses or is allowed to lose its hold’.⁴⁵ It is clear that Skinner and Nihill had a position of power and influence.

The more powerful influence or the weaker patient alike evokes a stronger application of the safeguard, and there can be no case more urgently requiring it than one of the influence of a priest, director, or mother superior of a convent, on an emotional woman, residing within the convent walls, and subject to its discipline.⁴⁶

Undue influence depends on the particular nature of the relationship, how the influence was exercised, and the relative emotional maturity of both parties. The context of a religious sisterhood is important; the judge continued by noting that ‘religious influence is the most subtle of all’, and that there was no need to find evidence of direct and overt pressure.⁴⁷ Kekewich J continued by speaking of the importance of “independent advice” before any gifts are made, especially by members of a closed religious community.⁴⁸

In the end the claim was dismissed by Kekewich J on the basis that undue influence was not present. Allcard had made the initial promise to give her money to the sisterhood before she formally joined, and when she still had the benefit of external advice from her family.⁴⁹ It is this conclusion (focusing on when Allcard made the

⁴⁵ *Allcard v Skinner* (n 11), 156 (Kekewich J)

⁴⁶ *Ibid*, 158 (Kekewich J)

⁴⁷ *Ibid*, 158 (Kekewich J); 183 (Lindley LJ)

⁴⁸ *Ibid*, 159 (Kekewich J)

⁴⁹ *Ibid*, 168 (Kekewich J)

initial promise, rather than the conditions at the time the actual transfers were made) that was questioned in the Court of Appeal.⁵⁰

Lindley LJ stated clearly that Allcard joined the sisterhood out of her own free will, and that she also voluntarily submitted to the expectations to leave her property to the sisterhood.⁵¹ She was legally entitled to make the gifts that she made. It places great complexity on the case.

Bowen LJ resolved the problem by noting that it is a part of the persistent divide between the common law and equity. The common law, being claimant-focused, would clearly say that Allcard freely joined and had mental competence; hence there is no relief. Equity, however, is defendant-focused. Bowen LJ said that undue influence is ‘not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play’.⁵² As such, the question is not whether Allcard did something right or wrong, or whether she was legally entitled to do what she did. The only question is whether it is conscionable for the sisterhood to retain the gift.

Lindley LJ first considered actual undue influence, and the requirement for overt pressure. The facts in *Allcard* do not support such a claim.⁵³ Allcard made her initial promise before formally joining the sisterhood, when she was still in regular contact with her family, and after joining she was still at all times in contact with her brother (albeit that Skinner, as the mother superior, read the brother’s letters). One can see, however, how close the facts in *Allcard* were to becoming actual undue influence.

Lindley LJ then considered presumed undue influence. What the courts look for is whether the transaction can be readily explained. What caused the greatest concern was the rule of the sisterhood which prevented a member from seeking outside advice without the prior consent of the Mother Superior.⁵⁴ The wording and ethos of such a rule would make it difficult to rebut any presumption of undue influence, especially so since Allcard lived within a closed community. Although Allcard communicated with her brother, this was perhaps not the same thing as seeking proper advice, and certainly not independent since Skinner read the letters. There is no suggestion of actual wrongdoing; the issue is the ethos created by the rules. The proposed remedy

⁵⁰ Ibid, 191 (Bowen LJ)

⁵¹ Ibid, 178 (Lindley LJ)

⁵² Ibid, 190 (Bowen LJ)

⁵³ Ibid, 181 (Lindley LJ)

⁵⁴ Ibid, 178, 184 (Lindley LJ)

was to return to Allcard the stocks still held by Skinner; there was no suggestion by the majority that Allcard be allowed equitable compensation for the full amount given to the sisterhood. The proposed remedy was appropriate – there was no need for Skinner to personally compensate Allcard for all the money given and already spent.⁵⁵ The situation would likely have been different if Skinner had spent the money for personal gain. However, in the end, the majority refused any relief on the basis of laches.⁵⁶

d. *Lloyd's Bank Ltd v Bundy* [1975] QB 326

The case concerned the Bundy family; Herbert the elderly father and Michael the son. It shows unconscionability in a private context within a family relationship, which is different from the above cases. Herbert lived at Yew Tree Farm. Michael decided to go into business and started a company, which hired out farming machinery. The company banked with Lloyd's. Michael, however, was not very successful and the company ran into financial trouble. Herbert, undoubtedly for paternal reasons, believed in his son. When the company was in financial trouble, Herbert would secure its loans.

In 1969, the bank was getting concerned and demanded additional security. Michael was confident that his father would allow the security. Mr Bennett was the assistant bank manager. Michael and Bennett went to see Herbert, and Herbert was presented with the loan documents. This was for a personal guarantee of £5,000 and an additional charge of the farm of £6,000. Bennett told Herbert to think it over. Herbert sought the advice of his solicitor, who warned against it. Nevertheless, the following day Herbert signed the loan documents. The farm, valued at £10,000, was now charged at £7,500. This was in May.

In December, the situation had got worse. There was a new assistant bank manager, Mr Head. He said that without additional security, the company would have to cease operations. Michael again insisted his father would provide additional security. Michael and Head went to see Herbert. Herbert was asked for an additional guarantee

⁵⁵ Pauline Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia' (2003) 26 University of New South Wales Law Journal 66, 78

⁵⁶ *Allcard v Skinner* (n 11), 186 (Lindley LJ); 193 (Bowen LJ)

of £4,500 (bringing the total up to £11,000), and an additional charge on the farm of £3,500 (bringing the total value charged up to £11,000). The farm, as said, was only valued at £10,000. This meeting, however, was different. Head came with the forms already filled out. All he needed was Herbert's signature. The signature was asked for then and there. Herbert said he supported his son and signed the documents.

In May 1970, a receiving order was made against the company. The bank called in its loans. As one would expect, the bank tried to force a sale of the farm, and a price of £9,500 was agreed to. Herbert was unhappy. In December 1971 Herbert was still in occupation at the farm, and the bank issued eviction proceedings. This gave rise to the defence of undue influence, namely that various guarantees and charges over the farm were void.

Lord Denning began his judgment by reiterating that as a rule, people cannot get out of unfavourable agreements.⁵⁷ The common law leave people to fend for themselves, provided there was a valid contract. Undue influence and unconscionable bargains are equitable exceptions; agreements can be set aside where there is some inequality in bargaining power and an absence of independent advice, where influence or pressure creates an environment where the agreement cannot stand. There does not have to be any direct wrongdoing. Independent advice is not a necessity; however 'the absence of it may be fatal'.⁵⁸ One must emphasise the *Allcard* situation, namely that the acts of the stronger party does not have to be in self-interest, but it is sufficient that the stronger party creates an environment in which it is unconscionable to retain the property. Lord Denning allowed Herbert's appeal.⁵⁹ The December 1969 guarantee and charge were set aside.⁶⁰ Though the bank overall acted in good faith in asking for the last guarantee and charge, they were in a position of influence and, with the final charge, did not allow for Herbert to seek independent advice.

e. *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773

The case clarifies the rules on both actual and presumed undue influence.⁶¹ In an earlier House of Lords decision, Lord Scarman had suggested that, in the case of

⁵⁷ *Lloyd's Bank Ltd v Bundy* [1975] QB 326, 336 (Lord Denning)

⁵⁸ *Ibid*, 339 (Lord Denning)

⁵⁹ *Ibid*, 340 (Lord Denning)

⁶⁰ *Ibid*, 340 (Cairns LJ)

⁶¹ *Etridge (No 2)* (n 2), [8] (Lord Nicholls)

presumed undue influence, the claimant must show that the transaction in question was to her “manifest disadvantage”.⁶² This was a high threshold and higher than what Lindley LJ laid down in *Allcard*. The courts afterwards also tried to apply this test to cases of actual undue influence, which the House of Lords also refuted.⁶³ *Etridge* clearly overruled Lord Scarman’s proposition. The questioned transaction does not have to be to the claimant’s “manifest disadvantage”, but has to be a ‘transaction which calls for explanation’.⁶⁴ It was a return to Lindley LJ’s original formulation.⁶⁵

Etridge puts its mark on so-called third-party undue influence, where A pressures B to enter into an agreement with C. The question is whether B can set the agreement aside despite the following objections: (a) A is not privy to the agreement and (b) C has not done anything wrong and indeed may be completely unaware of the relationship between A and B. The House of Lords clarified the circumstances in which B will be allowed to set any agreement aside. Because the agreement is with a third party, rescission is not automatic despite the presence of undue influence.

Etridge was a conjoined appeal of eight cases with broadly similar factual situations. In each, a wife had allowed the matrimonial home (or rather, her beneficial interest in the matrimonial home) to be subject to a mortgage in support of her husband’s financial affairs. In each case, the banks had sought a possession order against the matrimonial home because of the husbands’ failure to repay their loans. The wives sought to rescind the mortgages on the basis of presumed undue influence, namely that they had been pressured by their husbands to consent to the security being placed on the matrimonial home.

The House of Lords, following *O’Brien*, explained when a bank was put on notice of potential undue influence.⁶⁶ It is when a partner offers to stand surety for the other partner’s debt and the transaction is not obviously to the financial benefit of the surety. Lord Nicholls says that the *O’Brien* test means ‘quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband’s debts’.⁶⁷ Lord Nicholls emphasised the need for clarity given the everyday nature of such banking transactions. When a bank is put on inquiry, it has to take certain steps, including

⁶² *National Westminster Bank v Morgan* [1985] AC 686, 707 (Lord Scarman)

⁶³ *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, 209 (Lord Browne-Wilkinson)

⁶⁴ *Etridge (No 2)* (n 2), [12] (Lord Nicholls)

⁶⁵ *Ibid*, [24] (Lord Nicholls)

⁶⁶ *Barclays Bank plc v O’Brien* [1994] 1 AC 180, 196 (Lord Browne-Wilkinson)

⁶⁷ *Etridge (No 2)* (n 2), [44] (Lord Nicholls)

having a private meeting with the proposed surety to give financial advice warning about the risks involved in the proposed loan, and the bank should strongly insist on the proposed surety taking independent legal advice.⁶⁸

Much has been written about *Etridge*, which it is not necessary to repeat. Banks now have clear guidelines to follow when a partner stands surety for the other and there is no obvious financial benefit to the surety (crucially, this is very different from two partners seeking a joint mortgage to purchase a family home, where both stand to gain). Where those guidelines are not followed, the loan agreement can be vitiated.

f. Summary on undue influence

The cases divulge various unconscionability indicia.⁶⁹ In terms of the themes identified by Klinck, clearly present are mutuality, leverage, as well as candour. However, the clear drawback in Klinck's theories is their inherent vagueness, and other factors are also identifiable.

The first thing to consider is the context and then the relationship between the parties. Different types of relationships will affect a defendant's conscience differently. In the cases reviewed the relationships have often been close and emotional in nature, such as familial, romantic or religious relationships. The religious relationships can also take on a fiduciary character, given the presence of trust and confidence, as well as the provision of emotional and spiritual guidance. Where a relationship is characterised in this way, one party can easily find themselves particularly vulnerable, which in turn can be exploited or innocently used. The closer the parties, the more one trusted and confided in the other, the stronger the influence and (perhaps with a cynical outlook) the greater the risk of abuse of that influence.

Undue influence is less likely to happen in an arms-length commercial relationship where both parties are fiercely negotiating the best possible terms. It is much more likely to happen in close and personal relationships with an emotional element, such as between a vulnerable person and a spiritual advisor. In many ways this can be seen as a sliding scale, the closer the relationship the higher the risk. In the closer relationships, there is no equality between the parties. The position of power can be

⁶⁸ Ibid, [50] (Lord Nicholls)

⁶⁹ Undue influence continues to be pleaded today; consider i.e. *Darjan Estates Co plc v Hurley* [2012] 1 WLR 1782; *Bateman v Overy* [2014] EWHC 432

abused, and in the cases seen, the parties have acted without honesty or good faith. This undermines the natural law concept of community and the Golden Rule, which in itself can be seen as an unconscionability indicium.

The next thing to consider is the emotional character and predisposition of the claimant. When Klinck writes about leverage, and whether the defendant's conscience is affected, he asks if any 'psychological pressures' have affected the transfer.⁷⁰ This, however, is not the entire story. The starting point is the claimant's psychological predisposition. This is repeatedly referred to in the judgments. Successful claimants are often referred to as weak or vulnerable, or that there is some particular reason why they are susceptible to emotional pressure.

An example can be given. Research into sects suggests that belonging to a sect is 'a possible solution to existential difficulties by individuals who, in periods of crisis, have a more acute feeling of disorientation and solitude and who feel that the institutions and society structures cannot adequately fulfil their needs'.⁷¹ Evidence suggests that sects do not have a higher proportion of mental illness, and one should not immediately equate mental illness and emotional vulnerability.⁷² The emotionally unstable are coupled with the 'capacity of a charismatic leader to exert a dominative force', indeed this 'dynamic interrelationship' is vital.⁷³ Membership can be taken to the extreme, with well-known instances of mass suicide within sects.⁷⁴

Nottidge is a good example, since it raises questions about the emotional maturity of Louisa. Jung writes that once in a crowd it is easy for an individual to lose individuality and to go along with group decisions knowing they are wrong or immoral.⁷⁵ In this instance, once Louisa had joined the sect (which speaks to emotional immaturity), she was no doubt lost to the crowd. Jung continues by saying that emotions can easily lead to the unconscious taking control, and then 'very strange ideas indeed can take

⁷⁰ Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005-2006) 31 *Queen's Law Journal* 206, 230

⁷¹ Iginia Mancinelli MD, Anna Comparelli MD, Paolo Girardi MD and Roberto Taterelli MD, 'Mass Suicide: Historical and Psychodynamic Considerations' (2002) 32 *Suicide and Life-Threatening Behaviour* 91, 96

⁷² Simon Dein and Roland Littlewood, 'Apocalyptic Suicide' (2000) 3 *Mental Health, Religion and Culture* 109, 110

⁷³ Mancinelli, Comparelli, Girardi and Taterelli, (n 71), 96

⁷⁴ *Ibid*, 95

⁷⁵ Carl Gustav Jung, *The Archetypes and the Collective Unconscious* (2nd edn, Routledge, 1959, tenth printing 1991), 126. This has consequences for the criminal law doctrine of "common purpose" or "joint enterprise" where the law has been criticised, consider *R v Jogee* [2016] UKSC 8, *R v Gnago* [2012] 2 WLR 17; *R v Powell (Anthony) and English* [1999] 1 AC 1.

possession of otherwise healthy people'.⁷⁶ It is a psychological explanation as to why people sometimes act "out of character". Bryson J said that commonly 'persons claiming this relief have made gross errors of judgment, obvious to any objective outsider'.⁷⁷ It is thus important that the law recognises that, psychologically, sometimes people can fall under a spell.

The same factors are present in *Allcard*; once inside the closed walls there will be a group ethos, which can stifle individuality. Covert pressure can easily become unconscionable. The core of the judgment turns on the fact that Allcard was not permitted to seek independent advice at the time of making the gifts. Promises are not binding and potential donors may change their minds. But how can a person change their mind if no outside advice or opinion may be heard? To a person who lives within closed walls, hearing daily only the one opinion of the donee, it is difficult for the donee to conscionably retain gifts.

Following this, the courts must consider the emotional predisposition of the defendant. Undue influence can more easily happen where an emotionally strong and self-confident person interacts with a weaker and suggestible person.⁷⁸ Again, in *Nottidge*, Prince was seen as a fanatic, though it might be difficult to ascertain whether he was delusional or merely sinister.

Undue influence is more likely to happen to someone who is emotionally weak and vulnerable. Again, there is a sliding scale of psychological and emotional states where the risk of undue influence becomes increasingly likely. Of course, these two scales are parallel, the greater the emotional vulnerability the stronger the personal relationship. Membership of a cult is a good example. Someone emotionally fragile will form a close relationship with a charismatic leader, in whom they place great trust and confidence because that person is the only one who seems to make sense of the world.

Other, non-psychological factors are also relevant to understanding whether it would be unconscionable for a recipient to retain a benefit. The first is the balance of power. *Norton v Relly* is an interesting example of financial imbalance, because here it is the financially weaker party abusing the stronger party, made possible because of the religious context. The economic value of the benefit is also important, at least in

⁷⁶ Jung (n 75), 278

⁷⁷ *Hartigan* (n 7), [28] (Bryson J)

⁷⁸ Consider *McCulloch v Fern* [2001] NSWSC 406, [61]-[62] (Palmer J)

presumed undue influence where the courts will only intervene if the transaction is one that calls for explanation. This is a particular element of unconscionability not covered by *Klinck*, but draws upon the difference between the private and the public (legal) conscience. The private conscience will be affected no matter the size of the benefit obtained through pressure, but the public conscience will only come into play once the benefit is of a certain value. When a value calls for explanation is entirely fact dependent.

Another important factor is, as *Klinck* puts it, candour. This is more clearly seen in *Etridge*. If a partner asks the other for help, it is right for the courts to ascertain whether that partner was open and honest about the motives for seeking assistance and the risks involved. Openly lying about risks or investment rewards can be clear evidence that the defendant abused a position of influence, most likely for personal gain. In essence, was the financial backing sought in good faith?

Each case of undue influence is dependent on its own facts, in particular the personal circumstances of the claimant and the defendant. A close reading of the cases provides us with case-studies which, at the very least, lead us to ask the right questions.

Part 3: Unconscionability and unconscionable bargains

The term “unconscionable bargain” is rather broad and is not limited to one particular type of event. The key difference is posited to be that unconscionable bargains look at both the nature of the agreement and the manner in which it was entered into, where undue influence focuses on how the claimant’s intention was vitiated.⁷⁹

- a. *Clark v Malpas* (1862) 4 De Gex, Fisher & Jones 401; 45 ER 1238

Mr Gallimore owned three cottages. Other than that, he was poor. His only income was from letting two of the cottages out and living off the rent in the third cottage. Gallimore was also illiterate. One week Gallimore got ill. On Friday evening, his

⁷⁹ The difference between the two claims is subject to debate; consider Mindy Chen-Wishart, ‘Undue Influence: Vindicating Relationships of Influence’ (2006) 59 *Current Legal Problems* 231; Rick Bigwood, ‘Undue Influence in the House of Lords: Principles and Proof’ (2002) 65 *Modern Law Review* 435; Rick Bigwood, ‘Undue Influence: “Impaired Consent” or “Wicked Exploitation”?’ (1996) 16 *Oxford Journal of Legal Studies* 503; IJ Hardingham, ‘The High Court of Australia and Unconscionable Dealing’ (1984) 4 *Oxford Journal of Legal Studies* 275-287

neighbour, Mr Malpas, called. He enquired whether he could purchase Gallimore's cottages. There was no agreement. On Saturday morning, Gallimore still being ill, Malpas called again. This time an agreement was reached. The cottages were to be conveyed to Malpas. In return Gallimore would be entitled to live rent-free in his house for his lifetime and he would receive a small weekly income. There was a considerable difference between Malpas' gain and Gallimore's return. Gallimore called a witness as well as a solicitor that both he and Malpas had engaged previously. The agreement was signed on Saturday afternoon. Gallimore died on Sunday night.

Mr Clark was Gallimore's heir. He brought a claim to set the conveyance aside and have the three cottages reconveyed to him. Clark argued there had been an unconscionable bargain. The Court clearly stated the principle that equity would not intervene merely because a transaction had occurred at undervalue, with a possible exception if the undervalue was 'gross'.⁸⁰ Whilst the Court agreed in this case there had been a sale at undervalue, something more was needed for the claim to succeed.

Gallimore was described as 'a man in humble life, imperfectly educated and unable of himself to judge of the precautions' necessary for this type of arrangement.⁸¹ Importantly, he did not receive independent advice. Mr Cooper, a solicitor, was present but was not engaged by Gallimore personally, and the Court took the view that Cooper was primarily the buyer's solicitor.⁸² Another feature was the speed of the transaction; within the scope of a few hours Gallimore had signed away all his possessions, in return for a tenancy and an income. A concern was that the promise of money were not secured against Malpas' property, and the Court noted that Gallimore was not the type of man who would have known to ask for such security. There was no evidence that Malpas could honour his promise to pay an income. If it turned out that he could not, it would be too late since Gallimore had already conveyed his property. Cooper should have called attention to these matters. The agreement was therefore one at undervalue and one of 'gross imprudence'.⁸³

The transaction was set aside, with a number of unconscionability indicia present. Gallimore was a vulnerable person, whose position Malpas took advantage of.⁸⁴ It was not sufficient that the transaction was undervalued, but to this was added Gallimore's

⁸⁰ *Clark v Malpas* (1862) 4 De Gex, Fisher & Jones 401, 403; 45 ER 1238, 1239 (Knight Bruce LJ)

⁸¹ *Ibid*, 404; 1240 (Knight Bruce LJ)

⁸² *Ibid*, 404; 1240 (Knight Bruce LJ)

⁸³ *Ibid*, 404; 1240 (Knight Bruce LJ)

⁸⁴ *Ibid*, 405; 1240 (Knight Bruce LJ; Turner LJ)

personal circumstances. He was not educated, was illiterate, and had no legal understanding, nor was he legally advised. He was also ill, but there were no suggestions that his illness affected his mental capacity. The case demonstrates how the courts look at both the terms of the agreement (here grossly disadvantageous to Gallimore) and the conduct of the defendant (here Malpas took advantage of Gallimore's circumstances); the result is an unconscionable bargain.

b. *Earl of Aylesford v Morris* (1872-73) LR 8 Ch App 484

Earl of Aylesford is hailed as a key case for unconscionable bargains.⁸⁵ The case concerned Lord Guernsey. Lord Guernsey had no income. He lived of a variable allowance given by his father, which in no year exceeded £500. Lord Guernsey was a foolish man, who spent well above his allowance. He started borrowing money from Mr Graham, a solicitor. Soon, Lord Guernsey found himself unable to pay the loans back. Graham introduced Lord Guernsey to a moneylender, Mr Morris. Morris lent Lord Guernsey £8,000. £1,200 Morris kept himself by way of a discount (which seems to be in lieu of a security). £3,000 went to Graham, to whom Lord Guernsey thereafter still owed £1,000. The remaining £3,800 Lord Guernsey quickly spent himself. The loan was due after three months, after which it carried a 60% interest. After three months, Lord Guernsey was not in a position to repay the full amount. Using Mr Addison as an agent, a replacement loan of £11,000 was secured from Morris, on the same terms. Addison got a fee.

Lord Guernsey had no independent advice, was not able to ascertain the true nature of his inheritance, and had no knowledge of whether he could ever repay the loans with interest.⁸⁶ Morris issued the proceedings when Lord Guernsey failed to repay the £11,000. It was also at this point that the sixth Earl died, and Lord Guernsey became the seventh Earl of Aylesford, which is the title used in the legal proceedings.

Legislative change, such as the repeal of the usury laws, has not impacted on equity's right to set aside or vary transactions which are unconscionable. This includes excessive interest where it is levied in an unconscionable manner. Where a party takes unconscionable advantage of another, who is in a vulnerable situation, that party must

⁸⁵ Catherine MacMillan, 'Earl of Aylesford v Morris (1873)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012)

⁸⁶ *Earl of Aylesford v Morris* (1872-73) LR 8 Ch App 484, 495 (Lord Selborne)

show that the terms of the bargain are in fact ‘fair, just and reasonable’.⁸⁷ Morris had to show that the terms of the loan were ‘fair and reasonable’, but was unable to do so.⁸⁸ Indeed, Morris accepted before the court that he deliberately asked for 60% interest to get the best deal possible. The problem was that Lord Guernsey had no means of his own; he was locked-in, waiting for his inheritance.

Chancery gave special protection for remaindermen and revisioners, which is to say, the heirs to the great estates.⁸⁹ This was on the basis that the heir, locked into a trust settlement, was vulnerable to exploitation.⁹⁰ The reliance on an allowance placed them in a vulnerable situation if they found themselves needing to take out loans. Unscrupulous moneylenders could prey on their inability to get money elsewhere and a reluctance (or inability) to get more money from their fathers. They came ‘in the dark, and in fetters, without either the will or the power to take care’ of themselves and ‘with nobody else to take care’ of them.⁹¹ This meant that sons were vulnerable until such time that they inherited.

Lord Selborne said that it ‘was certain that the debtor, until his reversionary interest fell into possession, would never have any means of his own to make payment’.⁹² All he could do was either go bankrupt or endlessly push the loans forward with accumulating interest, hoping he would inherit sooner rather than later.

The unconscionability indicia rest on a number of factors. Firstly, Lord Guernsey did not take any independent advice. This is recurring feature in equity, the requirement that both parties are fully informed of their respective legal rights, and of the implications and consequences of the proposed transaction. Lord Guernsey was certainly foolish. Whilst equity as a rule does not protect fools from their own folly, it will do so when they have been taken advantage of. The second factor was Lord Guernsey’s fear of approaching his family and thus his lack of options when it came to raising money. True, his lavish spending were the product of his own foolishness, but the conscionable moneylender should have refused to lend money. Morris took advantage. The third factor was the deliberate three-month period after which the loan was repayable and otherwise a 60% interest would accrue. The term is unconscionable

⁸⁷ Ibid, 491 (Lord Selborne)

⁸⁸ Ibid, 496 (Lord Selborne)

⁸⁹ *Earl of Chesterfield v Janssen* (1751) 2 Vesey Senior 125, 158; 28 ER 82, 101 (Lord Hardwicke); also *Earl of Portmore v Taylor* (1831) 4 Simons 182, 213; 58 ER 69, 80 (Shadwell VC)

⁹⁰ MacMillan (n 85), 334

⁹¹ *Earl of Aylesford v Morris* (n 86), 492 (Lord Selborne)

⁹² Ibid, 498 (Lord Selborne)

since Morris knew or should have known that it was impossible for Lord Guernsey to repay the loan in that short period. Whilst English law, since the repeal of the usury laws, has hesitated to regulate interest rates, a 60% rate is excessive when the lender knows that the borrower would not be able to repay on time.⁹³ Both before the Vice-Chancellor and on appeal before Lord Selborne, the terms of the agreement were varied. Lord Guernsey was ordered to repay the capital of the loan but with a 5% interest.⁹⁴

The decision in the *Earl of Aylesford* and others like it are certainly questionable. They were based on public policy to protect the landed gentry and the social order of the times; a policy which began to disappear at the turn of the 20th century.⁹⁵ MacMillan suggests that the decision in the *Earl of Aylesford* can be contrasted to the decision of Bramwell B in *Preston v Dania*, which ‘decried equitable intervention into a contract’.⁹⁶

‘Where is the injustice of holding people to mean what they say? Where is the injustice of making a man perform what he chooses to promise? I protest I can see none. And to relieve a man from his obligations on some supposed equitable considerations, seems to me to be a mischievous thing’.⁹⁷

There is clearly a difference in opinion between the common law and equity. Lord Guernsey was the victim of his own folly. There are many things Lord Guernsey could have done differently and it is fair to ask why he should not be held to his own bargain. Here, it is important again to look at how equity operates. Equity is not claimant-focused (as is the common law), and not much turns on whether Lord Guernsey should or should not be held to his own agreements. Equity is defendant-focused; the question is whether Morris is entitled to his end of the agreement. In the circumstances, he is not.

⁹³ Consider the FCA Handbook, Consumer Credit Sourcebook, Part 5A

⁹⁴ *Earl of Aylesford v Morris* (n 86), 499 (Lord Selborne)

⁹⁵ Thomas Breeze, ‘The Attitude of Public Policy Towards the Contracts of Heirs Expectant and Reversioner’ (1904) 13 Yale Law Journal 228, 241

⁹⁶ MacMillan (n 85), 342

⁹⁷ *Preston v Dania* (1872-73) LR 8 Ex 19, 22 (Bramwell B)

c. *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914]
AC 25

In this case the issue is mortgage agreements. Historically, Chancery was strict to say that any terms which prevented the redemption of a mortgage other than repayment of capital, (reasonable) interest and costs was void on the grounds that they were unconscionable.⁹⁸ The strictness turned into a more ‘elastic’ jurisdiction ‘by the recognition of modern varieties of commercial bargaining’.⁹⁹ This was as modern and international commerce began towards the latter half of the 18th century, which led to a liberalisation of commercial and securities law. In trying to get around the strict rule, commercial parties started forming side-agreements. Such collateral agreements had also been held to be unconscionable, on the basis that they were usury by any other name.¹⁰⁰ After the repeal of the usury law and the general liberalisation of commercial law, Chancery came to recognise the validity of these side-agreements, which perhaps were a condition of the mortgage but did not hinder the right to redeem.¹⁰¹ An argument arose over when these collateral agreements would be permitted and when they would be held void.

G&C Kreglinger were wool merchants. New Patagonia Meat and Cold Storage Co were meat merchants. New Patagonia wanted to borrow £10,000. New Patagonia, due to their work in meat, had large quantities of sheepskins. C&G Kreglinger had disposable cash and was understandably interested in sheepskin. An agreement was reached in 1910. New Patagonia borrowed £10,000 on a five-year loan, where C&G Kreglinger was not to call in the loan until the five years had ended but New Patagonia reserved the right to pay off the loan early. The loan was secured by way of a floating charge over New Patagonia’s businesses properties. Alongside the loan was a collateral agreement. During the five years, New Patagonia was only to sell its sheepskins to C&G Kreglinger who had a right of refusal, or pay a 1% commission if they sold the sheepskins elsewhere.

⁹⁸ *Jennings v Ward* (1705) 2 Vernon’s Cases in Chancery 520, 521; 23 ER 935, 935 (Sir John Trevor MR)

⁹⁹ *G and C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 38 (Viscount Haldane)

¹⁰⁰ *Ibid*, 37 (Viscount Haldane)

¹⁰¹ *Biggs v Hoddinott* [1898] 2 Ch 307, 321 (Lindley MR), 322 (Chitty LJ)

In 1913, with two years remaining on the agreement, New Patagonia repaid the loan in full. C&G Kreglinger indicated that they wanted their right of refusal on the sale of sheepskin to continue for the full five years, something which New Patagonia disputed. The five year pre-emption period on the sales surely came to an end once the loan was fully repaid, and to say otherwise would be an unlawful clog on the equity of redemption. Full repayment should mean that they were completely free.

Lord Parker explained when collateral agreements would be held invalid.

‘(1.) unfair and unconscionable, or (2.) in the nature of a penalty clogging the equity of redemption, or (3.) inconsistent with or repugnant to the contractual and equitable right to redeem’.¹⁰²

Point (2) will be considered first. A penalty clogging the equity of redemption is one which hinders or obstructs a mortgagor’s right of redemption having failed to satisfy the requirements of the mortgage, for instance by failing to repay according to the stipulated time.¹⁰³ Such penalties may include a requirement to pay an additional sum of money. Equity can demand that the mortgagor continues to pay interest until such a time he can fulfil the requirements under the mortgage, but not much more. In (3), terms which are repugnant to the right to redeem include, for instance, a requirement of the mortgagor to legally purchase back his property if he fails to repay the mortgage on time (the mortgagee of course having legal title).¹⁰⁴ Any such term would void the collateral agreements. This is to protect the personal property of the borrower and not to hold him hostage to any requirement beyond the mortgage terms.

Finally, point (1) asks if the agreement is unconscionable. In explaining when an agreement could be voided for unconscionability, Viscount Haldane said that ‘a collateral advantage may now be stipulated for by the mortgagee provided that he has not acted unfairly or oppressively’ and as long as the mortgage is not irredeemable.¹⁰⁵ The crucial aspect is that the lender may not act “unfairly” or “oppressively”. The court upheld the collateral agreement, allowing C&G Kreglinger to continue with their right of refusal for the remaining two years.¹⁰⁶ It was not unconscionable; it was an

¹⁰² *G and C Kreglinger* (n 99), 61 (Lord Parker)

¹⁰³ *Ibid*, 48 (Lord Parker)

¹⁰⁴ *Ibid*, 50 (Lord Parker)

¹⁰⁵ *Ibid*, 37 (Viscount Haldane)

¹⁰⁶ *Ibid*, 45 (Viscount Haldane), 61 (Lord Parker)

ordinary business transaction. It had not been unduly forced upon New Patagonia. They were in a commercial relationship and there were no special factors to make New Patagonia vulnerable, such as imminent insolvency.

d. *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87; [1985] 1 WLR 173

The Lobb family, in the form of a company, ran a garage and petrol station. The business was not successful. In 1964 the company took out a loan from Total Oil and charged the petrol station. The loan was for £15,000 and was repayable over 18 years. Over the years, additional loans were taken out. As part of the loans, the company bound itself to Total Oil through an ‘exclusive petrol tie’, so that the company could only be supplied by Total Oil.¹⁰⁷

In 1969 the company was still in financial difficulties. An agreement was reached between the company and Total Oil. The premises were to be leased to Total Oil at a ‘peppercorn rental’ for a 51-year period, and then be sub-leased back to the company for a £2,500 annual rent for an initial 21-year period.¹⁰⁸ The purpose of the dual lease was to give Total Oil a stronger proprietary interest in the property. The lease agreement also contained an exclusive petrol tie.

In 1979, not being happy with the lease and the undertakings given by Total Oil, the company brought a claim to set the lease agreement aside. Several grounds were pleaded, but only the unconscionable bargain claim will be considered.¹⁰⁹ It was argued that the agreement was entered into when the company was in serious financial distress and was particularly vulnerable, and that the terms of the agreement were harsh.

Millett QC pointed out that the court was ‘concerned, not with the reality of the weaker party’s consent, but with the conduct of the stronger; for the word “unconscionable” seems to relate both to the terms of the bargain and to the behaviour of the stronger party’.¹¹⁰ Equity is focused on the defendant, the party alleged to have imposed the unconscionable term.

¹⁰⁷ *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87, 90

¹⁰⁸ *Ibid*, 90

¹⁰⁹ *Ibid*, 94, 98, 107 (Peter Millett QC); [1985] 1 WLR 173, 180 (Dillon LJ); 186 (Dunn LJ)

¹¹⁰ *Ibid*, 94 (Peter Millett QC)

Millett QC identified three conditions required to show an unconscionable bargain.¹¹¹ The first is that there must be a stronger and a weaker party, to the effect that there is a 'serious disadvantage' to the weaker party. There is no exhaustive list of reasons why one party might be at a disadvantage, but can certainly include psychological reasons, socio-economic conditions (such as poverty), ignorance and the lack of appropriate advice (including legal advice but not necessarily limited thereto). The second is that the stronger party must in a 'morally culpable manner' take advantage of this imbalance. Moral culpability is a whole science in itself but in the context we can infer that Millett QC meant that the stronger party must be aware of the imbalance of power and with that knowledge sets out to exploit the situation. It is probably not a requirement that the stronger party deliberately set out to exploit the imbalance of power; it should be sufficient that they continued with the bargaining whilst aware of the imbalance and without taking it into account, for instance by insisting on the weaker party seeking legal advice. As with everything, it is fact dependent, and it would be contrary to equity's ethos to strictly insist on a high standard. The third is that the resulting agreement is oppressive and something which goes beyond it merely being 'improvident'. The agreement had to be more than unreasonable, it had to be harsh, oppressive to the effect that it would be unconscionable for the defendant to enforce it.

With this high standard in mind, the claim should fail. Total Oil accepted that the first condition was present. There was an imbalance of power. The company, having run out of money, was in a desperate situation. It would probably do almost anything to raise more funds or, as it happened, restructure the loans agreements it had with Total Oil. Clearly the new lease agreement was a bad bargain.

The other two conditions were not met. The company had legal advice. It appears that this advice was not heeded to, but Total Oil was unaware of this. It gives another insight into the level of knowledge that is required; Total Oil knew that the company was being advised, and that is sufficient. It would be unreasonable to require them to also be aware of whether the advice was listened to. In this situation, if the company was being taken advantage of, it was of its own doing.

However, it would seem that they were not being taken advantage of. From the evidence, the company was happy with the deal and it was Total Oil who was hesitant

¹¹¹ Ibid, 94-95 (Peter Millett QC)

– they were the ones who carried the risk of the company defaulting and the loss of profit whilst a new garage owner could be found. Further, the lease agreement (where Total Oil took a 51-year lease at no cost and sub-leased it back to the company) was a fairly standard commercial agreement.¹¹² It is unsurprising that the unconscionable bargain claim was dismissed.¹¹³

The Court of Appeal confirmed that it was not sufficient to show that the terms of the agreement were unreasonable.¹¹⁴ The Court of Appeal further commented on the nature of any imbalance of power and why the courts need to assess both the terms of the agreement and the conduct of the parties. Dillon LJ said that it is ‘seldom in any negotiation that the bargaining powers of the parties are absolutely equal’.¹¹⁵ There will nearly always be some inequality. Loan agreements are a good example; the borrower will always be in a worse position because of his need to borrow, giving the lender the upper hand. Dunn LJ said that ‘mere impecuniosity has never been held a ground for equitable relief’.¹¹⁶ Being desperate for money does not mean there is an unconscionable bargain. The principle applies to most commercial agreements for the supply of goods or services; the supplier has the upper hand because he is in possession of the value sought by the purchaser. It is clear why the courts have to look beyond simply the relative balance of power, but also consider the actual bargain and the parties’ respective conduct. In this case, the company, albeit desperate, knew what they were doing and took legal and financial advice. Total Oil was hesitant; they were clearly not setting out to take advantage of the company.

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

Kakavas had a gambling addiction. He spent a lot of money at Crown Melbourne, a casino. Kakavas alleged that Crown Melbourne knew of his addiction and, in allowing him to continue to gamble, had taken unconscionable advantage. His unsuccessful claim was for relief from his gambling debt.¹¹⁷

¹¹² Ibid, 96 (Peter Millett QC)

¹¹³ Ibid, 97 (Peter Millett QC)

¹¹⁴ *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1985] 1 WLR 173, 183 (Dillon LJ)

¹¹⁵ Ibid, 183 (Dillon LJ)

¹¹⁶ Ibid, 189 (Dunn LJ)

¹¹⁷ *Kakavas v Crown Melbourne Limited* [2013] HCA 25, [5]-[6], [135]

The court highlighted that it was ‘relevant’ to the case ‘that the activities in question took place in a commercial context in which the unmistakable purpose of each party was to inflict loss upon the other party’.¹¹⁸ The court held that there was nothing wrong with a gambling establishment allowing a person to gamble, even if he was a “high-roller”. Crown Melbourne would be hard-pressed to distinguish between a high-roller and someone with a gambling addiction.¹¹⁹ The court said it ‘is necessary to be clear that one is not concerned here with a casino operator preying upon a widowed pensioner who is invited to cash her pension cheque at the casino and to gamble with the proceeds. One might sensibly describe that scenario as a case of victimisation’.¹²⁰ Of equal (if not greater) importance was the fact that Kakavas himself ‘went to considerable lengths to assure Crown that his troubles with gambling were now behind him when he sought to be re-admitted to Crown’s casino’.¹²¹ It highlights the importance of factual analysis when determining whether a party’s conscience has been affected.

f. Summary on unconscionable bargains

Many cases arguing unconscionable bargains play out in the commercial sphere, and some of the cases above have shown how parties who were unhappy with reasonable deals tried to use equity to get out of commercial agreements. Equity does not alleviate from foolish agreements. It will help those who have been exploited, not businessmen (even desperate ones) who come to regret bad decisions. A claimant who ‘voluntarily engages in risky business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business’.¹²² That is not to say that equity will never set aside commercial agreements, but they must really be unconscionable in the sense that they are truly harsh and imposed in an immoral manner.¹²³ People as free agents have to bear the burden of their own bargains. It is only when that freedom has been infringed by reason of the circumstances and actions of the stronger party that equity is justified in stepping in. It is right that vulnerable

¹¹⁸ Ibid, [25]

¹¹⁹ Ibid, [28], [30]

¹²⁰ Ibid, [30]

¹²¹ Ibid, [36]

¹²² Ibid, [20]; *Finland Investments* (n 4), [77] (Alison Foster QC)

¹²³ *Boustany v Pigott* (1995) 69 P & CR 298, 303 (Lord Templeman); *Hart v O’Connor* [1985] AC 1000 (PC), 1017-1018 (Lord Brightman)

people are protected against bargains which perhaps they did not fully understand or which they only entered into by reason of untoward pressure. This is less likely to happen in commercial arrangements between parties at arms-length who have the benefit of legal and financial advice. Moving beyond the Klinck's terms, access of independent advice is an important unconscionability factor. A commercial party who reasonably had access to advice cannot later complain if such advice was not taken or not heeded to.

Conclusion

The cases demonstrate in which circumstances equity will rescind agreements on the grounds of unconscionability. The recurring key phrase is balance of power, and whether a stronger party is barred by conscience to insist on his legal entitlement. He will not be allowed to do so if he has created an environment in which the weaker party had no choice but to enter into the agreement (undue influence) or where he has exercised influence to force the weaker party into a bad bargain (unconscionable bargains). These situations illustrate an "inequality of bargaining power".¹²⁴ The claimant's weakness or vulnerability can be measured in many ways, be they social, economic, or psychological. There is also a legal weakness, for instance the use of standard form contracts which in some contexts presents a "take it or leave it" ultimatum. This is particularly true of large companies or companies which hold some form of monopoly.¹²⁵ It is uncontroversial that it is unconscionable for a party to use this weakness for their own gain.

¹²⁴ *Bundy* (n 57), 339 (Lord Denning)

¹²⁵ *Angelo and Ellinger* (n 6), 457

Chapter 9

Unconscionability and Estoppel

This chapter will continue the bottom-up study of unconscionability by looking at some of the equitable estoppel claims. Estoppel claims are about holding people to their agreements where it would be unconscionable to renege on them, and as such is very much the opposite to undue influence and unconscionable bargains considered in the previous chapters, which seeks to vitiate agreements where it would be unconscionable to uphold them.

As with the previous chapter, it will start with a broad outline of the law on estoppel as well as summarising the key unconscionability indicia that arises in estoppel. The chapter will thereafter look at some cases for three types of estoppel, namely estoppel by acquiescence, promissory estoppel, and proprietary estoppel.

Part 1: Estoppel – an overview

Equitable estoppel is available where it can be shown that it would be unconscionable for a party to enforce their legal rights on the basis that they have consented to a contrary state of affairs.

Equitable estoppel comes in two types: promissory and proprietary. The test of unconscionability lies at their heart.¹ Promissory estoppel deals with disputes under a contract and proprietary estoppel deals with disputes over proprietary entitlements. Within proprietary estoppel there is also a doctrine of acquiescence; namely that a believed proprietary right cannot be denied if one party has, by conduct or passage of time, acquiesced to a particular state of affairs.² In recent cases the courts have argued that acquiescence does not ‘add anything’ to proprietary estoppel; the argument is that acquiescence is included in the broad test for proprietary estoppel.³ However, this chapter will consider estoppel by acquiescence separately since many cases turn specifically on the passage of time.

¹ *Lester v Woodgate* [2010] EWCA Civ 199, [25] (Patten LJ)

² John McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell, 2014), [12-009]

³ *Fisher v Brooker* [2009] 1 WLR 1764, [62] (Lord Neuberger); *Lester v Woodgate* (n 1), [43] (Patten LJ); Ben McFarlane and Philip Sales, ‘Promises, Detriment, and Liability: Lessons from Proprietary Estoppel’ (2015) 131 LQR 610, 614

Common law and equity have also jointly developed estoppel by representation; where a party has made a statement leading another party to believe in a particular set of facts and detrimentally relies on that statement, the first party cannot thereafter deny that factual position. Additionally there is estoppel by convention. This is where the parties believe or assume that the law or the facts are in a particular way, or where one party believes so and the other acquiesces to that belief, then that party cannot thereafter deny that legal or factual position. The law is also developing contractual estoppel, which prohibits a contractual party to assert a contrary factual position from one set out in the contract. Estoppel in these contexts works as defences to legal claims only.⁴ They will not be considered.

Unconscionability indicia

Equitable estoppel raises a number of unconscionability indicia. Many of them are directly related to the specific tests, such as reliance and detriment. It can be argued that the specific tests are examples of how unconscionability has crystallised over time to become clearer. However, that does not mean that the tests provide the whole definition of unconscionability.

The first unconscionability indicia to note is the context, followed by the nature of the relationship between the parties. The cases show that the estoppels are applied differently in a private as opposed to a commercial context, and that the threshold for wrongdoing is higher in the commercial context. The key question is whether parties should be held to informal agreements. Such agreements will be more common in private contexts, where parties cannot reasonably be expected to have access to professional advice and support. However, equity will be more wary to enforce informal agreements in a commercial setting, where it can be reasonably expected for the parties to have access to professional advice, and where the parties should have a formal contract.

⁴ Consider *Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* [1998] AC 878, 913-914 (Lord Steyn); *Ted Baker Plc v Axa Insurance UK plc* [2014] EWHC 3548, [121], [122], [124] (Eder J); *Kaupthing Singer & Friedlander Ltd (in administration) v UBS AG* [2014] EWHC 2450, [95], [98] (Andrew Smith J); *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311, [133] (Blair J); *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472, [66] (Carnwath LJ); Jo Braithwaite, 'The Origins and Implications of Contractual Estoppel' (2016) 132 LQR 120-147

The specific indicia are reliance and detriment. The cases suggest that it is only unconscionable to renege on a promise if it has been relied upon and the claimant has, in doing so, suffered detriment. These indicia also come up in chapter eleven, which looks at constructive trusts, and as such are not limited to estoppel claims. The cases show that the detriment has to be more than negligible, and there has to be a connection between the promise, the reliance, and the detriment. The cases again look at the balance of power between the parties, which is necessarily skewed as one party will have a legal entitlement (such as under a contract or legal ownership of property). When it comes to reliance, the courts also have in mind the psychology behind the relationship. For instance, many estoppel cases have arisen around ownership of a farm, where one family member has promised ownership to another in return for free work. In such a family context it can be difficult to say no, which makes it easier to show that the reliance was reasonable, than say free work undertaken between commercial parties. A further specific indicia is knowledge, which was discussed in chapter seven. It is clear that the parties must have some degree of knowledge of their respective rights and what agreements they have entered into. This, of course, also speaks to whether the reliance was reasonable.

The third category of unconscionability indicia are factors which arise following an equitable wrong. A lot of cases turn on acquiescence, where equity will refuse to enforce a legal right if the party has done something to signal an acceptance of a contrary state of affairs. The broad doctrine of acquiescence is thus an unconscionability indicia in its own right, as the cases in the section below will show.

Part 2: Unconscionability and (proprietary) estoppel by acquiescence

This section will consider cases dealing with proprietary interests which cannot be denied on the basis of acquiescence, which is seen as a form of proprietary estoppel.⁵ The test can be summarised in the following way. C has a proprietary interest. D interferes or proposes to interfere with that interest (not necessarily knowing that it is C's interest). C does not object but through words or conduct leads D to believe he is

⁵ *Fisher v Brooker* (n 3), [62] (Lord Neuberger)

allowed to act. C then cannot at a later stage bring a claim against D. Mere passivity does not indicate acquiescence.⁶

a. *The Earl of Oxford's Case* (1615) 1 Chancery Reports 1; 21 ER 485

Despite being a well-known case, the dispute in *The Earl of Oxford's Case* is rarely discussed. In essence, it was about estoppel.⁷ This is the oldest case that will be considered in these chapters, and it will be looked at because of its factual matrix. The case did not become an important precedent because it predates the Statute of Frauds.⁸

The underlying property transaction has been summarised by Ibbetson.⁹ In the mid-1500s, Magdalene College, Cambridge, acquired a freehold in today's central London, known as Covent Garden. The College entered into a series of successive leases to raise rental income. However, in the 1570s, the College was desperate for money and sought to restructure the lease arrangements.

In 1574 the College agreed to convey the land to Benedict Spinola, who had ties to Queen Elizabeth. However, the Ecclesiastical Leases Act 1571 barred any College from granting a lease or a conveyance agreement of more than 21 years.¹⁰ In light of this, the College and Spinola agreed to use the Queen as an intermediary. The purpose was to overstep the statute. The land was conveyed to the Queen on the understanding that the Queen would grant it to Spinola. This transaction voided the previous leases, and Spinola ejected the existing tenants. Spinola developed the land, carving out plots and built houses, which he rented out at great profit. In 1579 he sold the land to servants of the Earl of Oxford and in 1580 they conveyed the land to the Earl. In 1604 the Earl died and the lands passed to his heir, who was at the centre of the litigation.

In 1607 the College began to question the validity of its own conveyance. It realised, no doubt, that if it got the land back and directly collected rent from the now fully developed area, this would be of enormous financial benefit. After having been so creative in trying to get around the 1571 Act, the College now wanted to use the same Act to invalidate the deal.

⁶ *Lester v Woodgate* (n 1), [39] (Patten LJ); *Dyson Ltd v Qualtex (UK) Ltd* [2005] RPC 19, [323] (Mann J); *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 903 (Lord Wilberforce)

⁷ David Ibbetson, 'The Earl of Oxford's Case (1615)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012), 26

⁸ *Ramsden v Dyson* (1866) LR 1 HL 129, 134 (Lord Cranworth); Statute of Frauds 1677

⁹ Ibbetson (n 7), 3-13

¹⁰ Ecclesiastical Leases Act 1571 (13 Eliz c 10), s. 2

The legal arguments turned on whether the Act voided the grant to Spinola. At King's Bench, Coke CJ ruled in favour of the College, namely that the grant to Spinola was void.¹¹ Ibbetson notes that it is surprising that no mention is made of the fact that Spinola, the Earl of Oxford and their various tenants had invested time and money in developing the land; it was a purely 'formalist' judgement on statutory interpretation. If the college retook control of the land it would make a 'windfall profit'.¹²

Unhappy, the Earl of Oxford brought a successful claim in Chancery. The windfall was at the heart of the arguments.¹³ The Court held that it would be unconscionable for the College to retake the land without paying compensation to the Earl.¹⁴

The Act stood, legally the land belonged to the college, but the Earl had an equitable interest.¹⁵ In many ways it is a precursor to the idea that one cannot use a statute to perpetrate fraud.¹⁶ The College had waited decades, knowing that the land was being developed and that it had greatly increased in value; it is altogether wrong to use a statute the College so diligently tried to circumvent in the first place to get hold of that profit.

Thus, Lord Ellesmere writes that 'when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party'.¹⁷ It would be unconscionable to deny the Earl his equitable interest and so, by reason of conscience, the decision at King's Bench was set aside.

b. *Ramsden v Dyson* (1886) LR 1 HL 129

The next two centuries saw many cases where a person had built on another's property, and the legal owner only afterwards asserted his rights. In those cases the court would grant quiet enjoyment of that property to the builder.¹⁸ This leads to the House of Lords decision in *Ramsden v Dyson*.

¹¹ *The Case of the Master and Fellows of Magdalene College in Cambridge* (1615) 11 Coke Reports 66b, 74a-b; 77 ER 1235, 1246-1247 (Coke CJ)

¹² Ibbetson (n 7), 18

¹³ *The Earl of Oxford's Case* (1615) 1 Chancery Reports 1, 2; 21 ER 485, 485 (Lord Ellesmere)

¹⁴ *Ibid*, 5; 486 (Lord Ellesmere)

¹⁵ *Ibid*, 11; 487 (Lord Ellesmere)

¹⁶ *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 (Lindley LJ)

¹⁷ *The Earl of Oxford's Case* (n 13), 10; 487 (Lord Ellesmere)

¹⁸ *The British East-India Company v Vincent* (1740) 2 Atkyns 83, 83; 25 ER 451, 451 (Lord Hardwicke); *Stiles v Cowper* (1748) 3 Atkyns 692, 693; 26 ER 1198, 1198 (Lord Hardwicke)

Between 1531 and 1920, the majority of land around Huddersfield was owned by the Ramsden family. Sir John Ramsden was the fourth baronet until 1839. Management of the land was left to the land agent, Bower, who visited twice a year to collect rent, and Bower's local agent, Joseph Brook. For the most part, the estate only granted tenancies-at-will. These are agreements that allow a tenant to stay at the pleasure of the lessor for a fixed rent, and can be terminated at any time by either party.¹⁹ Bower, and in particular, Brook, made it clear to prospective tenants that Ramsden preferred tenancies-at-will but that the residents should not worry, because Ramsden would never evict them.²⁰ It was a system of mutual trust. Stuart VC referred to the system as 'extraordinary'.²¹ The system has been criticised for being inefficient and probably corrupt.²²

Piška suggest that there is reason in the madness. Leases were granted for 60-year periods, which were reviewed and renewable every 20 years, when a fine was levied, which typically was the payment of double the rent for that year. Huddersfield consisted of a growing number of working class families. They saw the tenancies-at-will as the favourable option because they were cheaper.²³ The evidence also suggests that Ramsden's agents discouraged tenants from taking leases.²⁴ The evidential dispute was the extent to which Sir John Ramsden himself was opposed to formal leases, or if this was Brook and Bower taking a relaxed approach to their job.

In 1839 Sir John Ramsden died and the title passed to his son. The fifth baronet was Sir John William Ramsden, who is the antagonist in the litigation. His new land agents wanted stricter control.²⁵ They favoured fixed-term leases since they could control (and increase) the rent and the fines payable for renewal.

What happened next is subject to conflicting views, undoubtedly coloured by socio-political biases. The leases were popular with the estate itself and with the growing number of wealthier middle-class residents who favoured the certainty. It caused uncertainty with the predominantly working-class people who had tenancies-at-will,

¹⁹ *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612, 617 (Cooke J)

²⁰ Nick Piška, 'Ramsden v Dyson (1866)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012), 271

²¹ *Thornton v Ramsden* (1864) 4 Giffard 519, 569; 66 ER 812, 833 (Stuart VC)

²² Jane Springett, 'Landowners and Urban Development: the Ramsden Estate and Nineteenth-Century Huddersfield' (1982) 8 *Journal of Historical Geography* 129, 132

²³ Piška (n 20), 272

²⁴ *Thornton v Ramsden* (n 21), 573; 835 (Stuart VC)

²⁵ Springett (n 22), 135

who faced a growing concern about the security of their homes.²⁶ Many, if not most, had spent their own money on building dwellings and other houses on the parcels of land that they leased. The concern, naturally, was what would happen if they were evicted.

Tensions grew considerably in 1858 when Ramsden evicted a tenant.²⁷ Town meetings were arranged. The tenants asked Ramsden to grant 999-year leases. To do this Ramsden needed a private Act of Parliament, which he unsuccessfully sought. In 1859, an Act was obtained for 99-year leases. This was, however, not well-received.²⁸ The tenants formed the Tenant-Right Owners' Defence Association (TRDA) to lobby on their behalf.²⁹

TRDA engaged a chancery lawyer, who opined that *The Earl of Oxford's Case* was 'analogous' to the present dispute.³⁰ Since Ramsden had allowed the tenants to build on the land, knowing they would spend their own money developing it, they had an equitable interest in it. Ramsden could not evict them at will. Piška explains that equity was invoked by the tenants 'as part of a rhetorical strategy in which equity was tied to certain values – honour, justice, fairness – and mythologies – the historic mission of equity and its assistance of the vulnerable and ignorant'.³¹

In 1861, Ramsden served eviction notices on seven tenants.³² A complaint to stay the eviction proceedings was brought before Chancery by Joseph Thornton, who was assisted by his equitable mortgagee, Lee Dyson.

In 1837, Thornton built a house on his land. Brook, then still the land agent, assured him that a lease was not necessary. In 1845 Thornton obtained a neighbouring plot of land, again as a tenant-at-will. Thornton spent more money on this plot. In 1857, he had to take out a loan and Dyson was listed as an equitable mortgagee over the second plot.

Stuart VC lived up to those equitable values. His conclusion was that Chancery 'has gone very far in many cases to protect the possession of a tenant who has in good faith

²⁶ Piška (n 20), 276; 'The Huddersfield Tenant Right Question – Letter from Sir John Ramsden', Leeds Mercury (30 May 1864), 2

²⁷ *Ramsden v Swift*, Yorkshire Assizes, March 12, 1858 (Martin B); reported in 'Yorkshire Assizes', Leeds Mercury (13 March 1858), 2

²⁸ Piška (n 20), 280

²⁹ *Ibid*, 281

³⁰ 'The Tenant-Right Owners' Case', Huddersfield Chronicle (18 August 1860), 5

³¹ Piška (n 20), 286

³² Frederick Jones, 'New Position of the Tenant-Right Dispute', Huddersfield Chronicle (9 November 1861), 6

expended money on land in a reasonable confidence that his possession would not be disturbed'.³³ In the present case, it is clear that Thornton (and Dyson) had a good faith expectation that they would be safely in possession of the land. Stuart VC explained that equity will not allow a tenant-at-will to be evicted without compensation where the tenant had spent money on the land, provided that the landlord was aware of the spending or had granted permission that building could take place.³⁴ Stuart VC granted relief in the form of a 60-year lease; at standard rent.³⁵ The dispute should have ended there. However, given the tensions that remained between the two sides, Ramsden decided to appeal to the House of Lords.

The House of Lords confirmed the general principle. A legal owner of land cannot knowingly sit by and let someone else build on his land and thereafter try to assert ownership of that property.³⁶ However, Lord Cranworth also said that as a general rule there is nothing preventing a landlord from taking possession of property built by a tenant on the lawful termination of the tenancy.³⁷ This was Ramsden's argument. He was the landlord and hence he had the right to terminate his tenancies. It is the tenant's own mistake if he spends money building on the land. Thornton and Dyson's claim was that the circumstances fell outside the general rule; they had been acting on the general expectation, given by the Ramsden estate, that they would have a perpetual tenancy, or obtain a 60-year lease which was indefinitely extendable.³⁸

Lord Cranworth's conclusion was the opposite of the Vice-Chancellor's. It turned on the evidence. Stuart VC had accepted the tenant's view of what had transpired. The majority of the House of Lords disputed Thornton's evidence, including the class evidence provided by other tenants-at-will. It was not accepted that Sir John Ramsden or his agents had ever made claims of perpetual tenancy; merely a promise in honour that the tenants could remain as long as rent was paid. It was a promise in honour that Sir John Ramsden "would not" disturb their tenancies, as opposed to saying that he "could not". Lord Cranworth reiterated that equity does not bind a person's honour.³⁹ The appeal was allowed.

³³ *Thornton v Ramsden* (n 21), 571; 834 (Stuart VC)

³⁴ *Ibid*, 571; 834 (Stuart VC)

³⁵ *Ibid*, 575; 836 (Stuart VC)

³⁶ *Ramsden v Dyson* (1886) LR 1 HL 129, 141 (Lord Cranworth C); 169 (Lord Wensleydale)

³⁷ *Ibid*, 141 (Lord Cranworth C)

³⁸ *Ibid*, 142 (Lord Cranworth C)

³⁹ *Ibid*, 146 (Lord Cranworth C); 167 (Lord Wensleydale)

Why was a landlord permitted to evict tenants who had, if not with the landlord's express approval then at least with his knowledge, invested considerably in building houses on their leased property and without having to pay compensation? Surely, if equity did not prevent eviction, why did it not at least provide compensation? It seems one issue was a desire for a national land registration system. It would be inconvenient if the formal system of freeholds and leaseholds would be disrupted by equitable intervention and discretionary transfers of entitlements.⁴⁰ The Victorian era saw enormous societal changes; housing being a key issue. It was desirable to have a formal system of land registration where leases could be noted.⁴¹ Some troublesome Yorkshiremen should not be allowed to disrupt that.

Piška posits that *Ramsden* marks a turning point which saw 'the emergence of standardisation, rationalisation and security of property as the flag-bearers of the new equity's image in the commercial world'; as the majority in the House of Lords turned away from equity's traditional 'protection of the agrarian classes' against their feudal lords.⁴² It was a new day. Certainty and formalism was *en vogue*; mythical allusions to Christian bishops and the happiness of the meek were out. In this respect, the decision of the House of Lords is wrong. It opted for formalism over justice and placed insufficient emphasis on the poor social standing of the claimants, many of whom were working class without formal education. The decision of Stuart VC might not satisfy the Land Registry enthusiast, but it was the equitable decision.

c. Summary on acquiescence

These two cases have shown two parties relying on legal entitlements where it would be wrong to do so. Magdalene College were estopped from relying on the statute but *Ramsden* was not estopped from relying on his legal entitlement to his land. It is submitted that the House of Lords reached the wrong decision, and that *Ramsden* should have been estopped from evicting the tenants-at-will. Despite the age of the two decision, some additional unconscionability indicia can be uncovered.

⁴⁰ Ibid, 162 (Lord Cranworth C)

⁴¹ This was first introduced in the Land Registry Act 1862, ss. 2-3; replaced by successive Acts in 1875 and 1892, before the modern system was introduced by the Land Registration Act 1925

⁴² Piška (n 20), 301

The first indicium is knowledge, which was discussed in chapter seven. The legal owner must know what the other party is doing, and must either have encouraged or consented to it beforehand, or done something to demonstrate consent after they have acquired knowledge of what is going on.⁴³ The outcome of any legal action where acquiescence is pleaded will also be determined by the legal owner's actions, and whether he came to equity with clean hands.⁴⁴

Another factor is the seriousness of the breach of a legal right.⁴⁵ In *Richards v Revitt* there was a covenant not to use a plot of land for the sale of spirits or operating a pub. The defendant did sell spirits for a period of time before an action was taken to enforce the covenant. There was no acquiescence because for the bulk of the time the defendant was only selling British wines; the action was only brought once he started selling imported wines and other spirits.⁴⁶ Buckley LJ later suggested that in '1877 the sale of British wines would not have been a serious matter to a licensed victualler'⁴⁷ As such, there is no acquiescence for only a minor and inconsequential breach of a covenant. What amounts to a minor breach is of course fact dependent. One important factor is the type of relationship between the parties, and a commercial relationship imposes different expectations on the parties' conduct, in particular by taking greater care in their dealings.⁴⁸ For the public conscience to become engaged there has to be some detriment to the first party. After this, the other party cannot turn around to deny that state of affairs, since to do so would be unconscionable. Unconscionability in this context is closely related to the parts of the test.

Part 3: Unconscionability and promissory estoppel

If one party to a contract makes an assurance to the other party that he will not enforce one or more contractual rights, and this assurance is intended or understood to have

⁴³ *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 151-152 (Oliver J); *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265, 1283 (Oliver LJ)

⁴⁴ *Bankart v Tennant* (1870) LR 10 Eq 141, 149 (James VC)

⁴⁵ *Richards v Revitt* (1877) 7 Ch D 224 (see page 226 (Fry J)); *Willmott v Barber* (1880) 15 Ch D 96, 105 (Fry J); *Osborne v Bradley* [1903] 2 Ch 446; *Electrolux Ltd v Electrix Ltd* (1954) 71 RPC 23, 33 (Evershed MR); *Shaw v Applegate* [1977] 1 WLR 970, 978 (Buckley LJ)

⁴⁶ *Richards v Revitt* (1877) 7 Ch D 224, 226 (Fry J)

⁴⁷ *Shaw v Applegate* (n 45), 976 (Buckley LJ)

⁴⁸ See e.g., *Bankart v Tennant* (n 44), 149 (James VC)

legal effect, then that party cannot go back on that assurance if the other party has relied on it to their detriment.⁴⁹

a. *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130

Central London Property Trust owned a block of flats in London. In 1937 they granted a lease over the block of flats to its subsidiary company, High Trees House. The lease was for 99 years and the agreed ground rent was £2,500 per annum. As the Second World War began, London saw a large exodus. High Trees was not able to pay the ground rent out of the rent it collected, because a lot of flats stood empty. In April 1940, the two companies agreed in writing that the ground rent was to be reduced to £1,250 per annum. Central London Property Trust passed a resolution affirming the agreement. In 1941 a receiver was appointed for Central London Property Trust.

In 1945, as the war came to an end, the flats were again fully let. In September, the receiver investigated the lease agreement and found that the sealed lease asked for ground rent of £2,500. He wrote to High Trees seeking the balance between the two rates which he deemed outstanding. Friendly litigation was initiated to consider what the legally correct ground rent was and whether the balance could be recovered. The receiver sought the balance only for the quarters ending September and December 1945 (which totalled £645).

The defence was three alternative arguments. The primary argument was that in 1940 the lease was validly varied so that the ground rent was reduced for the full duration of the lease. The second argument was one of estoppel, that the agreement in 1940 estopped the claimant for asking for the higher rent and the balance. The third argument was that at any rate, by not asking for the rent, the claimant could not claim the balance from 1940 to September 1945 but could do so for the future.⁵⁰

Denning J stated that if a promise is made, with the intention of it having legal effect, and with the knowledge that it would be acted upon, if it then is acted upon the promise cannot be reneged.⁵¹ This is not ‘estoppel in the strict sense’ but simply a question of

⁴⁹ *Crossco No4 Unlimited v Jolan Ltd* [2011] EWHC 803, [332] (Morgan J); upheld on an appeal which did not consider the estoppel defence, [2012] EWCA Civ 1619, [2012] 2 All ER 754, [115] (Etherton LJ)

⁵⁰ *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 131-132 (headnote)

⁵¹ *Ibid*, 134 (Denning J); see earlier i.e. *Fenner v Blake* [1900] 1 QB 426, 428 (Channell J); *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439, 448 (Lord Cairns C)

the unconscionability of reneging on promises.⁵² It is not a cause of action and there are no remedies for breach of the promise, but the courts will not allow a party to act inconsistently with the promise if the conditions of the test have been met.⁵³

Denning J applied the principle to the facts. It was clear that the agreement reached in 1940, to only levy a lesser rent, was a direct response to the war conditions. It was clear from the facts that the agreement was only intended whilst those conditions were present. Those conditions ended in 1945, as the war came to an end, and the flats were again fully let. The claim was only for the balance of the rent during the two latter quarters in 1945, and to that extent the claim was successful. The claimant could not ask for the balance between 1940 and the second quarter in 1945.⁵⁴

b. *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239; [2013] HLR 24

This case concerned the purchase of a block of flats and a dispute over the ground rent. The block of flats is known as Chasewood Park. Mr and Mrs Kim were tenants in one of the flats. They purchased the leasehold in 2001, under which they agreed to pay ground rent. The head lease, of 999 years, was held by the Nationwide Building Society.

In 2006 the Building Society indicated that they wanted to sell the head lease. The Residents' Association was an obvious purchaser. The Association decided to consult the current tenants to see if there was an interest. A letter was sent out in August 2006 to all the residents.

There were a number of legal errors in this letter. Importantly, the letter indicated that the Association wanted to obtain the freehold to the building, which was not the case. This error might have caused some misunderstandings.⁵⁵ The letter explains some of the benefits of the Association having the freehold. One of those was that there would be no ground rent. The letter explains that a company would be set up to obtain the freehold and that tenants who did not participate would have to continue to pay ground rent to that company. When giving evidence, the Chairman of the Association indicated that the statement that there would be no ground rent had not

⁵² *High Trees House Ltd* (n 50), 134 (Denning J)

⁵³ *Ibid*, 134 (Denning J)

⁵⁴ *Ibid*, 135 (Denning J)

⁵⁵ *Kim v Chasewood Park Residents Ltd* [2013] HLR 24, [2] (Patten LJ)

been agreed to by the Association; it had been included by the member who wrote the letter and it had been circulated before the drafting had been considered by the Association.⁵⁶

The Kim's indicated that they wanted to participate. The company was set up and acquired the superior lease in the spring of 2007. The Kim's paid £2,887.16 towards the cost and became a shareholder. In June 2007 a further letter was sent out to all the tenants who were members of the company. The letter said that the company had decided to continue charge annual ground rent in order to build up a fund to cover various expenditures.

The Kim's refused to pay the ground rent, on the basis that the letter from August 2006 had indicated that no ground rent would be charged.⁵⁷ The company brought a claim to recover the ground rent (which had not been paid between 2007 and 2011). Only the defence of promissory estoppel will be considered.⁵⁸

At trial, the judge held that there was no promissory estoppel. This was on the basis that the representation regarding the ground rent was misunderstood. The judge said that a 'mismatch between the promise and what is being understood, i.e. relied upon, is sufficient to negative an estoppel'.⁵⁹ Both parties have to be clear as to what the promise means. The judge also held that, had there been a clear promise, it was only 'suspensory' and could be withdrawn after reasonable notice.⁶⁰ The appeal relating to promissory estoppel concerned those three questions.⁶¹

The first issue was whether the representation was unequivocal. To raise an estoppel the promise relied on has to be 'clear and unambiguous'.⁶² Patten LJ found that the letter did not include an unequivocal promise.⁶³ It was written long before the completion of the purchase, when there was no guarantee that the purchase would happen. The Association could not predict what financial circumstances the company would be in if it completed the purchase. In this context, as a matter of construction, there was no clear promise. This suggests that renegeing on a promise can only be

⁵⁶ Ibid, [5] (Patten LJ)

⁵⁷ Ibid, [12] (Patten LJ)

⁵⁸ Ibid, [15] (Patten LJ)

⁵⁹ *Chasewood Park Residents Ltd v Kim* (unreported), [48] (Mr Recorder Hill-Smith); cited in *Chasewood Park Residents Ltd* (n 55), [18] (Patten LJ)

⁶⁰ *Chasewood Park Residents Ltd* (n 55), [19] (Patten LJ)

⁶¹ Ibid, [21] (Patten LJ)

⁶² Ibid, [23] (Patten LJ); see also *Low v Bouverie* [1891] 3 Ch 82, 106 (Bowen LJ); *Woodhouse AC Israel Cocoa v Nigerian Produce Marketing* [1972] AC 741, 755 (Lord Hailsham C)

⁶³ *Chasewood Park Residents Ltd* (n 55), [31] (Patten LJ)

unconscionable if the promise is clear, unambiguous and unequivocal and that both parties understood the promise to mean the same thing. Deciding this is a matter of construction for the courts and a contextual interpretation is necessary. The conclusion was that it was not ‘reasonable for Mrs Kim to have relied’ on the representation made in the letter.⁶⁴ This in effect dismissed the appeal so Patten LJ only considered the other two points briefly.

The second issue was reliance. There was a mismatch between the two parties. The Kim’s believed that they would acquire the freehold to their flat and hence there would be no ground rent. Their decision to participate in the scheme was based on a wish to obtain the freehold, rather than any desire to get out of the ground rent. Hence, there was no ‘material reliance’ on the representation made regarding the ground rent.⁶⁵ It is only unconscionable to renege on a clear, unambiguous promise, if the other party acted in reliance on that promise, as opposed to any other or ancillary representation.

The third issue was whether the representation was suspensory. The law states that promissory estoppel is suspensory with reasonable notice, unless such course of action would be unconscionable.⁶⁶ In this case it was not unconscionable. The first reason is commercial, namely that the company had good reasons why it continued to charge the ground rent. The second reason is that the company offered to recompense the Kim’s and revoke their share in the company; thus restoring them to their original lease. The unconscionability indicia therefore include the reasons or circumstances in which the promisor is proposing to go back on the promise. If the reasons are sensible, reasonable or commercially sound, then the estoppel is suspensory. If the promise is withdrawn in a manner which is deceitful, oppressive or fraudulent, that would be unconscionable. In this case, the company was acting in good faith, and provided sensible reasons as to why they wanted to continue charging the ground rent. As always, a willingness to compensate and restore the claimant to their original position is in accordance with good conscience.

⁶⁴ Ibid, [34] (Patten LJ)

⁶⁵ Ibid, [40] (Patten LJ)

⁶⁶ Ibid, [41] (Patten LJ)

- c. *Closegate Hotel Development (Durham) Ltd v McLean* [2013] EWHC 3237; [2014] Bus LR 405

The two claimants were Closegate Hotel Development (Durham) Ltd and Closegate (Durham No 2) Ltd, who were building a hotel. They had a large loan with Barclays Bank, which was secured by a floating charge over the companies' assets. On 11 October 2013, Barclays appointed two administrators.⁶⁷ The claimants argued that the charge was not enforceable by virtue of promises made by Barclays.⁶⁸ The application, ultimately unsuccessful, was to declare the appointments invalid.

The companies and Barclays had a long and complicated history. In November 2011 the companies filed a complaint with the High Court alleging misconduct on the part of a director appointed by Barclays. This led to a lengthy negotiation process, where the companies tried to settle the debt as well as the legal claim. Both parties consented to regular stays on the legal claim, whilst they were negotiating options regarding the debt. In the autumn of 2012 Barclays indicated that it might be willing to settle for a net payment exceeding £18 million, for which the freehold would pass to the companies. This would have to be agreed with the landlord of the hotel. The companies indicated to Barclays that they could provide the financing and Barclays agreed to negotiate with the landlord. The financing was to come from the Co-operative Bank. No agreements were reached and the negotiations dragged on. At the same time, the stays on the proceedings were repeatedly extended. Throughout the negotiations Barclays maintained that it reserved its legal rights. In January 2013 Barclays indicated that the matter was now “commercial, not litigation”, suggesting to the companies that the negotiations were going well. The last stay on proceedings expired in April 2013.

In August 2013 the Co-operative Bank withdrew its offer of funding. This was communicated to Barclays on 4 September 2013. Barclays did not reply. The companies were trying to secure funding from elsewhere. On 11 October 2013 Barclays called in the loan, arguing that the negotiations had failed, and they appointed the administrators.

⁶⁷ Insolvency Act 1986, Sch B1, paras 14(1), 16

⁶⁸ *Closegate Hotel Development (Durham) Ltd v McLean* [2014] Bus LR 405, [2] (Snowden QC)

The companies argued that the history of negotiations had given rise to a ‘mutual understanding’ that Barclays would not call in the loan without giving reasonable notice; a promissory estoppel had arisen ‘because the companies reasonably understood the communications from the bank and the course of conduct between them to be a representation that neither side should take any action whilst negotiations between them were continuing’.⁶⁹ This was denied by Barclays.

Snowden QC reiterated the need for a clear and unequivocal promise. If the words used ‘could reasonable be interpreted in several ways’ then there is no estoppel unless ‘the representee seeks and obtains clarification of the statement’.⁷⁰ This places the onus on the party who is trying to raise the estoppel to show that the promise was clear and that the only reasonable interpretation of the words used is the one they are advancing. In this case, the companies argued that the unambiguousness of the promise came from several sources and statements made over a course of time, as opposed to a single statement. The courts should treat such claims with ‘caution’.⁷¹

On the facts, the court found that the statements made by Barclays by no means came close to being unequivocal.⁷² Snowden QC also noted that refinancing negotiations are common and it would be commercially unsound to estop a bank from enforcing its loan merely because it participates in such negotiations, unless a clear and unambiguous promise has been made.⁷³

Snowden QC also posited that it is relevant for the court to consider how the estoppel would work in practice.⁷⁴ In this case it raised questions of when Barclays would be allowed to call in its loans. Would be it allowed to do so whilst negotiations were still ongoing, and if not, when would such negotiations end? What would amount to reasonable notice? The claimants’ argued that reasonable notice would be such that would allow the companies to conclude their negotiations. This is very open-ended and Snowden QC rightly says that no one ‘could reasonably have thought that this was a commercially workable regime’.⁷⁵ It shows that the courts take a practical and commercially-minded approach to determining whether an estoppel has been raised.

⁶⁹ Ibid, [43]-[44] (Snowden QC)

⁷⁰ Ibid, [57] (Snowden QC)

⁷¹ Ibid, [61] (Snowden QC)

⁷² Ibid, [62] (Snowden QC)

⁷³ Ibid, [63] (Snowden QC)

⁷⁴ Ibid, [73] (Snowden QC)

⁷⁵ Ibid, [75] (Snowden QC)

d. Summary on promissory estoppel

The unconscionability factors closely follow the test, giving some weight to the argument that conscience is what equity does.⁷⁶ However, the cases indicate further relevant unconscionability indicia.

The first is the agreement, in this case the promise which has been made. It is an informal agreement, but it has to be clear and understood by both sides. There is nothing unconscionable about enforcing a legal right unless one has made an unambiguous promise that one will not. The onus is on the party seeking to raise the estoppel to seek clarification on an unclear statement. Further, there has to be an intention that the promise will be relied upon. If that promise is acted upon so that the defendant has changed his position it would be unconscionable to go back on the promise. Generally, a party can go back on a promise as long as there is notice and good reasons. The reason for this is that that party is, after all, enforcing a legal right which both sides have originally agreed to. In *Chasewood Park* the company gave commercially sound reasons why they went back on the indication that they might not charge a ground rent, a party should only be estopped if that course of action is reasonable.

The estoppel also has to be reasonable before the courts will uphold it. This speaks firstly to the importance of context and the nature of the relationship between the parties. It also speaks to the third category of unconscionability indicia, which look at the claimants actions. It is unconscionable for a claimant to seek to enforce an assurance if the practical consequence of that assurance is unsound or unreasonable, perhaps because it will cause undue hardship to the party being estopped. *Closegate Hotel* is a good example of how the proposed estoppel would unreasonably impact on a bank. The estoppel has to be practical and commercially workable.

Part 4: Unconscionability and proprietary estoppel

The test can be summed up as follows. The defendant owns property and makes a promise or assurance to the claimant that the claimant will obtain some proprietary

⁷⁶ Mike Macnair, 'Equity and Conscience' (2007) 27 Oxford Journal of Legal Studies 659, 680; Fiona Roughley, 'The Development of the Conscience of Equity' in JT Gleeson, JA Watson, RCA Higgins, *Historical Foundations of Australian Law, Volume 1* (The Federation Press, 2013), 146

interest in that property. If the claimant reasonably relies on that promise or assurance to her detriment, the defendant is estopped from denying the claimant that proprietary interest, if that denial is unconscionable.⁷⁷ What distinguishes proprietary estoppel is that it can be used as a cause of action in its own right, through which the claimant can assert their proprietary interest.

a. *Re Basham* [1986] 1 WLR 1498

Re Basham was a family dispute and context, as always, is important. The claimant was Joan Bird. She claimed an interest in a house and other property which had belonged to her step-father, who had died intestate. In 1936, Joan's mother married Henry Basham. Joan was 15 years old. Joan was induced by her mother to give up her professional training in order to work for her mother. When the war started, the family moved to Great Hockham where Henry and Joan's mother acquired a pub. Joan worked in the pub without payment. Joan married in 1941. She was regularly dissuaded by Henry and her mother from taking paid employment, with statements along the line of "you don't have to worry about money, you'll be all right".⁷⁸

Joan's mother and Henry later moved to Weymouth and acquired a different pub. Joan regularly went to Weymouth to help in the pub, again without being paid. Henry and Joan's mother later bought a cottage in Hockham, called Rosslyn, which was for Joan and her husband's benefit; although it was never transferred into their names. Henry and Joan's mother later moved back to Hockham, where they bought a house and a petrol station. Joan helped decorate the house and also did some unpaid work at the petrol station. Joan's mother later had a heart attack and Joan spent some 25 years nursing her before she passed away. Henry retired in 1966, when he was 70 years old. Henry sold his home and moved into Rosslyn. In the following years Joan spent time nursing him. She also spent time doing up Rosslyn at her own expense. Joan's husband then lost his job. He was dissuaded from leaving Hockham and seeking farming jobs elsewhere by Henry, but rather took a factory job in Hockham. In the latter years, numerous assurances were made that Joan and her husband would acquire Henry's

⁷⁷ *Southwell v Blackburn* [2014] HLR 47, [2] (Tomlinson LJ); *Rawlings v Chapman* [2015] EWHC 3160, [133] (HHJ David Cooke)

⁷⁸ *Re Basham* [1986] 1 WLR 1498, 1501 (Nugee QC)

property when he died, as exchange for all the work they (and Joan in particular) had done.

On Good Friday 1982 Henry had a stroke and by signs indicated that he wanted to make a formal will. He managed to say that Joan should have the cottage. Four days later he died, but no formal will had been written. On intestacy Henry's estate passed to his brother, Robert. Joan issued a claim to acquire the estate, or what portion the court saw fit. The legal defence was that proprietary estoppel did not apply to promises of future proprietary interests, but only to proprietary interests the claimant already had.

Nugee QC explains that if the claimant has acted to her detriment on an assurance given by the defendant that the claimant has or was to obtain an interest in the defendant's property, then the defendant cannot deal with the property in a way inconsistent with the claimant's belief.⁷⁹ In a doubted statement, he goes on to say that where the promise is that the claimant is to get a proprietary right in the future, this is a species of constructive trust rather than proprietary estoppel.⁸⁰ In later cases it has been confirmed that proprietary estoppel does apply to promises of future interests, and that a constructive trust is simply a possible remedy.

Nugee QC found that Joan and her husband had suffered detriment. He considered the 'cumulative effect' of all of their actions, including not taking paid employment, not moving from Hockham when Joan's husband lost his job, and all the work done on the properties. Part of the defence was that Joan had done all these acts out of familial love, which would negate the idea of detriment. Nugee QC concluded that the acts went beyond what could be expected out of familial love, and indeed, Joan's husband did not have a close relationship with Henry.⁸¹ Joan did what she did in part based on her belief that she would inherit the property; without that belief she may well have obtained paid employment or allowed her husband to move to seek farming jobs outside Hockham.⁸²

Nugee QC dealt with two objections, namely that equity cannot intervene when the promise is for a future right, and that the property has to be identified and fixed, rather

⁷⁹ Ibid, 1503 (Nugee QC)

⁸⁰ Ibid, 1504 (Nugee QC); compared to *Re Cleaver, deceased* [1981] 1 WLR 939, 947 (Nourse J), *Grant v Edwards* [1986] 3 WLR 114

⁸¹ *Re Basham* (n 78), 1505 (Nugee QC)

⁸² Ibid, 1507 (Nugee QC); see also *Smith v Chadwick* (1882) 20 Ch D 27, 44-45 (Jessel MR); (1884) 9 App Cas 187, 190-191 (Earl of Selborne LC); *Greasley v Cooke* [1980] 1 WLR 1306, 1311-1312 (Lord Denning MR)

than fluctuating, which an estate surely is. Previous cases seemingly had suggested that the promise had to be for identified property which the claimant would have an immediate interest in.⁸³ Nugee QC doubted that that was their aim and that a broader approach had to be taken.⁸⁴ Nugee QC confirmed that proprietary estoppel should be held to cover cases where the claimant has been promised a future proprietary interest.⁸⁵ There is an inconsistency with his above statement saying that promises for the future should be seen as a species of constructive trust, but the ratio of the judgment, as accepted in later cases, is that proprietary estoppel encompasses promises for the future. Accepting that the estate is sufficiently clear, Nugee QC concluded that the defendant held the entire estate on constructive trust for Joan.⁸⁶

b. *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8

Mrs Royle died intestate. Her estate was worth a considerable amount of money. The administrator was Arthur Rice and there were 19 beneficiaries. Mr Jennings was a trained bricklayer but was available for odd jobs. In 1970, Mrs Royle employed him as a gardener for her home, Lawn House. He soon started performing other tasks, such as running errands and house maintenance. In the late 1980s, Mrs Royle stopped paying Mr Jennings, but did provide a lump sum towards the purchase price of his house. Mr Jennings continued to perform all these tasks for Mrs Royle, unpaid, until she died. In 1993, there was a burglary at Lawn House, and after that Mrs Royle convinced Mr Jennings to spend almost every night on her sofa. Throughout all this Mr Jennings continued his bricklaying business.

Mrs Royle was described as ‘frugal’.⁸⁷ From the late 1980s, she did not pay Mr Jennings. Mr Jennings had confronted Mrs Royle about payment, and she made an assurance that he would be provided for. Whilst the trial judge could not ascertain the exact words used, the accepted conclusion was that Mr Jennings had reason to believe that he would inherit all or part of Mrs Royle’s estate.⁸⁸

⁸³ *Ramsden v Dyson* (n 36), 170 (Lord Kingsdown); *Inwards v Baker* [1965] 2 QB 29, 27 (Lord Denning MR); *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, 242 (Lord Denning MR)

⁸⁴ *Re Basham* (n 82), 1509 (Nugee QC); see also *Taylor Fashions Ltd* (n 43), 151-152 (Oliver J); *Crabb v Arun DC* [1976] Ch 179

⁸⁵ *Re Basham* (n 78), 1510 (Nugee QC)

⁸⁶ *Ibid*, 1510 (Nugee QC)

⁸⁷ *Jennings v Rice* [2003] 1 P & CR 8, [6] (Aldous LJ)

⁸⁸ *Ibid*, [11] (Aldous LJ)

Mr Jennings's claim against the administrator was for proprietary estoppel. The trial judge found that a proprietary estoppel had been raised. He assessed the value of it to £200,000.⁸⁹ This outcome was accepted by Mr Rice. Mr Jennings appealed on the basis that he thought himself entitled to a greater share, if not all of the estate.

The trial judge made some comments about Mrs Royle's unconscionable behaviour. It was rather remarkable.

"I can now move on to consider the matter in the round and see whether it was unconscionable for Mrs Royle to go back on her assurances. In my judgment, it was. ... Mrs Royle promised Mr Jennings the moon and left him nothing. Mr Gardner [the bank manager] made several attempts to get her to make a will but she chose to die intestate and deliberately disappointed Mr Jennings. That is unconscionable conduct for a person who took the benefit of his services."⁹⁰

It is not clear why Mrs Royle chose to act in this manner; it goes well beyond being frugal. She induced Mr Jennings to keep working for her without payment, saying he would inherit, all the while refusing to write a will. Of course it is equitable to care for the elderly, but, as a relevant psychological factor, Mrs Royle seems to have taken advantage by praying on a person's natural concern for the old, weak and vulnerable. It is clear from the facts that the test has been made out; there has been detrimental reliance on a promise of a future proprietary interest.

The judge concluded, based on an assessment of the services Mr Jennings had provided, that he was only entitled to £200,000. He could not reasonably have charged her more, and this sum was equivalent to nursing home costs.⁹¹ The Court of Appeal concluded that the outcome was correct.⁹² The test is one of proportionality, and that the remedy had to match the detriment and the position that the claimant is in.⁹³ It is a fact-based inquiry, though based on those set principles rather than allowing the trial judge full discretion.⁹⁴

⁸⁹ *Ibid*, [12] (Aldous LJ)

⁹⁰ *Jennings v Rice* (CC, March 20, 2001), HHJ Weeks QC ; quoted in *Jennings v Rice* (n 87), [14] (Aldous LJ)

⁹¹ *Jennings v Rice* (n 87), [15] (Aldous LJ)

⁹² *Ibid*, [38] (Aldous LJ); see also *Gillett v Holt* [2001] Ch 210

⁹³ *Ibid*, [49] (Robert Walker LJ)

⁹⁴ *Ibid*, [43] (Robert Walker LJ)

c. *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752

This was a commercial property dispute, concerning a block of flats. The claimant, James Cobbe, was a property developer. The three defendants were the legal owners of the property, Yeoman's Row Management Ltd; Robert Lisle-Mainwaring (the director-shareholder); and his wife, Zipporah Lisle-Mainwaring (the company secretary). At the start of the trial, Mr Lisle-Mainwaring was removed as a defendant.⁹⁵

Cobbe and Mrs Lisle-Mainwaring were introduced in 2001, with Lisle-Mainwaring believing the property to be suitable for sale to a property developer. A first agreement was reached in 2001. If Cobbe could obtain planning permission to demolish the existing building and construct six new houses, as well as obtaining vacant possession, then the property would be sold to him.⁹⁶ This was purely an oral agreement and came to nothing. A similar agreement was reached in 2002. Cobbe would at his own expense obtain planning permission. Lisle-Mainwaring would obtain vacant possession. If planning permission was granted, the property was to be sold for £12 million, with an overage agreement for any later sale of the property.⁹⁷ This agreement was not put in writing either.

A factual dispute arose over the agreed deadline for Cobbe to obtain planning permission, with Lisle-Mainwaring insisting there had been a strict deadline of 31 December 2003, but with Cobbe believing that was an 'aspirational' but not strict deadline.⁹⁸ After the agreement was reached Cobbe spent time and money on obtaining planning permission, including hiring relevant professionals. Cobbe kept Lisle-Mainwaring informed of his work. Lisle-Mainwaring allegedly reminded Cobbe of the 31 December 2003 "deadline", a reminder Cobbe denies. She was aware that Cobbe kept working on obtaining planning permission after the deadline had passed, but she made no objections. Counsel was retained in February 2004, paid for by Lisle-Mainwaring, to advise on the planning application. Planning permission was granted on 5 April 2004.⁹⁹

⁹⁵ *Cobbe v Yeoman's Row Management Ltd* [2005] EWHC 266, [11] (Etherton J)

⁹⁶ *Ibid*, [19] (Etherton J); Rent Act 1977

⁹⁷ *Ibid*, [21] (Etherton J)

⁹⁸ *Ibid*, [21] (Etherton J)

⁹⁹ *Ibid*, [32] (Etherton J)

Following the planning permission meeting, Lisle-Mainwaring changed her tune. She now insisted that the original offer had lapsed since they had passed the December 2003 deadline. She now wanted to revise the offer, to make more money off it. Lisle-Mainwaring posits that a new agreement was reached; Cobbe insists he only said he would consider the commercial viability of her offer. At the end of May, Cobbe rejected the new proposal.¹⁰⁰

This led to various disagreements between the parties. There was an offer from the management company to pay for some of Cobbe's expenses with the planning permission. Cobbe brought a claim for an interest in the property (or the proceeds of its sale) through proprietary estoppel, or alternatively for restitution for his expenses.¹⁰¹ The final version of the claim seeks equitable relief by way of a constructive trust or proprietary estoppel.¹⁰²

Cobbe's argument was that the requirements for proprietary estoppel were made out. He had detrimentally relied on a promise that he would obtain title to the property. The gist of the defence was that the autumn 2002 agreement was not final and binding, but merely part of ongoing negotiations; it was subject to contract, which never materialised.¹⁰³ Crucial terms were missing, such as any deadline by which to achieve vacant possession.¹⁰⁴ The defence also made a general commercial "floodgate" argument, saying it would be impractical to grant relief for expenses incurred in the expectation of a future agreement.¹⁰⁵

The judge found that the facts gave rise to proprietary estoppel.¹⁰⁶ Arguably this was appropriate. It is not clear from the evidence that the December 2003 deadline was strict, and Lisle-Mainwaring did not indicate that Cobbe's work after that was at his own risk. Her participation in the process in early 2004 indicates that she did not regard December 2003 as a strict deadline. If she had, she should have told Cobbe and allowed the two sides to come to a new agreement. Given her encouragement and failure to communicate that she believed the deadline had passed, Lisle-Mainwaring

¹⁰⁰ Ibid, [36] (Etherton J)

¹⁰¹ Ibid, [8]-[9] (Etherton J); there was no application for specific performance for the sale of the land, since agreements for the sale of land must be in writing, Law of Property (Miscellaneous Provisions) Act 1989, s. 2(1).

¹⁰² Ibid, [41] (Etherton J)

¹⁰³ Ibid, [56] (Etherton J)

¹⁰⁴ Ibid, [57] (Etherton J); generally, *Walford v Miles* [1992] 2 AC 128

¹⁰⁵ Ibid, [60] (Etherton J)

¹⁰⁶ Ibid, [85] (Etherton J)

‘took an unconscionable advantage’ of Cobbe.¹⁰⁷ It was not open to her to renegotiate the deal in the spring. That was sly commercial opportunism. Cobbe was awarded a 50% share in the increased value of the property, secured by a lien.¹⁰⁸

The judgment was upheld in the Court of Appeal.¹⁰⁹ The Court discussed the difficult task of squaring legal certainty (especially with property transactions) and the need to ensure a fair and just outcome. Mummery LJ made an important point relating to equity being broadly defendant-focused. The management company, appealing, argued that Cobbe could not raise equity because he had not performed his part of the bargain (such as paying the purchase price). Mummery LJ said this is of less importance since the doctrine focuses on the unconscionable conduct of the defendant.¹¹⁰ Mummery LJ made it clear that Lisle-Mainwaring had acted unconscionably in allowing Cobbe to keep working after December 2003, if it was, as she argued, her position that there had been a strict December 2003 deadline.¹¹¹

The management company appealed to the House of Lords. The House of Lords decision caused a stir.¹¹² The House of Lords allowed the appeal, saying that the requirements for proprietary estoppel had not been made out. A concern was the impact the judgment would have on commercial negotiations. Their Lordships posited that certainty was of particular importance in property transactions.¹¹³ Lord Scott’s conclusion was that there was no promise which Lisle-Mainwaring could be estopped from denying.¹¹⁴ The lower courts had granted relief on the basis of unconscionability, but in Lord Scott’s view, failed to apply to ingredients of the test for proprietary estoppel.¹¹⁵ The argument was whether the agreement was “subject to contract”, because if expressly was so, then proprietary estoppel would not arise. This proposition was accepted in the lower courts, but they also held that the agreement

¹⁰⁷ Ibid, [123] (Etherton J)

¹⁰⁸ Ibid, [170] (Etherton J)

¹⁰⁹ *Cobbe v Yeoman’s Row Management Ltd* [2006] 1 WLR 2964, [95] (Mummery LJ); [120] (Dyson LJ)

¹¹⁰ Ibid, [46] (Mummery LJ)

¹¹¹ Ibid, [61] (Mummery LJ)

¹¹² Consider, Ben McFarlane and Andrew Robertson, ‘Apocalypse Averted: Proprietary Estoppel in the House of Lords’ (2009) 125 LQR 535; Lord Neuberger, ‘The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity’ (2009) 68 CLJ 537; Martin Dixon, ‘Confining and Defining Proprietary Estoppel: The Role of Unconscionability’ (2010) 30 Legal Studies 408; Penelope Reed, ‘Proprietary estoppel: the law after Cobbe and Thorner and its impact on inheritance tax’ [2010] Private Client Business 49; see also Simon Gardner, ‘The Remedial Discretion in Proprietary Estoppel’ (1999) 115 LQR 438

¹¹³ *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, [46] (Lord Walker)

¹¹⁴ Ibid, [15] (Lord Scott)

¹¹⁵ Ibid, [16] (Lord Scott)

was not expressly “subject to contract” but an agreement that, at least Cobbe, believed would be honoured.¹¹⁶ As their Lordships saw it, the issue was that Cobbe was an experienced property developer who knew (or should have known) that oral agreements over sale of land were unenforceable.¹¹⁷ There is no legal promise for Lisle-Mainwaring to go back on. Whilst Lisle-Mainwaring had acted unconscionably, this in itself is not sufficient to make out a proprietary claim.¹¹⁸ In the context, a claim for quantum meruit for Cobbe’s expenses was awarded.¹¹⁹

d. *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776

A year later the House of Lords heard another proprietary estoppel case, *Thorner v Major*. It allowed the House to consider the issues afresh in a different context.¹²⁰

This was a family dispute. There were two cousins, Jimmy and Peter. Jimmy had several children, including David Thorner, the claimant. Peter had six siblings but no children. He died intestate and three of his siblings became administrators of the estate and the defendants to the claim.

The dispute was about Steart Farm. Peter wanted David to inherit the farm. In the absence of a will, David could only obtain the farm through proprietary estoppel. There was broad agreement on the requirements.¹²¹ Randall QC held that the promise or assurance had to be looked at broadly, including words spoken or written as well as by conduct; there does not have to be an express, clearly stated promise.¹²²

The claim was that Peter had made repeated assurances that David would inherit his estate, or at least the farm, and that David had acted to his detriment in reliance on this assurance, making it unconscionable for the estate to deny him legal title. The estate denied that the ingredients for proprietary estoppel had been made out, or if they had,

¹¹⁶ *Yeoman’s Row Management Ltd* (n 95), [123] (Eherton J); *Yeoman’s Row Management Ltd* (n 113), [57] (Mummery LJ); *Yeoman’s Row Management Ltd* (n 113), [26] (Lord Scott)

¹¹⁷ *Yeoman’s Row Management Ltd* (n 113), [27] (Lord Scott)

¹¹⁸ *Ibid*, [37] (Lord Scott)

¹¹⁹ *Ibid*, [42] (Lord Scott)

¹²⁰ Yet another year later, the Privy Council heard a proprietary estoppel case, on appeal from St Lucia; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988; consider, in addition to the articles cited above, Martin Dixon, ‘Proprietary Estoppel: A Return to Principle?’ [2009] Conveyancer and Property Lawyer 260; Nicholas Hopkins, ‘The Relevance of Context in Property Law: A Case for Judicial Restraint?’ (2011) 31 Legal Studies 175; Brian Sloan, ‘Estop Me If You Think You’ve Heard It’ (2009) 68 CLJ 518

¹²¹ *Thorner v Curtis* [2007] EWHC 2422, [6] (Randall QC); *Uglove v Uglove* [2004] EWCA Civ 987, [9] (Mummery LJ)

¹²² *Thorner v Curtis* (n 121), [19] (Randall QC)

that it would be disproportionate for David to obtain the farm.¹²³ A crucial argument was that the promise or assurance was not sufficiently clear.¹²⁴

Peter spent his whole life working on the farm. He was described as a “man of few words”, meaning he was both a private person but also had literacy problems and had difficulties reading and writing.¹²⁵ The evidence describes that he ‘was not given to direct talking’ and this indirectness is important in assessing whether a promise or assurance was made.¹²⁶

Jimmy, and his son David, started helping out on Steart Farm. David continued to help out on his own after his father stopped coming. David did a lot of work, ranging from practical work, as well as administrative work. He worked up to 18 hours per day, seven days a week.¹²⁷ David was ‘essential’ to running the farm and that the farm’s profitability was attributable to David’s work.¹²⁸ The crucial fact is that David was never paid by Peter, and lived off “pocket money” that David got from his parents.¹²⁹

David hoped to inherit Steart Farm, based on various suggestions from Peter.¹³⁰ During the late 1980s, David explored other business opportunities. In 1990, Peter handed David documents relating to a life insurance policy, with Peter explaining “that’s for my death duties”.¹³¹ It raised the possibility that David would inherit. Given Peter’s taciturn ways, the judge found that this gesture was intended to indicate that David would inherit. It was perhaps also done to dissuade David from exploring other opportunities. Further discouragements took place over the following years.¹³² In 1997 Peter wrote a will leaving the farm to David, with various pecuniary legacies to other people. About a year later Peter had a falling out with one of the legatees. His solicitors sent him the will and it was presumed destroyed. Despite being advised that his estate would pass to his siblings on his death, Peter did not write a new will.¹³³ An important event took place in the summer of 2001, when Jimmy, in the presence of a friend,

¹²³ Ibid, [2]-[3] (Randall QC)

¹²⁴ Ibid, [4] (Randall QC)

¹²⁵ Ibid, [31] (Randall QC)

¹²⁶ Ibid, [32] (Randall QC)

¹²⁷ Ibid, [64] (Randall QC)

¹²⁸ Ibid, [66] (Randall QC)

¹²⁹ Ibid, [68] (Randall QC)

¹³⁰ Ibid, [86] (Randall QC)

¹³¹ Ibid, [94] (Randall QC)

¹³² Ibid, [98] (Randall QC)

¹³³ Ibid, [102] (Randall QC)

stated that David would take over Steart Farm and Peter nodded in response.¹³⁴ Peter made further indications that David would take over in the final years before his death.¹³⁵

The assurances made by Peter were objectively vague but clearly understood by David and clear enough given Peter's indirectness and general lack of words.¹³⁶ It is clear that David suffered detriment, by working for several decades without pay. The ultimate question was, looked at in the round, whether it would be unconscionable if David did not inherit. The judge found that the words and conduct by Peter clearly affected his conscience, given David's detrimental reliance, and thus an estoppel was raised.¹³⁷ The final award, satisfying the minimum equity, was for David to take the farm and its business assets, but not Peter's personal accounts.¹³⁸

The estate appealed arguing that the judge was wrong to find that an estoppel had been raised; a particular contention was that the assurance had not been sufficiently clear.¹³⁹ The Court of Appeal said that the assurance had to be 'clear and unequivocal' and that the claimant must show that the defendant intended that his assurance would be relied upon.¹⁴⁰ One fact which arguably undermined the claim was that David had started working on the farm long before Peter made any indications that David might inherit.¹⁴¹ As such, the detriment cannot strictly be said to have come from a reliance on the promise. The Court allowed the appeal, saying that the requirements for proprietary estoppel, notably the need for a clear assurance, had not been made out.¹⁴²

David successfully appealed to the House of Lords. The issue was whether David subjectively understood Peter's assurances, given David's understanding of Peter and the circumstances. The assurance has to be 'clear and unequivocal', but on a subjective basis, looking at the facts and what the parties reasonably understood.¹⁴³ It was not necessary to show that Peter knew or foresaw David's specific acts of reliance.¹⁴⁴ David 'reasonably relied' on the 1990 assurance; this was sufficient to raise the equity,

¹³⁴ Ibid, [109] (Randall QC)

¹³⁵ Ibid, [111] (Randall QC)

¹³⁶ Ibid, [127] (Randall QC)

¹³⁷ Ibid, [134] (Randall QC)

¹³⁸ Ibid, [143] (Randall QC)

¹³⁹ *Thorner v Major* [2008] EWCA Civ 732, [28] (Lloyd LJ)

¹⁴⁰ Ibid, [54] (Lloyd LJ)

¹⁴¹ Ibid, [56] (Lloyd LJ)

¹⁴² Ibid, [58] (Lloyd LJ); [75] (Lloyd LJ)

¹⁴³ *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776, [26] (Lord Rodger); [56] (Lord Walker); [85] (Lord Neuberger)

¹⁴⁴ Ibid, [5] (Lord Hoffmann)

despite the need for ‘later events to confirm that it was reasonable for him to have done so’.¹⁴⁵ The order of the trial judge was restored. Subjectively, the assurances were clear enough; David knew he would inherit the farm. This makes it unconscionable for the estate to refuse to hand title to David.

e. *Southwell v Blackburn* [2014] EWCA Civ 1347; [2014] HLR 47

This was a dispute between two partners over ownership of their private home. Catherine Blackburn had lived in a rented house. She invested between £15,000 and £20,000 in refurbishing that house. In 2000, she started a relationship with David Southwell. In 2002, David sold his house and they purchased a new house. The house was in David’s sole name, as was the mortgage. He spent £140,000 from selling his previous house and a further £100,000 through a mortgage. Catherine contributed around £5,000 towards the new house.

Catherine argued that there was a common intention to share ownership, which David denied. The trial judge found that David was ‘guarded’ and ‘reserved’ and was unlikely to have made any such promise; he knew he was purchasing the house for himself.¹⁴⁶ There were major factual disputes about what assurances David made regarding Catherine’s entitlement to have a home. Her claim was that he promised a house for life. David argued he only promised a home for the duration of the relationship. The judge found that David had made such promises, in order to get Catherine to give up her tenancy.¹⁴⁷ In 2009, the relationship came to an end. The trial judge found a proprietary estoppel, on the basis of those assurances made by David and the detriment suffered by Catherine in giving up her tenancy (in a house which she had refurbished) and investing some money in the new house. The judge awarded damages in the sum of £28,200, based on the £15,000 Catherine spent on her tenancy, the £5,000 spent on the house, and an inflation-based uplift in value.

David appealed. The argument was, particularly, that the value awarded was too high in that the judge had failed to take into account Catherine living rent-free for a number of years. The appeal was dismissed. The assurance made by David was that

¹⁴⁵ Ibid, [8] (Lord Hoffmann)

¹⁴⁶ *Blackburn v Southwell* (CC, 13/12/2013), [13] (HHJ Peace-Higgins QC); cited in *Southwell v Blackburn* [2014] EWCA Civ 1347; [2014] HLR 47

¹⁴⁷ Ibid, [15] (HHJ Peace-Higgins QC); cited in *Southwell v Blackburn* [2014] HLR 47

he was providing Catherine with a home for life.¹⁴⁸ This is what Catherine understood and what she relied upon. The Court was clear in that the various benefits that both parties got from each other in essence cancelled the other out.¹⁴⁹ Thus the trial judge was correct to only look at the financial losses Catherine suffered when moving in reliance on the assurance of a life-time home, namely the £15,000 on the tenancy and the £5,000 on the new house.¹⁵⁰

f. Summary on proprietary estoppel

Tomlinson LJ said in *Southwell v Blackburn* that ‘running through the evaluation of all of the elements is the requirement of unconscionability, such that the identification of promise or assurance, reliance and detriment might not of itself be sufficient to give rise to the equity’.¹⁵¹ Conscience is at the heart of estoppel.

The Court concluded that the unconscionability is the detrimental reliance, which makes a promise irrevocable.¹⁵² This is an important finding, and detriment should be seen as an unconscionability factor. Detriment comes in many forms, including a change of position, and financial loss. Detriment can be assessed by exploring what, if any, alternative financial opportunities the claimant gave up in reliance on the assurance.¹⁵³ Cases such as *Re Basham* suggest that detriment is something that goes beyond what can reasonably be expected from a relationship, such as acts done out of familial love. This is an important psychological factor and many cases clearly suggest that it can be difficult to say no in family relationships.

The context, again, is very important, and arguable should be an unconscionability factor in its own right. Broadly speaking, cases can arise in private, family contexts or in arms-length, commercial contexts.¹⁵⁴ Whether the public conscience is engaged varies between the two situations. The courts should be more hesitant to intervene in commercial relationships.¹⁵⁵ An important unconscionability factor is equality. In a commercial relationship there is a greater equality between the parties, who are all

¹⁴⁸ *Southwell v Blackburn* [2014] HLR 47, [9] (Tomlinson LJ)

¹⁴⁹ *Ibid*, [15] (Tomlinson LJ)

¹⁵⁰ *Ibid*, [18] (Tomlinson LJ)

¹⁵¹ *Ibid*, [2] (Tomlinson LJ)

¹⁵² *Ibid*, [20] (Tomlinson LJ); *Seward v Seward* (unreported, 20 June 2014), [70] (Monty QC)

¹⁵³ *Davies v Davies* [2014] EWCA Civ 568, [51] (Floyd LJ)

¹⁵⁴ *Yeoman’s Row Management Ltd* (n 113), [68] (Lord Walker)

¹⁵⁵ *Achom v Lalic* [2014] EWHC 1888, [95] (Newey J)

deemed to have experience, have no emotional involvement, and have the same opportunities to access legal and financial advice. The same cannot be said in private contexts, where there generally is little legal awareness, there are emotional factors present, and it is easier for an experienced party to dominate an inexperienced one.

The reliance has to be reasonable.¹⁵⁶ Whether the reliance was reasonable requires a careful scrutiny of the facts and is dependent on the context. Finally, the remedy itself is important. The aim of proprietary estoppel is to ‘avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that’.¹⁵⁷ As such, a relevant unconscionability indicium is the reasonable expectation. The courts will not provide a remedy greater than what conscience demands. The courts have correctly looked at the financial issues rather than getting bogged down in addressing the minutiae of each party’s behaviour, especially in family disputes which are always emotionally tricky.¹⁵⁸ A holistic look at the reliance and detriment suffered, compared to what expectations the claimant might have had, and possibly the need to benefit other parties, will provide the conscionable result.

Conclusion

This chapter has discussed three distinct types of estoppel. The indicia of unconscionability are closely related to the specific tests. At their heart, the tests look for a detrimental reliance on a promise. If there has been detriment (broadly construed) as a result of a reasonable reliance on the promise, it becomes unconscionable to go back on that promise.

The cases indicate that the courts do draw a divide between private and commercial contexts. In commercial dealings there is an expectation that the parties have access to expert advice. In *Cobbe*, for instance, the House of Lords found it incredulous that an experienced property developer did not take legal advice or insist on formally executed contracts. Conversely, the courts do not have such expectations in private or family disputes.

¹⁵⁶ *Re Frost* [2009] EWHC 2276, [9] (HHJ Andrews QC, sitting as a deputy judge)

¹⁵⁷ *Jennings v Rice* (n 87), [56] (Robert Walker LJ); *Sidhu v Van Dyke* [2014] HCA 19, [85]

¹⁵⁸ *Creasey v Sole* [2013] EWHC 1410, [111] (Morgan J); *Davies v Davies* (n 153), [44], [53] (Floyd LJ)

Various psychological factors arise when considering whether reliance has been reasonable. As explored in chapter seven and seen in the previous chapter, familial love can quickly cause problems, and can be manipulated. *Thorner v Major* and *Davies v Davies* (not considered) are two examples from farming communities.¹⁵⁹ It seems that the claimant was, in one way or another, induced by the defendant not to take up or continue employment elsewhere but that stay in the family business. Such family requests, even if subtly expressed, can be difficult to refuse. It makes it easier to demonstrate reasonable reliance. As said, it is less easy to understand why a commercial property developer relied on a promise by another commercial party without asking for a contract. The contexts lead to different expectations from the parties.

¹⁵⁹ *Thorner v Major* (n 143); *Davies v Davies* (n 153)

Chapter 10

Unconscionability, Fiduciaries, and the Express Trust

This chapter will explore the unconscionability indicia which arises out of the law on fiduciaries. Again, the chapter will start with a legal overview and a summary of the indicia. The chapter will then look at case law relating to express trustees, followed by case law on dishonest assistance to a breach of fiduciary duty and unconscionable receipt of misappropriated property following a breach of fiduciary duty.

Part 1: Fiduciary duties and unconscionability

This section will provide an outline of the fiduciary duties and what unconscionability indicia are present in the law on fiduciaries and third-party liability for breach of fiduciary duty.

Defining a fiduciary

There is no set definition of a fiduciary. The term can be traced to the Latin “fides”, meaning “faith”, in the sense of having ‘faith’ or ‘confidence in someone’.¹ The key characteristics can be distilled from the case law and related academic commentary.²

The two core duties are posited in *Bray v Ford*.³ The case was about libel.⁴ However, Lord Herschell touched upon fiduciary obligations, stating that a fiduciary cannot make an unauthorised profit or put himself in a position where his personal interests can conflict with his fiduciary interests.⁵ The duties are necessary, as noted in chapter two, not because of some ‘principles of morality’, but because ‘human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary

¹ Alistair Hudson, *Equity and Trusts*, (8th edn, Routledge, 2015), 687

² Consider Irit Samet, ‘Guarding the Fiduciary’s Conscience – A Justification of a Stringent Profit-stripping Rule’ (2008) 28 OJLS 763-781; Matthew Harding, ‘Trust and Fiduciary Law’ (2013) 33 OJLS 81-102; Dyson Heydon, ‘Modern Fiduciary Liability: The Sick Man of Equity?’ (2014) 20 *Trusts & Trustees* 1006-1022; Stephen Galoob, ‘Intentions, Compliance and Fiduciary Obligations’ (2014) 20 *Legal Theory* 106-132; Lionel Smith, ‘Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on behalf of Another’ (2014) 130 *LQR* 608-634

³ *Bray v Ford* [1896] AC 44

⁴ *Ibid*, 48 (Lord Halsbury LC)

⁵ *Ibid*, 51 (Lord Herschell)

position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect'.⁶ The duty is one of singular focus on the interests of the beneficiary.

A key case is *Keech v Sandford*.⁷ A trustee managed a trust for a child beneficiary, which included a lease. When the lease expired, the landlord refused to renew it, seeing as it was for a child. The trustee, no doubt in good faith, decided to take the lease in his own name during the child's infancy. This was held to have been in breach of the fiduciary duties.⁸ The lease was assigned to the beneficiary and the trustee had to account for any profits he might have made.⁹

The fiduciary duties are mandatory, and (at least in theory) cannot be contracted out of or circumvented.¹⁰ The fiduciary must act 'in good faith' in the best interest of his beneficiary; also expressed as a duty of 'loyalty'.¹¹ This is a wide duty and imposes a 'subjective' test of good faith; it is for the fiduciary to determine whether his actions are or are not in the best interest of his beneficiaries.¹² Other fiduciary duties, such as the no conflict rule, are assessed objectively.¹³ As such, whether the test for liability is objective or subjective will depend on what obligation is alleged to have been breached.

The leading case remains *Mothew*.¹⁴ The claim for breach of trust was dismissed.¹⁵ Millett LJ outlined the key characteristics of the fiduciary office. Fiduciaries will inevitably hold other duties particular to their office, be it trustees, agents, or company directors. The Court stressed that in this respect 'it is obvious that not every breach of

⁶ Ibid, 51 (Lord Herschell)

⁷ *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223

⁸ Ibid, 223 (Lord King LC)

⁹ Richard Hedlund, 'Secret Commissions and Constructive Trusts: Yet Again!' [2013] JBL 747, 749-750

¹⁰ *Fassihi v Item Software (UK) Ltd* [2004] EWCA Civ 1244; [2004] BCC 994, [35] (Arden LJ)

¹¹ Ibid, [41] (Arden LJ); see also Rebecca Lee, 'Rethinking the Content of the Fiduciary Obligation' [2009] Conveyancer and Property Lawyer 236-253; Companies Act 2006, s. 172; John Lowry, 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure' (2009) 68 CLJ 607-622

¹² *GHLM Trading Ltd v Maroo* [2012] EWHC 61, [194] (Newey J); *Regentcrest plc v Cohen* [2001] 2 BCLC 80, [120] (Jonathan Parker J)

¹³ *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134, 144 (Lord Russell); *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 2692, [2014] Bus LR 1110, [72] (Stephen Jourdan QC); *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399, [67] (Norris J); there is no liability for potential breach of conflict if a trustee has been appointed to that position, *Barnsley v Noble* [2014] EWHC 2657, [297] (Nugee J)

¹⁴ *Bristol & West Building Society v Mothew* [1998] Ch 1

¹⁵ Ibid, 24 (Millett LJ)

duty by a fiduciary is a breach of fiduciary duty'.¹⁶ To argue breach of fiduciary duty one has to identify the actual fiduciary duty. Millett LJ stressed the centrality of 'loyalty'; and the four tenets of loyalty was acting in good faith, not to make an unauthorised profit, not to be in a conflict of interest and not to act for the benefit of any third-party without informed consent.¹⁷ Breach of these duties involves 'disloyalty' and 'infidelity', but showing mere 'incompetence' is insufficient to prove a breach; the act must be 'intentional' (and some 'unconscious omission' is not a breach), but there is no requirement to provide dishonesty.¹⁸ Millett LJ's assessment of fiduciaries has been upheld in later cases.¹⁹

Building on this definition of fiduciaries, this chapter will look specifically at trustees, and the two claims of dishonest assistance and knowing receipt, which are accessory liabilities to a breach of fiduciary duty. The law on each will be briefly outlined at the start of each section.

Unconscionability indicia

The various claims raise a number of unconscionability indicia.

Context continues to have a role, but not as pronounced as for undue influence, unconscionable bargains and estoppel. Fiduciaries and express trusts are today commonly used in both private and commercial contexts. It is posited that the nature of the relationship is an unconscionability indicium in the first category, and the fiduciary relationship is undoubtedly the most distinctive of them all, and is straddles family relationships through to commercial relationships.

In the second category a number of indicia are identified. The starting point is the relative balance of power between the parties. It is obvious within a fiduciary relationship that the balance is heavily in favour of the fiduciary, especially in trusts where the fiduciary has legal title to the trust fund. Fiduciaries, especially professional fiduciaries, will also be expected to have access to specialist advice, which the law

¹⁶ *Ibid*, 16 (Millett LJ); *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362 (Southin J); *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 28 (La Forest J)

¹⁷ *Mothew* (n 14), 18 (Millett LJ)

¹⁸ *Ibid*, 18-19 (Millett LJ)

¹⁹ *Morkot v Watson & Brown Solicitors* [2014] EWHC 3439, [2015] PNLR 9, [54] (HHJ Behrens); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administration)* [2011] EWCA Civ 347, [2012] Ch 453, [35] (Lord Neuberger); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, [5] (Lord Neuberger)

does not expect of the beneficiaries, who are thus in a correspondingly weaker position.

A further key indicium in the second category is knowledge, which was discussed in chapter seven. Trustees must have complete knowledge of their trusts, and accessory liability turns specifically on what knowledge the third parties had of the primary breach of duty. Loyalty is another indicium, which, like knowledge, has a multifaceted definition. This includes making unauthorised profits, which, in accordance with good conscience, must be returned to the beneficiary.²⁰ To avoid disloyalty, such as acting in a conflict of interest or making an unauthorised profit, the courts have highlighted the need for disclosure, linking it to conscience. In *Imageview Management Ltd*, Jacob LJ said that all the agent ‘has to do to avoid being in breach of duty is to make full disclosure. Any agent who is doubtful about his position would do well to do just that - the mere fact that he has doubts will generally be a message from his conscience’.²¹ A further indicium is recognising the importance of the written agreement, such as a trust deed. It is axiomatic that it is unconscionable to act contrary to what is stated in the written agreement, if there is one, or contrary to the default statutory rules.²²

None of the cases discussed in this chapter raise issues around acquiescence or laches, but of course those principles would apply here if a breach was accepted or if there was a delay in bringing a claim.

Part 2: Unconscionability and express trustees

In its most basic form, a trust involves one person (the trustee) holding property on behalf of another person (the beneficiary).²³ The court has inherent jurisdiction to manage trusts.²⁴ The trustee will be the legal owner of the property, but his rights over the property are curtailed in favour of the beneficiary’s equitable interest. The common law did not accommodate such a position; a person either has legal title or not. Equity came to recognise the curtailment of legal proprietary rights on the basis that the

²⁰ *FHR European Ventures* (n 19), [46] (Lord Neuberger)

²¹ *Imageview Management Ltd v Jack* [2009] Bus LR 1034, [7] (Jacob LJ)

²² Consider the Trustee Acts 1925, 2000

²³ *Re MF Global UK Ltd (in special administration) (No 3)* [2013] 1 WLR 3874, [8] (David Richards J); *Re Lehman Brothers International (Europe) (in administration)* [2012] UKSC 6; [2012] 3 All ER 1

²⁴ *MF Global UK* (n 23), [26] (David Richards J); *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, [36] (Lord Walker); *Finers v Miro* [1991] 1 WLR 35, 45 (Balcombe LJ)

trustee's conscience was affected.²⁵ Chancery does not intrude on legal title but will enforce a conscience-based obligation for the trustee to exercise his legal title in a particular way. McFarlane has argued that beneficiaries have no proprietary rights, though others argue that beneficiaries do have a distinct proprietary entitlement.²⁶ The beneficiary has a personal claim in equity to regulate and reproach the trustee's conscience. This section will explore a number of cases dealing with a trustee's conscience. A trustee acting in breach of trust, as conventionally understood, is engaging in unconscionable behaviour. It is a breach of the trust deed or the default statutory rules.

a. *Burgess v Wheate* (1759) 1 Eden 177; 28 ER 652

Burgess v Wheate is 'pivotal' in the development of trust law in its 'emphasising that the trust is an institution based on the conscience of the trustee'.²⁷ The outcome is dependent on the legal and social conditions of pre-modern England, but the case reveals much about the role of conscience in trust law.

The factual background is long and complicated.²⁸ Two sisters were tenants-in-common (with a half-share each) of a manor and land. There was also a mill, which had been leased out on two successive 500-year leases to John Chandler as security for a mortgage. One sister, Ann, died without issue and her half-interest in the manor passed to John's niece, Elizabeth. The other sister, Mary, also died without issue. Elizabeth married Nicholas, but they died without issue. As part of dealing with the mortgage, Mary released her half-share in the equity of redemption to John Chandler. Elizabeth and Nicholas made a similar agreement, but stating that the whole of the

²⁵ *Ayliffe v Murray* (1740) 2 Atkyns 58, 60; 26 ER 433, 434 (Lord Keeper Henley); *Patel v Shaw* [2005] EWCA Civ 157, [33] (Mummery LJ); consider however Chantal Stebbings, 'Benefits and Barriers: The Making of Victorian Legal History' in Anthony Musson and Chantal Stebbings, *Making Legal History: Approaches and Methodologies* (CUP, 2012), 82

²⁶ Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008), part B4.4; see also Peter Jaffey, 'Explaining the Trust' (2015) 131 LQR 377-401; Robert Stevens, 'When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?' (2012) 92 Boston University Law Review 919, 922-923; Daniel Clarry, 'Fiduciary ownership and trusts in a comparative perspective' (2014) 63 International and Comparative Law Quarterly 901, 928; Frederic Maitland, *Equity also The Forms of Action at Common Law* (AH Chaytor and WJ Whittaker (eds), CUP, 1910), 17; consider Richard Nolan, 'Equitable Property' (2006) 122 LQR 232, 236-237

²⁷ Paul Matthews, '*Burgess v Wheate* (1759)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012), 144

²⁸ *Ibid*, 115-155

mill should be conveyed to them on the payment of £500. They did pay but the mill was never transferred to them.

Elizabeth and Nicholas settled the manor and land on trust in 1718. They had a life interest and the remainder to pass to their heirs or assigns. Elizabeth died in 1738 without children and without making an assignment. Sir Francis Page, the trustee, took physical possession of the manor and the lands. Elizabeth had no heirs on her father's side, who would be the only ones who could take under a trust. She did, however, have an heir on her mother's side, Richard Burgess. Burgess brought a claim against Page, arguing that Burgess was the rightful owner. During the proceedings Page died and the claim was continued against his representative, Frances Wheate.

The issue was whether an heir on the mother's side could inherit in common law. A maternal heir could only inherit from a person who had "purchased" the land (including having it conveyed to them without consideration) but not from a person who had inherited the land.²⁹ Burgess' argument was that, whilst Elizabeth had inherited the land (thus excluding him) she had settled the land on trust in 1718. Without issue and without having appointed a beneficiary, she was entitled to call on the land. If she had called on the land, she would have taken it as a purchaser. Because equity sees as done that which ought to be done, Burgess argued that Elizabeth should be seen as a purchaser, allowing him to inherit.

This argument was rejected. Sir Thomas Clarke MR, advising the Lord Keeper, posited a clear difference between what "ought" to be done and what "might" have been done.³⁰ The situation with the mill was different. Elizabeth had made a payment for title to the mill but it had not been transferred to her. With a valid contract, based on consideration, equity did see that conveyance as having been done. Elizabeth was the purchaser and thus Burgess could inherit the mill.³¹ Lord Keeper Henley, in giving judgment, concurred.³²

The bulk of the legal argument was presented by the Attorney-General on behalf of the Crown. There is no need to consider the legal arguments in detail, since the law has long since changed. The Crown argued that it took the land under the doctrine of escheat, on the basis that there was no legal heir and that the trustee could not be

²⁹ Ibid, 132

³⁰ *Burgess v Wheate* (1759) 1 Eden 177, 186; 28 ER 652, 656 (Sir Thomas Clarke MR)

³¹ Ibid, 656 (Sir Thomas Clarke MR)

³² Ibid, 682 (Henley LK)

permitted to take the land.³³ Escheat originated in feudal times, which held that land reverted to the superior lord if a tenant died without heirs. Ultimately, of course, the Crown is superior lord. Escheat on intestacy was abolished in the 1920s and was overtaken by bona vacantia.³⁴ The Crown's argument was dismissed, on the basis that the trustee currently was the tenant (with legal title) and that the Crown could not claim escheat when there was a tenant.³⁵

Burgess' claim for inheritance as a maternal heir was dismissed. The Crown's claim for escheat was dismissed. What did that mean for the trustee? The judgments do not say. Matthews writes that the outcome was 'all about the *inability of the claimants to take the land away from him*'.³⁶ This is analysed on the basis of conscience.³⁷ The trustee has legal title to land but the arrangements under the trust affects his conscience and limits his ability to freely deal with the property. If there are no more beneficiaries, the trustee has legal title but no one to affect his conscience. *Burgess v Wheate* 'did not give the trustee or his representative a beneficial title', nor could anyone take the land away from him.³⁸ It is a peculiar situation but at the same time the logical outcome. If there are no beneficiaries the trust dissolves (arguably a settlor could claim a resulting trust, if the settlor was alive). The Crown's claim for escheat on intestacy would become successful by later statutory changes.³⁹

The unconscionability indicium is that a trustee cannot deal with the property other than for the benefit of the beneficiaries. This is dependent on there being any beneficiaries. If there are none, the trustee's conscience cannot be affected. Today that the Crown stands as an ultimate beneficiary through bona vacantia, meaning the trustee's conscience will be affected to the end.⁴⁰ However, the fundamental principle

³³ Matthews (n 27), 136

³⁴ Law of Property Act 1922, s. 148; Administration of Estates Act 1925, ss. 45-46; Inheritance (Provision for Family and Dependents) Act 1975, s. 24; the doctrine of escheat remains applicable in other circumstances, see e.g. *Scmla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793, 799 (Stanley Burton QC)

³⁵ *Burgess v Wheate* (n 29), 678 (Henley LK); consider also *Attorney-General v Sir George Sands* (1679) Hardres 488, 496; 145 ER 561, 566 (Hale CB)

³⁶ Matthews (n 27), 144

³⁷ See also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705 (Lord Browne-Wilkinson)

³⁸ Matthews (n 27), 144

³⁹ Intestate Estates Act 1884, s. 4; Administration of Estates Act 1925, s. 46

⁴⁰ Consider also the Military Lands Act 1892, s. 8; *Re Edi's Declaration of Trust* [1972] 1 WLR 1135, 1151 (Goulding J)

remains, the trustee is the legal owner and his conscience is only affected for as long as there is a beneficiary.⁴¹

b. *Re Benjamin* [1902] 1 Ch 723

David Benjamin made a will in 1891. It said the residue of his estate would go in equal shares to all his children. David died in 1893. He had 13 children. Twelve of those were present and accounted for. The dispute related to the thirteenth, Philip.

In August 1892, Philip owed money to his employers. He went on holiday to France with a friend. On 1 September 1892, he got a telegram from his employers asking him to return to London (the telegram made no mention of the money owed). Philip boarded a train in Aix-la-Chapelle. He was never heard from again. At the end of September, David amended his will to state that Philip was entitled to £30,000 if he survived David.

Later, one of Philip's brothers was given letters of administration over his estate, with the Probate Division declaring that Philip died on or since 1 September 1892. Later, the trustees of David's will brought a claim for the Court to determine what they should do with Philip's share of David's estate. The Court said that Philip was to be presumed dead from the 1st September 1892.⁴² The Court issued an order, now known as a Benjamin-order, declaring that the trustees were at liberty to distribute Philip's share to the other beneficiaries as if Philip had predeceased the testator without marriage or issue, but without formally declaring Philip dead.⁴³ The reason Philip was not declared dead was to allow his administrators to be able to present new evidence of his death at a later stage but at the same time shielding the trustees from any liability.⁴⁴

Again, the conscience of the trustee is only affected in relation to known beneficiaries. If the beneficiaries are dead or missing, the trustee's conscience cannot be affected. The purpose of the Benjamin-order is to direct that a trustee's conscience need no longer be affected by a particular beneficiary, on the basis of the beneficiary's unexplained absence. It has been expanded beyond inheritance cases, include payment

⁴¹ Matthews (n 27), 155

⁴² *Re Benjamin* [1902] 1 Ch 723, 725 (Joyce J)

⁴³ *Ibid*, 726 (Joyce J)

⁴⁴ Consider now the Variation of Trusts Act 1958, s. 1 and the Trustee Act 1925, s. 61

to creditors and within pension schemes.⁴⁵ It links conscience to the trustee's knowledge. It also highlights the objective nature of conscience, in that the court is allowed to direct how a trustee's conscience is to be affected.

c. *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367

This Supreme Court decision concerned the appropriate remedy for breach of trust. Mr and Mrs Sondhi owned a home, valued at £4.24 million. Barclays Bank had a legal charge on the property. In June 2006, they applied to borrow £3.3 million from AIB, which was to be secured by a first legal charge on their home. In effect, the loan was conditional on Mr and Mrs Sondhi redeeming their first charge with Barclays.

AIB instructed Mark Redler & Co Solicitors to handle the transactions. The solicitors acted under the rules set out in the "Council of Mortgage Lenders' Handbook for England and Wales", which required, amongst other things, that the bank would get a first legal charge, and that the solicitors held the funds on trust for the bank until completion. Barclays provided the information on their loan, which consisted of two accounts, and the balance owed was around £1.5 million. The solicitors acquired the funds from AIB. They then asked for a formal redemption statement from Barclays.

The legal dispute arose from a misunderstanding. Barclays provided a redemption statement for only one of the two accounts, and the solicitors erroneously believed that this was the full redemption figure. The solicitors 'were at fault because they should have realised' that the figure only related to one of the two accounts.⁴⁶ The solicitors paid Barclays that figure and released the balance of the £3.3 million to Mr and Mrs Sondhi. Barclays insisted on being paid the outstanding balance. Mr and Mrs Sondhi promised to pay it, but they did not. The solicitors, trying to resolve the situation, did not at first inform AIB, but only did so at a much later date. AIB and Barclays then negotiated, agreeing that Barclays held a first charge and AIB a second charge. Mr

⁴⁵ Consider, *Re Gess* [1942] Ch 37 (given the war, it was not feasible to trace creditors in Poland); *Re Green's Will Trusts* [1985] 3 All ER 455 (a testamentary trust akin to *Re Benjamin*); *Capita ATL Pension Trustees Ltd v Gellately* [2011] Pen LR 153 (a court order certifying a class of beneficiaries entitled to a particular pay-out); *Re MF Global UK Ltd (in special administration) (No 3)* [2013] 1 WLR 3874 (payment to creditors after insolvency); see Antony Zaccaroli and Adam Al-Attar, 'MF Global: Benjamin orders in a commercial context' (2014) 20 *Trusts & Trustees* 246

⁴⁶ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367, [5] (Lord Toulson)

and Mrs Sondhi defaulted on their loans. Barclays sold their home for £1.2 million (it had been overvalued), redeeming their first charge, and AIB received the balance of the sale price, which was £867,697.

AIB brought a claim against the solicitors. AIB wanted to be refunded for their total loss, which was roughly £2.5 million (£3.3 million, less the received £867,697). The solicitors argued that their liability was limited to the money AIB would have lost anyway had the solicitors properly redeemed Barclays. This was around £275,000 (the sale price of the house, at £1.2 million, less the already received £867,697).

The solicitors had acted in breach of trust.⁴⁷ The issue was whether a defaulting trustee was liable for a beneficiary's entire loss, or simply the loss that can causatively be attributed to the breach of duty. The House of Lords had previously held that the answer is the latter, and that trustees should not be liable for losses which the beneficiary would have suffered anyway.⁴⁸ The House of Lords decision has been subject to some academic criticism, but it was confirmed in the Supreme Court.⁴⁹

The basic principle of trust law is to either restore the beneficiary to the original position, as if the breach had not happened, or to divest the trustee of any unauthorised profit or gain.⁵⁰ On this basis, the proper remedy was limiting the compensation to about £275,000 which AIB did lose as a direct result of the breach of trust.⁵¹ The value of compensation should be assessed at trial, 'with the benefit of hindsight', so as to establish whether the loss flowed from the breach of trust or if the loss stemmed from external factors.⁵² The relatively modern inclusion of the need for causation, approved in *Mark Redler*, has been academically supported on the basis that the rules of causation are clearer than the older rules on accounting.⁵³ In the present case, Mr and Mrs Sondhi's house was overvalued and they were unable to repay the loan. These are issues the bank should have considered and addressed. That the house was sold for

⁴⁷ Ibid, [48] (Lord Toulson)

⁴⁸ *Target Holdings Ltd v Redfern* [1996] AC 421, 436 (Lord Browne-Wilkinson); also *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, 163 (McLachlin J, dissenting); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 687 (Tipping J)

⁴⁹ Consider Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 45-48; Charles Mitchell, 'Stewardship of Property and Liability to Account' [2014] *Conveyancer and Property Lawyer* 215, 225-226

⁵⁰ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367, [64] (Lord Toulson); [93] (Lord Reed)

⁵¹ Ibid, [65] (Lord Toulson); [141] (Lord Reed)

⁵² Ibid, [135] (Lord Reed)

⁵³ Lusina Ho, 'Equitable Compensation on the Road to Damascus' (2015) 131 *LQR* 213, 218

a third of the value of the AIB loan is not something affecting the conscience of the solicitors.

d. Summary on breach of trust

Trustees are the legal owners of the property.⁵⁴ Their ownership rights are curtailed based on an obligation of conscience, which is to manage the trust fund on behalf of identified beneficiaries. The main duty is to ‘provide the greatest financial benefits’ for all beneficiaries.⁵⁵ In exercising their duties, the trustees are bound to act with the same care and diligence as an ordinary, prudent business man would in administering his personal affairs; in certain circumstances they are also bound by a statutory duty of care.⁵⁶ The two standards are, in practice, very much one and the same.⁵⁷

The obligation of conscience is to act for the benefit of the beneficiaries and to act with the relevant standard of care. The duties of administration of the trust and the liabilities falling on a trustee may vary between lay and professional trustees as well as between private trusts and commercial trusts.⁵⁸ This is unsurprising and mirrors the different approaches taken by equity in estoppel, undue influence and unconscionable bargains between private and commercial contexts.

The remedies are based on how the conscience is affected. Where loss has been suffered by the trust fund, the trustee is bound to restore the loss as long as it is causatively linked to a breach. There should be nothing particularly controversial about this.⁵⁹ As seen, the trustee’s duty, binding his conscience, is to properly manage the trust fund in accordance with the trust deed and the law.⁶⁰ His conscience is affected if he does not properly manage the fund. To alleviate his troubled conscience, the trustee must restore what the trust fund lost (if any) due to his breach. A trustee’s conscience is not affected by external factors over which he has no control. If a trustee

⁵⁴ E.g. Trusts of Land and Appointment of Trustees Act 1996, s. 6(1)

⁵⁵ *Cowan v Scargill* [1985] Ch 270, 289 (Megarry VC); *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253, [119] (Heydon and Crennan JJ)

⁵⁶ *Speight v Gaunt* (1883) 22 Ch D 727, 739 (Jessel MR); *Re Whiteley* (1886) 33 Ch D 347, 355 (Lindley LJ) *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, 531 (Brightman J); Trustee Act 2000, s. 1

⁵⁷ Law Commission, *Trustees’ Powers and Duties*, Law Com No 260 (1999), [2.35]; *Brudenell-Bruce v Moore* [2014] EWHC 3679, [93] (Newey J)

⁵⁸ *AIB Group (UK)* (n 50), [70] (Lord Toulson); [102] (Lord Reed)

⁵⁹ Due to the Court’s agreement with *Redferns*, the judgment in *AIB v Mark Redler* has been criticised on the same grounds; see Adam Shaw-Mellors, ‘Equitable Compensation for Breach of Trust: Still Missing the Target?’ [2015] *Journal of Business Law* 165, 172

⁶⁰ *AIB Group (UK)* (n 50), [64] (Lord Toulson)

has made an unauthorised profit, he is liable to disgorge that profit to the trust.⁶¹ Unauthorised profits are held on trust, meaning the beneficiary is entitled to any increase in value between the time the trustee took the benefit and the date of trial. This should again be seen as uncontroversial, based on the obligation of conscience. The trustee, as a fiduciary, cannot retain anything he is not entitled to (because this affects his conscience), and this includes any uplift in value.

Part 3: Unconscionability and dishonestly assisting a breach of fiduciary duty

This section looks at claims against a person who dishonestly assisted in a breach of fiduciary duty. The cause of action has been referred to as “knowing assistance” or “dishonest assistance”. Since knowledge is a prerequisite for dishonesty not much turns on the different terminology.

The concept of “knowledge” was discussed in chapter seven, and is wide-ranging. Knowledge amounts to both actual and imputed knowledge.⁶² The five types of knowledge comes from the judgment in *Baden*, a knowing assistance case. Various investment funds, who claimed to have an entitlement to monies held in a trust fund with a French bank, argued that the bank had knowingly assisted in a breach of trust when the bank, at the instructions of the customer in whose name the money stood, had transferred the money to a bank in Panama. The judge held that the bank had not had knowledge of any breach of trust or fraud.⁶³

For dishonest assistance, the focus is on the first three types of knowledge, and the key question is whether the defendant acted honestly or not.⁶⁴ As seen, in addition to actual knowledge, the courts can impute knowledge where the defendant has turned a blind eye or failed to make reasonable inquiries.⁶⁵ Some judges have suggested that the *Baden*-categories should not be applied, because the focus is on dishonesty rather than

⁶¹ *AIB Group (UK)* (n 50), [64] (Lord Toulson); [93] (Lord Reed); *FHR European Ventures* (n 19), [46] (Lord Neuberger)

⁶² *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, [250] (Peter Gibson J); also *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, 267 (Buckley LJ); *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1590 (Ungoed-Thomas J)

⁶³ *Baden* (n 62), [340] (Peter Gibson J)

⁶⁴ *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 293 (Millet J)

⁶⁵ *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13, [33] (Lord Sumption)

merely knowledge of the facts.⁶⁶ However, the categories remain useful given the centrality of knowledge.⁶⁷

The claim is made out where a defendant has actual knowledge and subsequently participates in a breach of fiduciary duty; or where the defendant deliberately turns a blind eye or fails to make reasonable enquiries as to the facts and nonetheless provides assistance. The court previously adopted a “combined test” to dishonesty, meaning that the defendant must act contrary to what an ordinary, honest person would do, and must also realise that he is acting in such a manner (even if in his personal view he believes he is acting honestly).⁶⁸ However, modern case law has clarified that equity now adopts a single, objective standard of honesty.⁶⁹

The principle applies to dishonestly assisting a breach of fiduciary duty, as opposed to just assisting a breach of trust.⁷⁰ The remedy is either providing an account of profit or providing equitable compensation. There must be a causal link between the dishonest assistant’s gain and the breach in question; and an account can be ordered even if the principal has suffered no loss or the fiduciary made no gain.⁷¹

a. *Barnes v Addy* (1873-1874) LR 9 Ch App 244

John William Addy (Addy) was the sole surviving trustee of a family trust settled by his uncle, William Addy. At the time of the dispute, only two quarters of the trust remained; one quarter held by Addy for his wife (a daughter of William Addy) for life and the remainder to their children and one quarter held for Ann Barnes (a daughter of William Addy) for life and the remainder for her children.

Ann had married Henry Norman Barnes, who did not get along with Addy. There were disputes between them, which had led to solicitors being instructed, but the legal

⁶⁶ *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 392 (Lord Nicholls)

⁶⁷ *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [36] (Lord Hutton)

⁶⁸ *Ibid*, [36] (Lord Hutton)

⁶⁹ *Barlow Clowes International Ltd (in administration) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, [15] (Lord Hoffmann); *Goldtrail Travel Ltd (in liquidation) v Aydin* [2014] EWHC 1587, [145] (Rose J); *First Subsea Ltd v Balltec Ltd* [2014] EWHC 866, [357] (Norris J); *Vivendi SA v Richards* [2013] EWHC 3006, [2013] BCC 771, [183] (Newey J); *Otkritie International Investment v Urumov* [2014] EWHC 191, [75] (Eder J)

⁷⁰ *JD Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC 639, [518] (Peter Smith J); *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199, [61] (Andrew Smith J); *Goldtrail Travel Ltd (in liquidation) v Aydin* [2014] EWHC 1587, [128] (Rose J)

⁷¹ *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, [114] (Longmore LJ); Paul Davies, ‘Gain-based Remedies for Dishonest Assistance’ (2015) 131 LQR 173, 175

matter was settled. As part of those discussions, in 1857, it was agreed (the exact facts were disputed, but nothing turns on that) that the trust fund should be divided. Addy was to remain trustee for his wife and children and Barnes was to become trustee for his wife and children.

Both Addy and Barnes instructed solicitors, Mr Duffield for Addy and Mr Preston for Barnes. Duffield arranged the various deeds required for the appointment of Barnes as a trustee and the transfer of the trust fund, as well as a deed of indemnity. Duffield voiced his objection to the proposed arrangement. Preston reviewed the deeds and confirmed with Ann Barnes that she understood the risks and was happy to proceed. The trust fund was then divided with £2000 being transferred to Barnes. Barnes quickly cashed the full amount and used it for his personal business venture. That venture failed and Barnes was declared bankrupt in February 1859.

The Barnes' children brought a claim against Addy for breach of trust, seeking to restore the £2000. The solicitors were also joined as defendants for their participating in affecting the breach of trust. The claim against Addy was successful and his estate was ordered to pay the £2000 to the Barnes' children. The claim against the solicitors failed, and against this decision the children appealed.⁷²

The Lord Chancellor held that a third party can only be liable to restore the trust fund if they had acted dishonestly or if they had actually received trust property.⁷³ The rationale for the principle was to ensure the effective work of solicitors, accountants and other agents who lawfully assisted fiduciaries in their duties. Professionals should feel free to provide any and all lawful assistance without the threat of financial liability if there was to be a future breach of fiduciary duty of which they had no knowledge.⁷⁴

Dishonest assistance requires the third party to have knowledge of that breach. A solicitor who knowingly provides advice on how to breach a duty becomes liable for any losses on account of his knowledge and his action. In the present case, the appeal was dismissed on the basis that neither solicitor had any knowledge or suspicion that Barnes was going to pocket the trust money for personal use.⁷⁵ Indeed, both solicitors had taken pains to voice their concerns and objections to the proposed transaction.

⁷² *Barnes v Addy* (1873-1874) LR 9 Ch App 244, 250

⁷³ *Ibid*, 252 (Lord Selborne LC)

⁷⁴ *Ibid*, 252 (Lord Selborne LC)

⁷⁵ *Ibid*, 255 (Lord Selborne LC)

Knowing receipt requires actual receipt of trust property. In this case, again, neither solicitor had ever been in receipt of the property.

Had liability been established the third party is personally liable; this means either returning misappropriated property in specie (or a traceable substitute) or provide equitable compensation to the amount the beneficiary has lost.⁷⁶

b. *Barlow Clowes International Ltd (in administration) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476

This case concerned a fraudulent investment scheme. Barlow Clowes was a company run by Peter Clowes, which raised money from investors purportedly for investment in UK gilt-edged securities. Little of the money raised was actually spent for this purpose and most of it went to Clowes and his associates. The International Trust Corporation (Isle of Man) Ltd (which was later renamed Eurotrust) was a company providing offshore finance services. Peter Henwood and Andrew Sebastian were the main directors. In 1987, Henwood and Sebastian, through the ITC, assisted Barlow Clowes in moving client funds around. In doing so, they dishonestly assisted Barlow Clowes in a breach of trust. Only Henwood appealed to the Privy Council against the finding that he had been a dishonest assistant.

In 1985, Henwood met Guy Cramer, an associate of Clowes. Over the next year, the ITC managed regular large offshore payments between Barlow Clowes and companies managed by Cramer. These transactions, which had no commercial basis, were perhaps sufficient to raise concerns with Henwood and Sebastian. In the spring of 1987, ITC became more involved in Barlow Clowes' affairs, when Barlow Clowes took over a listed company managed by Cramer. Cramer and Clowes invited Henwood on various trips and discussed the possibility of ITC merging with Barlow Clowes, a proposition Henwood found appealing. The facts suggest that at this point, Henwood must have known on what basis Barlow Clowes was operating. In the summer of 1987, Henwood and Sebastian authorised various payments between Barlow Clowes and another company managed by Cramer, and later authorised the payment of those funds from the company into Cramer's personal accounts. This was found to have been done in knowledge that the money was misappropriated from Barlow Clowes.

⁷⁶ *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [9] (Lord Sumption)

The basis of Henwood's liability was that of Nelsonian knowledge. He must have suspected that something was amiss, but deliberately decided not to make enquiries.⁷⁷ Barlow Clowes raised money from the public who thought they were investing in gilts. Instead, millions of pounds were passing into Cramer's personal account. The Privy Council, agreeing with the trial judge, found that on an objective test this was clearly dishonest behaviour; when entertaining such suspicions no honest person could authorise the payments to Cramer without making enquiries.⁷⁸

The case demonstrates that the *Baden*-categories of knowledge continue to be of relevance. Towards the final transactions, Henwood had actual knowledge of misappropriation, not least because he had been told as much by employees of Barlow Clowes.⁷⁹ Prior to that he had reasonable suspicions but deliberately failed to make enquires as an ordinary and honest person would have done. Lord Nicholl's comment in *Tan* that "knowledge" should be replaced with "dishonesty" is arguably erroneous on the basis that dishonesty stems from knowledge. Without knowledge, as defined in *Baden*, there can be no dishonesty.

c. *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314

This case concerned a director, Roland Nash, who withheld a payment due to Starglade. Starglade owned a patch of land in Hythe, which was situated on the side of a slope. In 1998, the company instructed Technotrade Ltd to produce a "site investigation report" to determine whether the land was suitable for property development. Technotrade indicated in its report that the land was suitable.

Starglade sold the land to a company called Larkstore Ltd, whose sole director/shareholder was Nash. Larkstore started developing the site. In October 2001 there was a major mudslide which damaged properties uphill of the site. In March 2003 the owners of those properties took legal action against Larkstore and the building company it has engaged (Bess Ltd) for, inter alia, negligence in carrying out ground excavations.⁸⁰ Larkstore in turn brought a claim against Technotrade as a Part 20 defendant. As part of this, Starglade assigned the 1998 report to Larkstore for

⁷⁷ *Barlow Clowes International Ltd (in administration) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, [11] (Lord Hoffmann)

⁷⁸ *Ibid*, [12] (Lord Hoffmann)

⁷⁹ *Ibid*, [30] (Lord Hoffmann)

⁸⁰ *Offer-Hoar v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 WLR 2926, [13] (Mummery LJ)

consideration of £1. To the assignment was added a side agreement, saying that Larkstore will pay to Starglade half of any net monies it receives from Technotrade in any settlement or award, that is to say, half of the sum after Larkstore has deducted relevant legal costs for bringing the claim against Technotrade. The letter confirms that those monies are to be held on trust for Starglade.⁸¹ The proceedings against Technotrade were settled out of court with a confidentiality clause. However, Larkstore received £365,000 in total, which amounted to £309,000 after costs.⁸² As such, £154,000 was held on trust for Starglade.

At this point, Larkstore was insolvent. Nash, instead of paying the money to Starglade and putting his company into administration or liquidation, used the £309,000 to make other payments.⁸³ This included £15,500 paid to Nash's personal account. Starglade brought a claim against Larkstore, which was later amended to be brought against Nash when Larkstore was struck of the register.⁸⁴ The claim was for the full £154,000 on the basis that Nash dishonestly assisted Larkstore to breach the trust, and repayment of the £15,500 Nash had received in breach of trust. The Deputy Judge dismissed the first claim and upheld the second claim. Starglade appealed against the dismissal of the first claim.⁸⁵

The dispute was centred on the poor relationship between Nash and Starglade. It stemmed from the negotiations in 2004 when the Technotrade report was assigned and Starglade was insisting on receiving 50% of any award. Nash felt that Starglade had taken advantage of him. The negotiations produced in Nash a desire to 'frustrate Starglade if he could'.⁸⁶ Nash continued to frustrate Starglade in its proceedings, by only disclosing the terms of the confidential settlement after a court order had been obtained by Starglade, then by finally applying to strike the insolvent Larkstore of the register, and by making payments to Larkstore's creditors, four of six of whom had close connections to Nash. Nash sought and received vague (and arguably borderline negligent) advice from his solicitors on whether he could prefer the creditors over Starglade. The Deputy Judge concluded that Nash's desire to pay Starglade last was

⁸¹ Ibid, [15]-[16] (Mummery LJ)

⁸² *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [3] (The Chancellor)

⁸³ Ibid, [4] (The Chancellor)

⁸⁴ Ibid, [5] (The Chancellor); Companies Act 1985, s 652(5)

⁸⁵ Ibid, [6] (The Chancellor)

⁸⁶ Ibid, [9] (The Chancellor)

not dishonest (though otherwise it was accepted that Nash had assisted in Larkstore's breach of trust).⁸⁷

The Court of Appeal confirmed that the test for dishonesty is objective and the benchmark is set by the courts, and as such is not dependent on subjective views nor met simply because a majority opinion would hold a course of action as dishonest.⁸⁸ The Court of Appeal allowed the appeal and held that Nash had acted dishonestly. This is because he knew that the side agreement was legally binding, and nonetheless deliberately set out to pay Starglade last in an attempt to annoy them. As noted, this was merely the latest of a series of acts designed to undermine Starglade. The Court also held that whereas the Insolvency Act 1986 does include provisions around priority creditors, those rules have no impact on the question of honesty when it came to making payments.⁸⁹ Nash was described as "intelligent", he knew what he was doing, he knew that he only sought partial legal advice, and he must have known that he had no conclusive advice as to the legality of his actions.⁹⁰

Nash was ordered to account for the full £154,000. The basis of his dishonesty was his knowledge that his company was insolvent and that Starglade would be hard-pressed to get any money if he paid the other creditors first, as well as his express intention to frustrate Starglade. They might have upset him when assigning the technical report, but barring undue influence or duress, that is no excuse to deliberately try to deny them their legal entitlement.

d. Summary on dishonest assistance

Context is less important in this claim, but many cases arise in a commercial context where the defendants are assisting fiduciaries to commit financial fraud. Although the previous chapters have suggested that equity is reluctant to intervene in the commercial context, it is more willing to do so with claims around breach of fiduciary duty. This is because of the protection afforded by equity to beneficiaries in fiduciary relationships.

⁸⁷ Ibid, [18] (The Chancellor)

⁸⁸ Ibid, [32] (The Chancellor)

⁸⁹ Ibid, [37] (The Chancellor); Insolvency Act 1986, ss 239-241

⁹⁰ Ibid, [36] (The Chancellor)

The key unconscionability indicium in the second category is knowledge, which was discussed in chapter seven. The claim for dishonest assistance turns on honesty, and whether the defendant has or has not acted honestly. Whether an act is honest is assessed based on knowledge of the relevant facts. This includes knowledge of whether the person you are assisting owes relevant fiduciary duties to another. Knowledge in this claim encompasses the first three types from the *Baden*-categories. This includes turning a blind eye to the obvious or failing to make reasonable enquiries. If the fundamental duty, from the law of reason, is to do good, then turning a blind eye or failing to ask reasonable questions is clearly wrong. Any assistance provided after that becomes unconscionable, since the defendant can no longer be certain that he is doing what is good.

Part 4: Unconscionability and knowing receipt of misapplied property

This section will consider knowing receipt of misapplied property following a breach of fiduciary duty, which has in recent times been referred to as unconscionable receipt. The use of the term unconscionable receipt is credited to *Akindele*, though it had been used earlier.⁹¹ The use of unconscionability, as distinct from knowledge (derived from the *Baden*-formulation), has been judicially criticised.⁹² Nonetheless, the courts have continued to use unconscionability, alongside the *Baden*-categories of knowledge.⁹³ At present, with primarily first-instance judgments to draw upon, the precise formulation (knowing/unconscionable receipt) is subject to debate.

The test for knowing receipt comes in three parts. There has to be a breach of fiduciary duty which leads to a misappropriation of the claimant's property. The defendant has to receive the property or the traceable proceeds of the property, and the defendant has to receive the property with the knowledge that the property stems from a breach of fiduciary duty.⁹⁴ Knowledge in this context is a 'lower' standard than

⁹¹ *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437, 455 (Nourse LJ); *Re Montagu's Settlement Trusts* [1987] Ch 264, 285 (Megarry VC)

⁹² *Relfo Ltd (in liquidation) v Varsani* [2012] EWHC 2168, [79] (Sales J)

⁹³ *Arthur v The Attorney General of the Turks and Caicos Islands* [2012] UKPC 30, [33] (Sir Terence Etherton); *Charter plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313, [8] (Carnwath LJ); *JS Microelectronics Ltd v Achhada Dilip G* [2016] HKCFI 519, [69] (Recorder Teresa Cheng SC)

⁹⁴ *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (Hoffmann LJ); *BCCI (Overseas)* (n 91), 448 (Nourse LJ); *Winnington Networks* (n 69), [124] (Stephen Morris QC)

dishonest assistance, given that there is no need to show dishonesty.⁹⁵ In *Winnington Networks*, Stephen Morris QC agreed that, despite earlier criticism of the *Baden*-categories of knowledge, they remain useful; and for knowing receipt all five categories of knowledge were applicable.⁹⁶ Thus, a person can knowingly receive property by having constructive knowledge.

a. *Agip (Africa) Ltd v Jackson* [1990] Ch 265; [1991] Ch 547

Agip SPA is an international oil company based in Italy. Agip (Africa) Ltd was a wholly owned subsidiary, incorporated in Jersey, which dealt with oil exploration in Africa. The events leading up to the dispute took place throughout the 1980s. Agip had a US dollar account with the Banque du Sud in Tunis. Over the course of many years, Agip's chief accountant, Mr Zdiri, defrauded the company of millions of US dollars. Once payment orders had been signed by Agip's signatories, Zdiri replaced the name of the payee with some other third party, whom Agip had no legitimate business dealings with. The claim against Jackson and others was that they were (without direct knowledge of the fraud) participants in the aftermath of the diverted payments.

Mr Jackson and Mr Bowers were partners and, as Jackson & Co, ran an accountancy practice in the Isle of Man. Mr Griffin was their employee. The three of them were the defendants in the action. It was not disputed that they acted on the instructions of a client, a French lawyer called Yves Coulon, though it was not clear for whom he might have acted.

The partnership had a business relationship with Mr Humphrey, who was an accountant. The fraud worked in the following manner. Jackson would incorporate a company, with Griffin and Humphrey variously acting as directors. A payment, diverted from Agip by Zdiri, would be made into the company's bank account, and thereafter, on instructions from Yves Coulon, the payment would be forwarded to

⁹⁵ *Otkritie International Investment v Urumov* [2014] EWHC 191, [81] (Eder J); *BCCI (Overseas)* (n 91), 450 (Nourse LJ); *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405 (Buckley LJ); *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769, 777 (Scott LJ); *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484, 497 (Vinelott J)

⁹⁶ *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10, [2013] Ch 156, [132] (Stephen Morris QC)

other companies and people. In this respect, the companies set up by Jackson acted as conduits through which the diverted payments from Agip would be made.

This legal action only concerned one of the diverted payments, with a value of just below \$520,000, made on Friday 4 January 1985, and completed on Monday 7 January. It was made to Baker Oil Services Ltd. Jackson and Griffin were the directors and the company address was the Isle of Man address of Jackson & Co. It was the last fraudulent transaction made before Zdiri was discovered by Agip. On instructions from Griffin, the money was paid firstly into a Jackson & Co account at Lloyds, and from there on to another Jackson & Co account at the Isle of Man Bank, and from there the bulk was paid out to third-party recipients, including Yves Coulon.

Agip obtained a judgment against Baker Oil, which was worthless in that Baker Oil had been put into liquidation and its account had been closed. For this reason, a claim was made against Jackson, Bowers and Griffin. The claim was, at common law, for money had and received, and in equity, for both dishonest assistance and knowing receipt. The common law claim failed, primarily due to the limitations of common law tracing. Lloyds Bank received a telex confirming the transaction. It asked that Baker Oil's account be credited (in London) and that Lloyds Bank in New York would be credited by Citibank, which was Banque Du Sud's corresponding bank in the US. Given the time differences, Lloyds in London credited Baker Oil before the New York transaction took place. There was nothing to trace, since all that left Tunis was 'a stream of electrons' and, at any rate, the transfer would have been mixed with other monies at the various banks in the US.⁹⁷

Equity has developed more flexible rules for tracing, and there was 'no difficulty' in tracing the money (the chose in action) in equity from Banque du Sud to the defendant as the controllers of Baker Oil and Jackson & Co.⁹⁸ The existing requirement that the money was sent in breach of fiduciary duty was easily satisfied by the fact that Zdiri had a fiduciary duty to Agip in his capacity as chief accountant.⁹⁹ Tracing proves the money was with Jackson. To recover the value, now mostly paid away, an equitable claim had to be made out.

⁹⁷ *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 286 (Millett J); Lord Millett later called for the abolition of the distinct rules for common law and equitable tracing, see *Foskett v McKeown* [2001] 1 AC 102, 128

⁹⁸ *Agip (Africa)* (n 97), 289 (Millett J)

⁹⁹ *Ibid*, 290 (Millett J)

Millett J explained that a claim for knowing receipt could be made out in two circumstances. The first was where a person receives misappropriated trust money for his own benefit having notice that it is misappropriated. The second is where a person lawfully receives the money, knowing it to be subject to a trust, not for his own benefit, but then misappropriates the money.¹⁰⁰

Millett J dismissed the knowing receipt claim.¹⁰¹ The second class of cases did not apply, because the money was not received lawfully, so it turned on the first class. The essential feature was receipt for personal gain, which Millett J rightly emphasised, so as to exclude from liability innocent parties such as banks.¹⁰² Jackson and Bower, as the partners in Jackson & Co, did receive the money when it came to the partnership's bank accounts, but the money was not received for their personal benefit nor used for their personal benefit; it was merely passed on according to instructions they had received. Griffin, as an employee, did not receive the money at all (nor did he receive it in his capacity as a director of Baker Oil).

It is clear from this assessment that the crucial factors are knowledge and the intent behind the receipt and disposal. In the second class of cases, the recipient must have some knowledge of the fiduciary relationship (but not necessarily the exact terms of, for instance, a trust), meaning he is not conscionably allowed to dispose of the money before making further enquires. In the first class of cases, the recipient must have notice of the fiduciary relationship and there must be an intention to receive or use the money for personal gain. If those factors are absent, the recipient is not acting unconscionable if he receives and passes the money on, in that he (like a bank) is a mere conduit.

b. *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717; [1994] 2 All ER 685

El Ajou concerns the aftermath of fraudulent transactions. The facts are complicated by the large number of companies (mostly used as puppets for the frauds) and transactions (spanning multiple jurisdictions on several continents). There is no need to consider all the transactions in detail.

¹⁰⁰ Ibid, 291 (Millett J)

¹⁰¹ Ibid, 292 (Millett J)

¹⁰² Ibid, 292 (Millett J)

Three Canadians, operating in the Netherlands, perpetrated a share investment fraud. As stock brokers they induced investors to pay large sums for worthless shares. The investments were then diverted into a variety of different companies. One of the investors was Mr El Ajou, a wealthy businessman from Saudi Arabia. He claimed that he could trace some £1.3 million to an English company, engaged in (genuine) property development, called Dollar Land Holdings (DHL).

The dispute centred on what knowledge DLH had of the original fraud. One of the directors of DHL was Sylvain Ferdman. He worked as an agent through his own company, the Société d'Administration et de Financement SA (SAFI). Ferdman represented two associates of the Canadians, and was well aware of the fraud being perpetrated.¹⁰³ DLH was a subsidiary of Keristal Investments and Trading SA, a Panamanian company which was beneficially owned by a foundation in Liechtenstein. The foundation was owned by two Americans, but run by Ferdman. Keristal acquired DHL because the Americans wanted to engage in property development in England. DHL was acquired on the advice of William Stern, who was appointed the managing director of a subsidiary of DHL, but who also directed DHL. Ferdman had no involvement in the running of DHL.

In February 1986 DHL realised that they could undertake a development project called Nine Elms, in Battersea. Stern asked Ferdman if he could procure finance. Ferdman introduced Stern to one of the three Canadians, and the two of them negotiated a deal. £270,000 was to be paid to Stern's subsidiary company for the exclusive use for the payment of the deposit of the site, and a further £1.03 million was to be made available later. The contract for sale (after the subsidiary had paid the deposit) was assigned to DHL. DHL then sold the land to a property development company, and provided the £1.03 million towards the purchase price, and thus acquired a 40% interest in future profits once the land had been developed. The £1.03 million was advanced through a circuitous route. Ferdman resigned in 1987. In early 1988, the Canadians (now under investigation) asked to withdraw from their joint venture investment. Stern negotiated the sale of DHL's interest to the property development company, and paid £1.75 million to the Canadians.

Ferdman had two roles, one as director of DHL and one as an agent for the Canadians (through SAFI). It is clear that he orchestrated the financing of the Nine Elms project.

¹⁰³ *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717, 727 (Millett J)

The question was whether DHL could be said to have his knowledge when it received the two payments (£270,000 and the £1.03 million) and when it later disposed of that money by selling its share in the property to the property development company. Millett J found that, whilst Ferdman himself knew, his knowledge could not be imputed to DHL because Ferdman was not heavily involved in the business decision; he was not the directing mind of the company.¹⁰⁴ Similarly, Millett J found that Stern had not known, nor had cause to make inquiries, about the origins of the Canadian's money.¹⁰⁵

El Ajou successfully appealed. Nourse LJ began with an examination of the doctrine of the directing mind and will of a company; namely that a company knows things and acts based on a principal person, the directing mind.¹⁰⁶ Where the Court of Appeal differed from Millett J was how to identify the directing mind. Millett J had gone for a big picture approach, saying Ferdman was not the directing mind because he had no day-to-day control over DHL and it was Stern who had finally taken the decisions. Nourse LJ held to the contrary, that each specific act can have a different directing mind, and since Ferdman had done all the legwork to secure and manage the finances, for the specific purpose of whether DHL knew the money was the product of fraud, Ferdman was its directing mind.¹⁰⁷ It was emphasised that Ferdman took the financial decisions without the authority of any board resolutions. The matter was remitted to the High Court to determine the appropriate remedy.

The emphasis in this case was on whether Ferdman's knowledge could be imputed to DHL. The judges resolved the matter through the directing mind and will theory, as opposed to the agency theory which had also been pleaded. The unconscionability factor for knowing receipt is simply that, receiving misappropriated money knowing the relevant facts. Hoffmann LJ was right in warning companies which, for whatever reason, are run by offshore agents and entities that they may be liable for any wrongdoings linked to those agents. There was no question that the Americans who used DHL as a vehicle to invest in the British property market had done nothing wrong

¹⁰⁴ Ibid, 741 (Millett J)

¹⁰⁵ Ibid, 747 (Millett J)

¹⁰⁶ *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane)

¹⁰⁷ *El Ajou* (n 108), 697 (Nourse LJ), 700 (Rose LJ), 706 (Hoffmann LJ); see also *R v Andrews Weatherfoil Ltd* [1972] 1 WLR 118, 124 (Eveleigh J); *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 200 (Lord Diplock)

and no doubt that DHL was a genuine company. Their liability was linked to being caught up with Ferdman.

c. *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10; [2013] Ch 156

The dispute centred on carbon emission allowances; as part of an EU-framework, companies that emit carbon dioxide as part of their operations are allocated EU allowances (EUAs) which determine the maximum amount of carbon dioxide that company is allowed to emit in a year. The EUAs are, however, transferrable, and companies which come in below their allowance can sell the excess EUAs; the aim is to incentivise companies to reduce their emissions. The EUAs are registered and traded through national registries, and can, subject to law, be bought and sold by professional traders.¹⁰⁸

Armstrong is a German company that operated power plants, and held EUA accounts with the German registry. Winnington is a UK based trader in EUAs, and does not have its own carbon emitting installations. On 25 January 2010, Winnington was contacted by a businessman called Bhovinder Singh who said he represented a Dubai-based company called Zen Holdings Ltd. Various conversations took place on the 25th and 26th of January, leading to an agreement for Winnington to purchase EUAs from Zen. It was alleged that Winnington did not follow its proper procedure in vetting Zen, known as a “Know Your Customer” (KYC) procedure. Winnington in its first email to Zen indicated what information Zen needed to provide, and whilst Zen failed to provide all required information, the purchase took place anyway on 28 January.

On the 28th of January a phishing email was sent to Armstrong. It was read by two officers who deemed it genuine; the email asked the company to provide its username and password to its registry account as part of a security upgrade. 21,000 EUAs were removed from Armstrong’s account. On the same day Winnington purchased 21,000 EUAs from Zen for roughly €270,000, and the electronic records show that the EUAs transferred to Winnington were from Armstrong’s account. Winnington, as part of an agreement reached in the days preceding, sold the EUAs on to another trading firm, for a profit. The fraud was discovered later that day. Armstrong brought a claim

¹⁰⁸ *Winnington Networks* (n 96), [12] (Morris QC)

against Winnington, for proprietary restitution at common law and for knowing receipt in equity. The common law claim was dismissed because the judge found that Armstrong had lost its legal title when “the fraudster” (presumably Zen) took control of the account and gained ‘de facto ministerial control’.¹⁰⁹

The knowing receipt claim was successful. The judge held that Winnington’s knowledge was such as to make its receipt of the EUAs unconscionable.¹¹⁰ There were three principal reasons.¹¹¹ First was Zen’s refusal to provide the information asked for under the KYC procedure, which Winnington had repeatedly reminded Zen of, and had been asked in order to establish that Zen owned the EUAs. The second was that the EUAs were sold on to a second trader without Winnington making additional checks on the original ownership of the EUAs. The third was that Winnington made the payment to Zen without having obtained information as to ownership of the EUAs. Winnington’s knowledge fell under *Baden*-types (2) and (3), namely turning a blind eye and failing to make the proper enquiries.¹¹² Winnington actually did make the enquiries (they repeatedly emailed Zen asking for the information), but then proceeded with the transaction without receiving any answers. The judge found that type (5) had been made out as well, namely that on the facts known, a reasonable person would have made additional inquiries, and the failure to do so meant that Winnington acted in a “commercially unacceptable” manner.¹¹³

Even if the courts are hesitant to interfere with commercial transactions, this is a case of reckless business. It demonstrates clearly the risks that come with acting without information and entering into deals with unknown parties. Perhaps Winnington took a calculated risk, but with any risks taken, one has to be willing to face the consequences.

d. *Relfo Ltd (in liquidation) v Varsani* [2012] EWHC 2168; [2014] EWCA Civ 360

This case concerned a fraudulent money transaction. The claim was brought by the liquidator of Relfo Ltd, who argued knowing receipt and unjust enrichment. Both

¹⁰⁹ Ibid, [276] (Morris QC)

¹¹⁰ Ibid, [278] (Morris QC)

¹¹¹ Ibid, [279]-[281] (Morris QC)

¹¹² Ibid, [285] (Morris QC)

¹¹³ Ibid, [286] (Morris QC)

claims were upheld. The focus of the legal argument was on the correct application of the doctrine of tracing, which is a prerequisite before a claim in knowing receipt can be made where money has passed into the hands of a third party. This is because the transaction in question was not linear but rather fragmented and indeed certain connections had to be implied by the facts. This section will focus on the issue of knowing receipt.

The Varsani family is wealthy and several members are successful businessmen in their own right. The patriarch was Velji Jadva Karsan Varsani (referred to as Varsani senior in the judgments) and one of his sons was Bhimji Velji Jadva Varsani, who operated a bank account in Singapore which was the ultimate destination of the misappropriated money. Devji Ramji Gorecia is a UK businessman who had a longstanding relationship with the Varsani family. He advised them on business opportunities and also took business loans from them; he was described by the judge as a ‘business partner in whom they place great trust’.¹¹⁴

In 1996, Gorecia set up Relfo Ltd. Members of the Varsani family, and two others, were additional shareholders. Relfo engaged in property development and in 2001 made a substantial profit, which gave rise to a tax liability of around £1.26 million. At this point, the other shareholders decided to leave Relfo, and a large dividend payment was made. Gorecia and his wife remained as shareholders because they wanted to keep using Relfo for other projects. Gorecia took advice on how to limit Relfo’s tax liability, and used this as a justification for Relfo’s later payments which underpinned the knowing receipt claim. The judge found that Gorecia’s evidence on the tax advice received was not ‘credible’.¹¹⁵

In May 2004 HMRC issued a formal demand for the tax, now standing at £1.4 million (inclusive of interest). Relfo only had £506,000 in its account. Rather than paying that money to HMRC, £500,000 was paid to Mirren Ltd, at that company’s bank account in Latvia. Converted into US dollars, this amounted to \$890,000. The next day, a US-registered business called Intertrade Group LLC made a payment of \$878,000 from its bank account in Lithuania to Bhimji Varsani’s bank account in Singapore. The liquidator argued that the two payments are linked, and what Bhimji Varsani received was the traceable proceeds of the money paid out by Relfo, less a

¹¹⁴ *Relfo Ltd (in liquidation) v Varsani* [2012] EWHC 2168, [4] (Sales J)

¹¹⁵ *Ibid*, [9] (Sales J)

1.3% deduction which was assumed to be a charge levied by various Ukrainian businessmen who facilitated the transactions.¹¹⁶ Thereafter, Bhimji Varsani transferred \$100,000 to Gorecia, allegedly as a 'reward' for organising the pay-out.¹¹⁷ Relfo went into creditors' voluntary liquidation, and Gorecia listed the £500,000 as debt owed from a failed investment with a computer business in Moscow.¹¹⁸

Relfo had previously done business in Ukraine, helped by a Ukrainian businessman called Dagan. Gorecia had personally, and with Varsani family money, invested in various Ukrainian businesses, which it seemed had eventually run into financial difficulties.¹¹⁹ A considerable amount of money was lost.¹²⁰ The Moscow investment was proposed in 2004 because Gorecia realised that Relfo might have to pay the tax bill. Dagan and other business partners in Ukraine suggested Relfo invest the money in a venture to purchase computer chips, and promised a significant profit return.¹²¹ The genuineness of his investment was challenged by the liquidator, an assertion backed up by the fact that Gorecia's evidence as to its details varied over time, and in the end the judge found that a letter purporting to prove its genuineness was 'not an authentic letter referring to a genuine transaction'.¹²² The liquidator, in the course of his investigations in Ukraine, got an email with various facts from a Timur Kudaev, whose role remained unclear. The email alleged that the payment from Relfo to Mirren was indeed a sham and made with intention to furthering the money to Singapore.¹²³

The liquidator initiated proceedings in Singapore. The first defence pleaded by Bhimji Varsani admitted that the money received came, by way of intermediaries, from Mirren (and thus Relfo).¹²⁴ The defence was later amended and the admission was withdrawn. The court in Singapore found that the money received by Bhimji Varsani was traceable to Relfo and that Bhimji Varsani had the requisite knowledge.¹²⁵ The claim was, however, dismissed on the principle that the courts of one country will

¹¹⁶ Ibid, [13] (Sales J)

¹¹⁷ Ibid, [15] (Sales J)

¹¹⁸ Ibid, [18] (Sales J)

¹¹⁹ Ibid, [25] (Sales J)

¹²⁰ Ibid, [30] (Sales J)

¹²¹ Ibid, [26] (Sales J)

¹²² Ibid, [28], [53] (Sales J)

¹²³ Ibid, [34] (Sales J)

¹²⁴ Ibid, [39] (Sales J)

¹²⁵ *Relfo Ltd (in liquidation) v Varsani* [2008] SGHC 105; [2008] 4 SLR 657, [43], [51] (Prakash J)

not enforce tax and revenue law of another nation.¹²⁶ This necessitated the claim in England.

The judge found that the transaction made from Relfo to Varsani in Singapore was made because Gorecia wanted to make up to the Varsani family for the losses they had sustained in the Ukrainian investments, and that the Moscow business opportunity was invented ex post facto as a justification to give HMRC. The judge found that Varsani senior, at least, and likely Bhimji Varsani as well, knew full well the purpose behind the payment.¹²⁷ The liquidator made various claims against Bhimji Varsani, and the knowing receipt claim was successful.

Gorecia acted in breach of his director's duties when making the payment from Relfo to Mirren.¹²⁸ The main issue, as stated, was tracing. Was the money that Bhimji Varsani received in Singapore the traceable proceeds from Relfo? The judge concluded that he could trace the money from Relfo to Bhimji Varsani, adopting the same inferences as Millett J had in *El Ajou*.¹²⁹ Although there was no direct money trail, and indeed Intertrade paid Varsani before it received the money (in an indirect fashion which was impossible to prove) from Mirren, the evidence supported inferring the outcome sought by the liquidator. A main reason behind the inference was the complete lack of commercial reasons behind the payments made (there was no reason why Intertrade paid Varsani, and Relfo's reason to pay Mirren had been debunked, and Bhimji Varsani's reason for paying the \$100,000 to Gorecia was not believed).¹³⁰ The judge similarly found that Bhimji Varsani had knowledge of the reasons behind the transaction, so as to make it unconscionable for him to retain the benefit.¹³¹ This is in line with the findings of the court in Singapore.

Varsani's appeal to the Court of Appeal was unsuccessful. As stated, the bulk of the argument in the Court of Appeal was on tracing, and whether the inferences drawn by the judge were legally appropriate. Lady Justice Arden, delivering the principal judgment, agreed with the judge. The inferences were backed up by the evidence, including the at times patchy evidence, about Relfo's business ventures in Ukraine and the contacts it had there as well as Gorecia's intention to make up for the losses

¹²⁶ Ibid, [71] (Prakash J); consider *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491, 511 (Lord Keith)

¹²⁷ *Relfo Ltd* (n 114), [59]-[60] (Sales J)

¹²⁸ Ibid, [70] (Sales J)

¹²⁹ Ibid, [76]-[77] (Sales J)

¹³⁰ Ibid, [77] (Sales J)

¹³¹ Ibid, [81] (Sales J)

suffered by Varsani.¹³² The Court also agreed that there is no immediate need for the money to be forwarded in a chronological order, as long as there is an intention to later reimburse (such as banks crediting an account before actually receiving the value from the crediting bank).¹³³

The crucial factor making it unconscionable for Bhimji Varsani to retain the money was his knowledge that his family was receiving the money as a goodwill gesture to make up for the investments they had lost in Ukraine. Gorecia acted in breach of his director's duties when essentially depleting Relfo's account and sent the £500,000 to Mirren in Latvia. There was sufficient evidence to show that Bhimji Varsani knew that that transaction was a sham, and as said, was ultimately intended for him and his family.

e. Summary on knowing receipt

This chapter has maintained the title of “knowing receipt” for this claim, although after *Akindele* it has been referred to as unconscionable receipt. At present time the law appears to be unsure of how “unconscionable” is to be used and if it adds anything to the action. In chapter five it was suggested that unconscionability in itself was not a cause of action, but merely an objective benchmark. Unconscionability in this context remains linked to knowledge, and so the cause of action can usefully retain the title of knowing receipt.

The test is that the recipient must have sufficient knowledge of the facts so as to make his retention of the funds received unconscionable. He must know that the funds originate in a breach of fiduciary duty, though he must not know all the details of that breach. The *Baden*-categories, whilst criticised by some judges, remain useful as shown by the decision in *Winnington*. Both actual and constructive knowledge are applicable. The usefulness of the *Baden*-categories is that they give some real meaning to the terms “actual” and “constructive” knowledge, which are otherwise rather vague.

All five cases looked at concern fraud in the commercial context. That is not to say that knowing receipt cannot arise in private context as well. The distinction noted in earlier chapters apply, namely that the courts are more hesitant to intervene in business

¹³² *Relfo Ltd (in liquidation) v Varsani* [2014] EWCA Civ 360, [57] (Arden LJ)

¹³³ *Ibid*, [63] (Arden LJ)

transactions, such as in *Akindele*. *Winnington* and *Varsani* show, however, that there is no hesitation to intervene when that is warranted.

Conclusion

The cases have shown that fiduciary law is based on the conscience of the fiduciary. They have a duty in conscience to their beneficiaries, which, over time, has been mostly placed on a statutory footing. Because of the importance of the fiduciary duties, liability for breach has been extended to third-parties who knowingly interfere with the fiduciary's exercise of his office. Whilst equity is more hesitant to interfere in commercial dealings, equity nonetheless remains vigilant with will intervene where necessary. *Akindele* is a good example of a necessary litigation, even though on the facts the claim was rightly dismissed. The Bank of Credit and Commerce International scandal was described by later Chancellor and Prime Minister Gordon Brown as the 'biggest banking fraud in history', with the bank laundering money for the world's elite criminals and terrorists.¹³⁴ It was appropriate to investigate all dealings within the bank, and knowledge, whether on the *Baden*-test or any other test, provides the basis on which to determine wrongdoing. Knowledge emerges as a key unconscionability criterion for fiduciaries and third-parties who assist in the breach of fiduciary duties. As noted, knowledge in equity has a broad definition, and goes well beyond actual knowledge. It demonstrates that deliberately turning a blind eye is as wrong as deliberately acting unlawfully.

¹³⁴ Gordon Brown, HC Deb, 22 Oct 1992, Vol 212, 577; more generally see Robert Mazur, *The Infiltrator: Undercover in the World of Drug Barons and Dirty Banks* (Little Brown and Co, 2009)

Chapter 11

Unconscionability and the Constructive Trust

This is the last of the four chapters looking at specific equitable claims to uncover the indicia of unconscionability. It will look at some applications of the constructive trust, specifically the common intention constructive trust. The first section will provide an overview of the constructive trust and outline the unconscionability indicia which are relevant for the common intention constructive trust (CICT). The following sections will look at the application of this trust firstly in family homes and secondly in joint venture agreements. The previous chapters have already considered the application of the constructive trust as a remedial tool to determine ownership of property, and those uses of the constructive trust will not be reconsidered.

Part 1: Constructive trusts and unconscionability

Whilst the chapter will only look at the CICT, it is convenient to start with a brief overview of the law on constructive trusts more broadly. In distinction from an express trust, which is intentionally established by the settlor, the constructive trust, as a species of implied trust, is instead recognised by the courts. The circumstances of such recognition, and how it works, is subject to debate. There is no agreement about the constructive trust, whether it is a singular entity, whether it operates differently in different contexts, and whether it even exists.

Matthews has suggested that there are thirteen types of constructive trusts.¹ Or rather, the suggestion is that the courts can find a constructive trust in at least thirteen different types of situations. Matthews groups the thirteen types into three categories. The first two categories deal with constructive trusts that arise following a breach of express trust. Those circumstances were considered in the previous chapter, and include where the trustee misappropriates trust funds and where third parties acquire misappropriated trust funds. The third category is constructive trusts arising independently of an express trust. This includes constructive trusts arising as a remedy

¹ Paul Matthews, 'The words which are not there: a partial history of the constructive trust', in Charles Mitchell (ed), *Constructive and Resulting Trusts*, (Hart Publishing, 2010), 4-5

to proprietary estoppel, which was considered in chapter nine. This third category also includes the CICT.

Swadling has suggested that the constructive trust does not exist, but is merely a word used for a wide range of proprietary remedies.² The suggestion is that it might be a misnomer to speak of a constructive trust, but rather one should address the particular proprietary remedies independently of the other. It is clear from this that the constructive trust is varied and its use in a range of circumstances might point to a lack of internal consistency.

The concept that unifies the constructive trust is unconscionability, namely that the trust is recognised in order to counteract unconscionable outcomes.³ The vague nature of the constructive trust might be deliberate, in order for it to be malleable and applicable to a wide range of circumstances, whenever unconscionability is identified.⁴ The role of the constructive trust is to reallocate proprietary interests to obtain a conscionable result.

Reallocating property: institutional and remedial constructive trusts

Despite the constructive trust having chameleonic characteristics, common law jurisdictions have grouped the constructive trusts into two types: an institutional constructive trust and a remedial constructive trust. Their operation differs somewhat but the difference might have been overstated.

The argument around the proper role of the constructive trust is whether the courts have power to reallocate proprietary interests. English law places great emphasis on property and ownership. Honoré has written that ownership is the ‘greatest possible interest in a thing which a mature system of law recognises’.⁵ William Pitt the Older is attributed to having said that not even the King of England would dare enter the shackle of a poor man. Lord Denning pointed out that that is true only unless the King had legal justification.⁶ The importance of the debate is not just philosophical; during

² William Swadling, ‘The Fiction of the Constructive Trust’ (2011) 64 *Current Legal Problems* 399, 400; *Charter plc v City Index Ltd* [2007] EWCA Civ 1382, [2008] Ch 313, [64] (Arden LJ)

³ *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 409 (Millett LJ)

⁴ *Carl-Zeiss Stiftung v Herbert Smith (No 2)* [1969] 2 Ch 267, 300 (Edmund Davies LJ)

⁵ A M Honoré, ‘Ownership’ in A. G. Guest (ed), *Oxford Essays in Jurisprudence* (OUP, 1961), 108; John Locke, *Two Treatises of Government* (P. Laslett (ed), CUP, 1988), 350; Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing, 2002), 34

⁶ *Southam v Smout* [1964] 1 QB 308, 320 (Lord Denning MR)

the Age of Enlightenment and the American and French revolutions, property and ownership (a right now belonging to the masses, not just the feudal lords) was seen as intrinsically linked to ‘liberty and equality’.⁷ This has led to the ‘traditional absolutist view of property’, namely that only Parliament can reallocate proprietary interests and the courts are limited to only protecting existing ones.⁸ However, Rotherham argues, as is evident from the chapter on proprietary estoppel, that courts do in fact reallocate proprietary interests, and merely maintain a linguistic fiction that they do not.⁹

In this respect, English law insists that it only recognises an institutional constructive trust. This is a constructive trust which arises automatically on the occurrence of a relevant event, and the role of the court is to ex post facto recognise its existence. The remedial constructive trust however is a remedial order where the courts purposefully reallocate proprietary interests after trial. English law, whilst discussing the possibility of a remedial trust, has consistently rejected it.¹⁰ There are instances where English judges have argued in favour of a remedial trust, but these seem to only be obiter statements with no authority.¹¹ Cases where judges have referred to a remedial trust include proprietary estoppel cases, where the courts have remedial discretion whether to recognise a constructive trust or some other remedy, which in itself seems to invalidate the argument that English law only recognises institutional constructive trusts. The arguments against a remedial trust include the unfairness that can be caused, in commercial dealings, to third parties that may have acquired an interest after a constructive trust would have arisen but before a remedial trust is imposed.¹² These concerns have been squarely addressed in other jurisdictions which employ a remedial trust, such as Australia.

⁷ Thomas Watkin, ‘Changing Concepts of Ownership in English Law during the Nineteenth and Twentieth Centuries’ in Martin Dixon and Gerwyn Griffiths (eds), *Contemporary perspectives on property, equity and trusts law* (OUP, 2007), 141-142

⁸ Rotherham (n 5), 49

⁹ *Ibid*, 46

¹⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714-715 (Lord Browne-Wilkinson); *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812, 830 (Nourse LJ); *London Allied Holdings Ltd v Lee* [2007] EWHC 2061, [260] (Etherton J); *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619; [2012] 2 All ER 754, [84] (Etherton LJ); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administration)* [2011] EWCA Civ 347, [2012] Ch 453, [37] (Lord Neuberger); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, [47] (Lord Neuberger)

¹¹ *Thorner v Major* [2009] 1 WLR 776, [20] (Lord Scott); *Walden v Atkins* [2013] EWHC 1387, [57] (HHJ Simon Barker QC)

¹² *London Allied Holdings Ltd v Lee* [2007] EWHC 2061, [262] (Etherton J); later expanded upon by the judge in Terence Etherton, ‘Constructive trusts and proprietary estoppel: the search for clarity and principle’ [2009] Conv 104, 106

The Supreme Court in *FHR European Investments* might have settled the matter by stating that English law only recognises an institutional constructive trust. This does not, however, explain the discretionary use of the trust after, for instance, proprietary estoppel. In the contexts which the constructive trust will be looked at in this chapter, it is clear that it is an institutional trust. It arises because certain circumstances are satisfied and not out of judicial discretion.

In Australia, the constructive trust has been referred to as a remedial trust. Deane J in *Muschinski* explained that the trust was ‘remedial in its origins’.¹³ As noted, the constructive trust continues to have a remedial role in equitable principles in English law today. Deane J continues by saying that the distinction between an institutional and a remedial constructive trust is overstated, and indeed ‘there can be no true dichotomy between the two notions’.¹⁴ The operation of the constructive trust in family home disputes is very similar in England and Australia, despite the difference in terminology.

The remedial trust can be imposed ‘regardless of actual or presumed agreement or intention’ to prevent an unconscionable result in relation to the beneficial interest in property.¹⁵ As in England, which will be seen below, there is an objective assessment of the facts to determine the “true” intentions of the parties and their decisions regarding the property. The courts cannot impute an intention where the evidence demonstrates that the parties had a different intention.¹⁶ *Muschinski* highlighted that the trust was not imposed based on a principle of ‘fairness’ or at the court’s absolute discretion; it serves to prevent unconscionable outcomes based on the parties’ intentions.¹⁷

The Australian courts have presented some principles by which the courts determine whether to recognise a remedial trust. The courts have emphasised that a constructive trust should not be imposed if a lesser remedy is sufficient to do justice.¹⁸ This is because of the importance attached to ownership and the wide-ranging implications that follows from being stripped of ownership. The courts also consider the impact on

¹³ *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, [6] (Deane J)

¹⁴ *Ibid*, [7] (Deane J)

¹⁵ *Ibid*, [6] (Deane J)

¹⁶ *Ibid*, [13] (Gibbs CJ)

¹⁷ *Ibid*, [13] (Brennan J); [8] (Deane J)

¹⁸ *Mainieri v Cirillo* [2014] VSCA 227, [29]; *The Bell Group Ltd (in liquidation) v Westpac Banking Corp (No 9)* [2008] WASC 239, [9668]; *Giumelli v Giumelli* [1999] HCA 10, (1999) 196 CLR 101, [10]

third-parties.¹⁹ For instance, in the New Zealand case of *Fisher v Shantung Enterprises* a remedial trust was rejected because its imposition would remove assets of a bankrupt person from some of his creditors.²⁰ This also demonstrates that the remedial trust is not a free-wheeling vehicle for justice, but is based on principles, which afford the courts sufficient flexibility to meet new circumstances and prevent unconscionable outcomes. However, conceptual uncertainty remains in Australia and the debate continues.²¹

It is beyond the scope to fully address the nature of the constructive trust. The chapter's focus is to identify the unconscionability indicia which lead to a trust being recognised, and those indicia may well be independent from the issue of whether the trust is institutional or remedial.

Unconscionability indicia

The rest of the chapter will only look at the CICT. The unconscionability indicia can be briefly summarised. Again, the cases draw a distinction between the private and commercial contexts. As the next section will show, the CICT first developed out of domestic disputes over ownership of the family home. A particular strand of the CICT developed to deal with joint venture agreements within commercial relationships.

A key unconscionability indicium in the second category, namely indicia relating to the claim, is agreements. Where an agreement has been reached, and the parties thus have formed a common intention, equity will in certain circumstances prevent one party from reneging on that agreement. This emphasises the importance even of informal agreements within a family. As with proprietary estoppel, it will only be unconscionable to renege on that agreement if the other party has suffered some detriment in reliance on it. Reliance and detriment thus reappear as relevant indicia. Again, the cases will show that detriment is construed broadly in equity, and this has been a key point of contention in many cases.

Again, the courts have to be mindful of the relative balance of power between the parties. Invariably, in these disputes one party will have legal ownership, which of

¹⁹ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19, [129]; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, [510]

²⁰ *Fisher v Shantung Enterprises Ltd* [2001] NZHC 569, [55] (Patterson J)

²¹ *The Bell Group Ltd (in liquidation) v Westpac Banking Corp (No 9)* [2008] WASC 239, [4798]

course puts them in an advantageous position. It raises questions about how the courts should go about to untangle family disputes, where it is unlikely that the parties have formed formal agreements, and where the parties might have been coloured by emotions such as love, or have had an unequal dealing with the family assets. This raises a number of psychological factors about the mundane and everyday behaviour of people how important it is that the law has reasonable expectations.

One particular issue raised by Hudson is the divide between law (and what the law expects) and human reality when dealing with CICT.²² The law searches for a common intention, which, for instance, includes looking at joint savings and bank accounts. In *Stack v Dowden* the judges remarked that it was ‘unusual’ for Mr Stack and Ms Dowden, having lived together for many decades, to still have separate bank accounts.²³ The argument made by Hudson, and others, is that there are no norms in modern relationships (as opposed presumably to the old, traditional-looking “nuclear family”, with the husband as sole breadwinner).²⁴ Hudson, by way of example, refers to the joke made in the popular US sitcom *The Big Bang Theory*, where a lead character presents his new girlfriend with a “relationship agreement”, which details in minutiae all elements (including finances) of their relationship.²⁵ Indeed, the two main characters, who share a flat, have a “Roommate Agreement”, which details their shared life at home – a useful reminder that cohabitation (and disputes over equitable ownership) is not limited to romantic couples.²⁶ The joke in the show is the absurdity of having formally drafted agreements to regulate relationships, but the legal point is that this seems to be what the law expects.

The law must recognise the realities of all relationships where parties cohabit and, through various means, contribute to the property: a general test of unconscionability, which properly recognises these factors, is arguably better than the detailed search for an agreement.²⁷ Looking for formal indicators, such as a joint bank account, does not necessarily reflect the reality of many relationships. Nonetheless, through the various actions of the parties, a common intention that the property is meant to be shared must

²² Alistair Hudson, *Equity and Trusts*, (8th edn, Routledge, 2015), 784

²³ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [91]-[92] (Lady Hale)

²⁴ Hudson (n 22), 784; citing Hans Magnus Enzenberger, *Mediocrity and Delusion: Collected Diversions* (Verso, 1992), 179

²⁵ Hudson (n 22), 786-787; *The Big Bang Theory*, Season 5, Episode 10 (CBS, Nov 17, 2011)

²⁶ *The Big Bang Theory*, Season 2, Episode 6 (CBS, Nov 3, 2008)

²⁷ To this effect, consider the Australian approach; *Baumgartner v Baumgartner* [1987] HCA 59, (1987) 164 CLR 137, [36]; *Bryson v Bryant* (1992) 29 NSWLR 188, 16 Fam LR 112, 118 (Kirby P)

be manifested. The agreement must be clearer when there is a commercial joint venture agreement, which will be discussed in part three, but even then the agreement does not have to be anything resembling a formal contract.

The relevant indicia thus are the context, the nature of the relationship between the parties and what can reasonably be expected within such a relationship, agreements (which can be construed from a wide range of factors), reliance and detriment (which again is a broad concept). Laches and acquiescence are applicable, but these are not raised in any of the cases discussed in this chapter.

Part 2: Unconscionability and the ‘common intention’ constructive trust

This section will consider the operation of the CICT. In short, it arises where there has been a common intention between a legal owner and a non-legal owner that ownership will be shared, and the non-legal owner has in reliance on that understanding acted to their detriment, meaning it would be unconscionable for the legal owner to deny the non-legal owner their interest in the property.²⁸ In the past few decades, the trust has often arisen after the breakdown of a cohabiting relationship, where one partner was the legal owner, and the other partner, in the course of the relationship, had spent money on the property. The CICT also arises in commercial contexts, which will be considered further in part three below.

Married women, cohabitants and the family home

The modern CICT emerged in the 1960s, as changing social circumstances saw a need for the law to protect the interests of wives at the end of a marriage. This was eventually addressed by statute.²⁹ The problem continues for cohabiting couples who are not married or in civil partnerships. What rights does a non-legal owner of a property have if he or she has spent their own money on the property, but they are now asked to leave at the breakdown of the relationship?

²⁸ *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 FLR 1240, [50] (Patten LJ)

²⁹ The Matrimonial Causes Act 1973, ss. 23- 25 etc; consider the Matrimonial Homes Acts 1967, 1983; the Matrimonial Proceedings and Property Act 1970, s. 37; and now the Civil Partnership Act 2004, s. 65

A line of authorities starting in the 1940s held that a wife had a “special” licence to reside in the matrimonial home, even if the husband (as legal owner) left; the wife could only be ejected by a court order.³⁰ This was referred to as the “deserted wife’s equity”. It differed from a contractual licence because it was not revocable at will. The “deserted wife’s equity” did not prove popular.³¹ A cause for contention was that the equity could be enforced against third-parties, such as banks if the husband defaulted on the mortgage repayments. The concept was conclusively dismissed by the House of Lords in *Ainsworth*.³² The wife had a simple licence which did not bind anyone other than the husband. *Ainsworth* was overruled by statute.³³

Disputes also arose around the beneficial entitlements of non-legal owners who spent their time and money on improving the family home. Two early House of Lords decisions lay the groundwork for the CICT, as it applies over the family home. They predate the Matrimonial Causes Act and Civil Partnership Act, but explain the fundamental test for common intention. The law had already held that a person who made a contribution to the purchase price of a property, which was not a gift, held a beneficial interest in the property proportionate to their contribution by way of a resulting trust.³⁴ It has been argued that today the CICT has overtaken the resulting trust in all aspects of determining agreements to share beneficial interests in the family home.³⁵ The House of Lords held that a non-legal owner making contributions to the family home could only obtain a beneficial interest through agreement; it had to be the “common intention” of both parties that beneficial ownership would be shared.³⁶ If there is such a common intention, and the non-legal owner thereafter spends money on the property (thus suffering a detriment), it would be “inequitable” for the legal owner to deny that person their beneficial interest.

³⁰ *Bramwell v Bramwell* [1942] 1 KB 370, 374 (Goddard LJ); *Stewart v Stewart* [1948] 1 KB 507, 513 (Tucker LJ); *Errington v Errington* [1952] 1 KB 290, 298 (Denning LJ); *Bendall v McWhirter* [1952] 2 QB 466, 476-477 (Denning LJ); see the Married Women’s Property Act 1882, s 17

³¹ Edmund Heward, *Lord Denning: A Biography* (Weidenfeld and Nicolson, 1990), 52

³² *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1226 (Lord Hodson)

³³ Matrimonial Homes Act 1967; now the Family Law Act 1996, s. 30

³⁴ *Westdeutsche Landesbank Girozentrale* (n 12), 708 (Lord Browne-Wilkinson); *Curley v Parkes* [2004] EWCA Civ 1515, [14] (Peter Gibson LJ); *Barrett v Barrett* [2008] EWHC 1061, [2008] 2 P & CR 17, [6] (David Richards J)

³⁵ *Stack v Dowden* (n 23), [31] (Lord Walker); *O’Kelly v Davies* [2014] EWCA Civ 1606, [2015] 1 WLR 2725, [32] (Pitchford LJ)

³⁶ *Pettitt v Pettitt* [1970] AC 777, 794 (Lord Reid), 822 (Lord Diplock); *Gissing v Gissing* [1971] AC 886, 905-906 (Lord Diplock)

The first leading case was *Lloyd's Bank plc v Rosset*.³⁷ A husband and his wife purchased a home using the husband's money. The house was described as semi-derelict, and renovation works began a few weeks prior to the exchange of contracts. The renovations were funded by the husband, but overseen (and to an extent participated in) by the wife. A few months after the exchange the husband took out an overdraft, secured by a charge over the house. The wife was unaware of the charge. A year later, the husband left due to marital difficulties and did not repay the loan. The husband did not resist the bank's demand for possession of the property; however the wife resisted the bank's petition on the grounds that she had a beneficial entitlement to the property under a constructive trust, which amounted to an overriding interest under the then Land Registration Act.³⁸ The House of Lords considered the grounds for establishing common intention, clarifying that what was required was an agreement to share beneficial interest in the property. Lord Bridge posited that a partner, spending time on overseeing renovations, and even participating in them, was not sufficient to establish such agreement, and the wife's claim failed.³⁹ Lord Bridge held that the requirement was either some express agreement prior to acquisition ('however imperfectly remembered and however imprecise their terms may have been') or, in the absence of such express agreement, an inferred agreement based on contributions by the non-legal owner to the purchase price (or, at a later stage, contributions to the mortgage repayments).⁴⁰ If the non-legal owner acted to their detriment based on such an agreement (and of course a detriment is readily shown by a financial contribution to the purchase price), a constructive trust would arise.

This strict approach, namely that only contributions to the purchase price would suffice to obtain a beneficial interest, was loosened in later judgments. It was seen as unjustly restrictive and could deny justice to parties who had financially contributed to aspects of the property other than the purchase price, based on a common intention. In determining whether there is a common intention to share the beneficial interest,

³⁷ *Lloyd's Bank plc v Rosset* [1991] 1 AC 107

³⁸ Land Registration Act 1925, s. 70(1)(g); now the Land Registration Act 2002, Sch 1, para 2; Sch 3, para 2; consider *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 505 (Lord Wilberforce)

³⁹ *Rosset* (n 37), 131 (Lord Bridge); cf *Lloyd's Bank plc v Rosset* [1989] Ch 350, 386 (Nicholls LJ)

⁴⁰ *Rosset* (n 37), 132-133 (Lord Bridge); throwing doubt on earlier Court of Appeal decisions, consider *Grant v Edwards* [1986] Ch 638, 648 (Nourse LJ); *Eves v Eves* [1975] 1 WLR 1338, 1345 (Brightman J)

and determining what shares of the beneficial interest either party has, the courts now look to the whole course of dealings between the parties.⁴¹

If a property is bought in one name only, and the other party does not contribute to the purchase price, the non-legal owner has to demonstrate that there was a common intention to share the beneficial interest. The common intention can arise prior to acquisition or after. It is determined objectively on the facts, including the parties' words and conduct, with the court looking at the whole course of dealings. The quantification of the beneficial interest is based on the facts. If a property is bought in both names, but there is no agreement as to how the beneficial interest is to be split, the courts will presume that it is split in equal shares. A similar approach is taken in Australia; *Baumgartner* noted that 'equity favours equality' as a starting point for quantifying the beneficial interest.⁴² The parties can counter that presumption by showing that there was a common intention to split the beneficial interest unevenly.⁴³ The key is looking at the whole course of dealings between the parties to identify what the common intention, either express or implied, was.⁴⁴ This is an objective test, based on the parties' words and conduct.⁴⁵ Judges have reiterated the importance of keeping the rules flexible in order 'to absorb the various different potential factual scenarios and be astute to discern unconscionable behaviour'.⁴⁶ The courts have also reiterated the point that what they are concerned with is the whole course of dealings relating to the property in question, not the relationship as a whole. The case of *Graham-York*, for instance, concerned a partner of a deceased man who had violently and sexually abused the partner throughout the relationship. Tomlinson LJ noted that a right-minded person might well have awarded the partner a 50% interest in the property as a matter of redistributive justice, but that as a matter of law this was impossible.⁴⁷ All that can be taken into account is any agreements regarding the property.

⁴¹ *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, [69] (Chadwick LJ)

⁴² *Baumgartner v Baumgartner* [1987] HCA 59, (1987) 164 CLR 137, [37]

⁴³ *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776, [17], [25] (Lady Hale and Lord Walker)

⁴⁴ *Stack v Dowden* (n 23), [60] (Lady Hale); *Abbott v Abbott* [2007] UKPC 53, [19] (Lady Hale)

⁴⁵ *Jones v Kernott* (n 43), [17], [46] (Lady Hale and Lord Walker); *Geary v Rankin* [2012] EWCA Civ 555, [20] (Lewison LJ)

⁴⁶ *AM v SS* [2014] EWHC 2887, [24] (Coleridge J)

⁴⁷ *Graham-York v York* [2015] EWCA Civ 72, [2015] HLR 26, [22] (Tomlinson LJ)

a. *Geary v Rankine* [2012] EWCA Civ 555

This case concerned two partners, Mrs Geary and Mr Rankine, running a guesthouse in Hastings. They were not married and had a child together. Their relationship began in 1990, when Mrs Geary was still married, and she did not divorce until 2002. Rankine purchased a guesthouse called Castle View in 1996. The purchase price was £61,000 and was paid solely by Rankine. The house was in Rankine's name alone.

The original intention was for Rankine and Geary to keep living in London, and have the guesthouse run by a professional manager. Its purchase was thus a commercial investment. However, the manager was a 'disaster'.⁴⁸ Rankine moved to Hastings to run the guesthouse, whilst Geary remained at her job in London. Eventually Rankine realised that he could not run the guesthouse on his own and Geary left her job and moved to Hastings. She participated in running the guesthouse, including managing administrative and financial matters. She was not paid a wage but was given money by Rankine as needed, though he was described as controlling and reluctant to hand over money. Though she had some control over the business finances, she was not a co-signatory on the account and could not draw money from it. Rankine explained that he had refused to make Geary a partner in the business so long as she remained married to her husband, so as to prevent the husband making any claims against the business for financial support for him and the two children he had with Geary. Geary was not made a partner after her divorce, and stated that Rankine became evasive when she asked him about it.

The relationship broke down in 2009. Geary made a claim for an interest in the property either by way of it being co-owned through a commercial partnership or by way of a common intention constructive trust. Both claims were rejected at trial and on appeal. The partnership claim was rejected because the family relationship had, on the facts, never evolved into a business relationship; there was no profit sharing, and Rankine had carried on the guesthouse business after the end of the relationship, which in any event would have terminated a partnership.⁴⁹ The Court of Appeal added that even if there had been a partnership it did not follow that the guesthouse (bought by Rankine alone as a commercial investment) was partnership property.⁵⁰

⁴⁸ *Geary v Rankin* (n 45), [21] (Lewison LJ)

⁴⁹ *Ibid*, [12]-[13] (Lewison LJ)

⁵⁰ *Ibid*, [15] (Lewison LJ)

The constructive trust argument was that a common intention to share the beneficial interest had arisen during their running the guesthouse (it was rightly accepted by Geary that there was no pre-acquisition common intention). Lewison LJ posited that it would be more difficult to ascertain any common intention where the property was not the family home but rather a commercial investment.⁵¹ There had to be a common, which is to say shared, intention. The facts of the case suggested that Rankine never had the intention of sharing beneficial interest in the property.⁵² Lewison LJ held that the facts might, at best, have shown a common intention to run the business together, but an intention to run a business together did not equate to an intention to share ownership in the property.⁵³ Geary only divorced six years after the property was bought, and Rankine never made any statement (either before or after her divorce) to the effect that ownership was to be shared; as noted he was evasive when she asked. It was clear that he never intended her to have an interest in the property.⁵⁴ In the absence of a common intention, the fact that Geary acted to her detriment in leaving her job in London and working for free cannot give right to a proprietary interest, and the outcome of the case is correct. It demonstrates that the use of conscience does not entail a free-wheeling search for justice but rather is based on clearly identifiable rules. Other claims, such as unjust enrichment, did not appear to have been pursued but could perhaps, on the facts, have been successful.

b. *O'Kelly v Davies* [2014] EWCA Civ 1606, [2015] 1 WLR 2725

Kenneth Davies and Jeanette O'Kelly were in a relationship. In 1987 they jointly purchased a property on William Street, Swansea, as their family home. In 1991 it was transferred into O'Kelly's sole name. O'Kelly sold the house to Davies in 2006 and at the same time O'Kelly, in her sole name, purchased another property, Lon Olchfa. Davies rented out the William Street property and used the rent to pay the mortgage; the property was eventually repossessed. The couple lived at Lon Olchfa until 2011 when the relationship ended. At this stage, Davies applied for a declaration that

⁵¹ Ibid, [18] (Lewison LJ)

⁵² Ibid, [20] (Lewison LJ)

⁵³ Ibid, [21] (Lewison LJ)

⁵⁴ Ibid, [22] (Lewison LJ)

O’Kelly held the Lon Olchfa property on trust for them both. O’Kelly disputed that but Davies was successful both at trial and on appeal.

A factual dispute arose over the nature of the relationship and whether the parties had actually been cohabiting. The judge found that they had and made a declaration that the properties were in O’Kelly’s sole name (first William Street until 2006 and Lon Olchfa thereafter) so that she could claim benefits as a single occupant and single mother.⁵⁵ Davies was the main breadwinner and paid the mortgages on both properties. They also had a joint bank account in the last years of their relationship. The judge found, assessed objectively, that there was a common intention to share the beneficial interest in William Street also after it was transferred into O’Kelly’s sole name.⁵⁶ Lon Olchfa was purchased because O’Kelly wanted to live in the catchment area of a particular school; William Street was sold to Davies because he alone wanted to keep it and rent it out. Lon Olchfa was in O’Kelly’s sole name so that she could continue claiming single mother benefits. The judge found that it was the parties’ continued common intention that the beneficial interest in Lon Olchfa was to be shared; objectively ascertained on the basis that it was their family home, shared with their daughter, and that Davies through his income paid the bulk of the mortgage repayments.⁵⁷ There was no clear evidence on the quantification of the beneficial interest. Davies sought an equal share, despite making a greater financial contribution, which the judge found to be ‘fair’ and so ordered.⁵⁸ The judge found that the claim was not defeated because the property transactions were carried out to further an illegal purpose, Davies could assert this beneficial title without recourse to any illegal agreement.⁵⁹

The Court of Appeal agreed with the judge. Viewing the relationship as a whole it was clear that there was a common intention to share the beneficial interest in the two family homes.⁶⁰ The unlawful purpose behind having the homes in O’Kelly’s sole name was not the basis on which Davies sought his interest (since it would have failed for illegality) but rather through that objectively ascertained common intention.⁶¹ It

⁵⁵ *O’Kelly v Davies* [2014] EWCA Civ 1606, [2015] 1 WLR 2725, [6] (Pitchford LJ)

⁵⁶ *Ibid*, [9] (Pitchford LJ)

⁵⁷ *Ibid*, [11] (Pitchford LJ)

⁵⁸ *Ibid*, [12] (Pitchford LJ)

⁵⁹ *Ibid*, [13] (Pitchford LJ); *Tinsley v Milligan* [1994] 1 AC 340, 366 (Lord Jauncey); but see now *Patel v Mirza* [2016] UKSC 42; [2016] 3 WLR 399

⁶⁰ *O’Kelly v Davies* (n 55), [31] (Pitchford LJ)

⁶¹ *Ibid*, [30] (Pitchford LJ)

was a matter of property law. Davies was granted an equal share in the beneficial interest.

Summary on common intention constructive trusts

It is clear that the constructive trust is not used as a free-wheeling and arbitrary vehicle to achieve justice. It shows that conscience is based on objective principles, which do remain flexible enough to meet new circumstances. The focus for a CICT is in the name; there has to be a common intention that the property is to be shared. If the property is owned by one person, the non-legal owner must act to her detriment in reliance on that common intention. Following *Oxley v Hiscock*, the courts take a very wide view as to what amounts to detriment. Leaving work to look after the children and other strictly speaking non-financial contributions to running of the family home can suffice, provided it was in reliance on the common intention. The unconscionability factor is the legal owner denying the non-legal owner their beneficial interest after they have detrimentally relied on the common intention. The cases have highlighted that the courts take a flexible approach in family home disputes, but, as will be clear in the section below, this does not rule out the CICT from commercial disputes.

Part 3: Unconscionability and the *Pallant v Morgan* constructive trust

This section will consider the *Pallant v Morgan* constructive trust.⁶² Recent academic debate has disputed that a constructive trust arises and postulates that the equity present is a breach of fiduciary duty; though the law does recognise the trust.⁶³ This dispute seems to stem from the court's reluctance to recognise a constructive trust in the commercial context.⁶⁴ This has been criticised by others, suggesting that a constructive trust should be recognised if the requirements for the *Pallant v Morgan* equity are met.⁶⁵

⁶² *Pallant v Morgan* [1953] Ch 43

⁶³ Michael Lower, 'The *Pallant v Morgan* Equity' [2012] Conv. 379, 386; Man Yip, 'The *Pallant v Morgan* Equity Reconsidered' (2013) 33 Legal Studies 549, 550

⁶⁴ *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619; [2012] 2 All ER 754, [86] (Etherton LJ, dissenting)

⁶⁵ Consider Nicholas Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31 Legal Studies 175, 192

When two parties jointly agree to acquire property, but as a matter of fact, only one party legally acquires the property, and by agreement the other party refrains from trying to obtain the property, then a constructive trust can arise over that property to ensure that the non-acquiring party receives his intended beneficial interest.⁶⁶ A five-stage test was laid down by Chadwick LJ in *Banner Homes*.⁶⁷ (1) There has to be a pre-acquisition agreement between two or more parties which (2) does not have to be contractually enforceable; (3) the agreement envisages that one party will acquire the property and the other will obtain an interest in it, and (4) the acquiring party does not inform the non-acquiring party that it is going back on the agreement (thus giving the non-acquiring party a fair chance to obtain the property themselves) and (5) the agreement must either have benefitted the acquiring party or been detrimental to the non-acquiring party, so as to make it unconscionable for the acquiring party to obtain the full beneficial interest.

The facts suggest that the acquiring party acts as an agent, thus having fiduciary obligations, and that the non-acquiring party can bring a claim for breach of fiduciary duty as opposed to directly seeking a constructive trust. There are, however, no legal objections to a constructive trust being sought; the debate is one of principle and whether equity should have a role in commercial dealings. The law is today clear in saying that the constructive trust can arise in commercial contexts and is not dependent on there being a fiduciary relationship.⁶⁸ This equitable claim is thus one type of a CICT.

a. *Pallant v Morgan* [1953] Ch 43

The name-sake case is *Pallant v Morgan*, although the principle had already been established.⁶⁹ Mr Pallant was the leaseholder of a property situated on a larger estate known as Blackdown, in Chichester. Mr Morgan was a freeholder of a neighbouring property.

⁶⁶ *Kilcarne Holdings Ltd v Targetfellow (Birmingham) Ltd* [2004] EWHC 2547, [219] (Lewison J)

⁶⁷ *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372, 397-399 (Chadwick LJ); *Clarke v Corless* [2010] EWCA Civ 338, [38] (Patten LJ)

⁶⁸ *Credit & Mercantile plc v Kaymuu Ltd* [2014] EWHC 1746, [130] (Kerr QC); [2015] EWCA Civ 655, [62] (Sales LJ); *Crossco No 4* (n 64), [130] (Arden LJ)

⁶⁹ *Chattock v Muller* (1878) 8 Ch D 177, 181 (Malins VC)

In 1950 they learnt that Blackdown was to be sold at auction. Both Pallant and Morgan had an interest in acquiring the estate, because they wanted to prevent further felling of trees in the estate's woodland. To that effect, they realised that they had an interest in cooperating in securing ownership of Blackdown, rather than bidding against each other. They had some inconclusive discussions to that effect. Morgan engaged a land agent, because he wanted to acquire further properties at the auction. The agent, Mr James, had some inconclusive discussions with Pallant. The discussions focused on the price and how the land was to be apportioned between the two. Following those discussions, Pallant engaged his own agent, Mr Mason, because he wanted expert advice on the timber rights that came with the estate.

The two agents, James (for Morgan) and Mason (for Pallant) had one telephone conversation prior to the auction. No firm agreement was reached but certain broad points were agreed upon. They met again on the day of the auction. There was disagreement at trial over what was said on the day, but the judge favoured the evidence of Mason.⁷⁰ James made an assurance to Mason that Mason should not bid (so as to keep the final auction price down), and that if James was successful in the action, the land and price would be divided according to the broad agreement reached during the telephone conversation. James was successful and acquired Blackdown for £1000. Following the auction James refused to finalise any agreement with Mason, arguing that they had no pre-auction agreement.

Pallant brought a claim against Morgan for ownership of the land. As noted, the judge found that James had made assurances to Mason, which stopped Mason from bidding. The judge found, however, that the claim for specific performance had to fail for want of a contract; as the judge said, there was 'too much left undecided'.⁷¹ However, applying what is now the doctrine of *Pallant v Morgan*, the judge found that Morgan held the land on constructive trust, to be apportioned and sold to Pallant per the broad agreement (the details of which had to be settled by the parties, not the court). Allowing Morgan to keep the land entirely would be 'tantamount to sanctioning a fraud on his part', and could not be permitted.⁷²

The unconscionability factor is the going back on the promise made. It must be shown that, per the criteria later laid down in *Banner Homes*, the defendant made a

⁷⁰ *Pallant v Morgan* [1953] Ch 43, 47 (Harman J)

⁷¹ *Ibid*, 48 (Harman J)

⁷² *Ibid*, 48 (Harman J)

gain or the claimant suffered a detriment; in the current case it is clear that Morgan made a gain because he did not have to outbid Pallant.

b. *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372

Banner Homes Group plc (Banner) and Luff Developments Ltd (Luff) were both property developers. Both were interested in acquiring a freehold site at White Waltham in Berkshire. The site was owned by ML Holdings plc (MLH), who wanted to sell it. Another company, Hewland Engineering Ltd was interested in buying only two of the eight acres of the land, but MHL wanted to sell the land in a single transaction. Luff was interested in buying the site, and formed an agreement with Hewland as a sub-buyer. At the start of 1995, Luff decided that it wanted a joint venture partner for the purchase of the remaining six acres. It came into contact with Banner. From spring to autumn 1995 Banner and Luff negotiated with the view of forming a joint venture agreement. The site was to be purchased by a third company, owned in equal shares, and to this effect Luff obtained a shelf-company called Stowhelm Ltd. The negotiations between Luff and Banner were never formalised, and were held up by, amongst other things, disagreements over the proposed shareholder agreement for Stowhelm. By October 1995, there were pressure from MLH and Hewland for the transaction to go ahead, and Luff started doubting whether it wanted Banner as a joint venture partner. Luff, however, did not share those doubts with Banner. The reason was that it wanted to keep Banner from being a rival purchaser for the site.⁷³ Negotiations continued past the purchase date, with Banner believing that the joint venture agreement was a certainty, but with Luff having decided to back out. Stowhelm did obtain the freehold on 22 November as planned, but it was only three weeks later that Banner was informed that Luff were backing out.⁷⁴

Banner brought a claim against Luff, arguing inter alia that Luff (as the sole shareholder in Stowhelm) held the site on trust in equal shares between itself and Banner. The judge gave two principal reasons for rejecting the constructive trust.⁷⁵ The first was that whilst Banner and Luff negotiated over the shareholder agreement neither side considered itself legally bound to proceed as joint venture partners and

⁷³ *Banner Homes Group* (n 67), 379 (Chadwick LJ)

⁷⁴ *Ibid*, 380 (Chadwick LJ)

⁷⁵ *Ibid*, 382 (Chadwick LJ)

Luff was therefore entitled to back out. The second was, even if there had been a binding agreement, Banner had not suffered any detriment, which the judge held was a requirement.⁷⁶

On appeal, Chadwick LJ, having reviewed the case law (all at first instance), presented the five criteria that were stated above. Of particular importance was the assertion that the claimant had to demonstrate either that it had suffered a detriment or that the defendant had gained some advantage, but that there was no need to show both.⁷⁷ The presence of the agreement, and the detriment/advantage, makes it unconscionable for the acquiring party to retain full ownership of the acquired property.

The Court of Appeal rightly allowed the appeal and recognised the constructive trust. There had been a sufficiently clear agreement between the parties; what was left was negotiating the details of the shareholder agreement for the third-company vehicle through which they were to jointly purchase the land. Luff deliberately withheld its doubts about keeping Banner on as a joint venture partner, partly to prevent Banner from being a rival purchaser (which could potentially press the price up). The final order, as sought by Banner, was that Luff held the shares in Stowhelm on constructive trust for Banner and themselves in equal shares.⁷⁸

c. *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619; [2012] 2 All ER 754

The case concerned the Noble family, which owned properties and ran various amusement arcades and venues. For various reasons Philip Noble and his sister-in-law Gill Noble decided to split the business ventures in half. One asset owned by Philip, through his vehicle Crossco No4, was the freehold of a building in Piccadilly, Manchester. He also ran, through his vehicle Piccadilly, an amusement arcade on the ground floor. Piccadilly held a lease from Crossco, which ran 15 years, from 2007 to 2022. The lease had a break clause which required the landlord to give three months' notice. The rest of the building was empty.

⁷⁶ Consider *Gissing v Gissing* [1971] AC 886, 905 (Lord Diplock); *Grant v Edwards* [1986] Ch 638, 656 (Browne-Wilkinson VC); *Lloyd's Bank plc v Rosset* [1991] 1 AC 107, 132 (Lord Bridge); *Yaxley v Gotts* [2000] Ch 162, 176 (Robert Walker LJ)

⁷⁷ *Banner Homes* (n 69), 399 (Chadwick LJ)

⁷⁸ *Ibid*, 402 (Chadwick LJ)

As part of the splitting process, referred to as a demerger, Philip took on the trading parts of the business group and Gill took on the property ownership part of the business group. For various reasons, including tax management, it was imperative that the business group was split evenly between the two sides. In 2009, an agreement was reached that the freehold of the building would pass from Philip to Gill (which is to say, it was transferred from Crossco to Gill's vehicle, Jolan Piccadilly Ltd (Jolan)). This is because the property was, apart from the ground floor, empty and suitable for redevelopment.

The fact that led to the dispute was what would happen to Piccadilly, which still held the lease and operated the amusement arcade. During the demerger negotiations, where both sides were advised by a variety of business, financial and legal advisors, it would seem that no one took note of the break clause in the lease. The lease held by Piccadilly covered all five floors of the building, and the negotiations focused on how the lease would be varied or surrendered and a new lease granted, so as to only cover the ground floor, leaving the rest of the building free for redevelopment. Because of time constraints, no formal agreement was reached regarding the lease before the freehold was transferred. Jolan obtained planning permission for the building, including stores for the ground floor, and gave notice that it was exercising its rights under the break clause.⁷⁹ Piccadilly objected. One of its arguments was that, following the discussions and agreements during the demerger, Piccadilly had a right to remain in the premises for the duration of the lease (until 2022), and that it thus had a beneficial right to the premises by way of a constructive trust following *Pallant v Morgan*.⁸⁰

The constructive trust argument was rejected by the trial judge. Philip seemed to have been under the impression that the agreements reached in February and March 2009 included that his company (Piccadilly) would remain on the ground floor and continue to pay rent at the same rate (either under a varied or new lease).⁸¹ The judge also found that Crossco (which is to say Philip or his advisors) did not know of the break clause.⁸² At the same time, some of Gill's advisors knew about it, but operated on the assumption that that meant that Philip's side knew about it.⁸³ Importantly, Gill

⁷⁹ *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWHC 803, [4]-[5] (Morgan J)

⁸⁰ *Ibid*, [10] (Morgan J)

⁸¹ *Ibid*, [90] (Morgan J)

⁸² *Ibid*, [173] (Morgan J)

⁸³ *Ibid*, [177] (Morgan J)

did not “turn a blind eye” to the question of whether Philip knew about it.⁸⁴ The trial judge identified that unconscionability was the correct test for identifying a constructive trust in this situation.⁸⁵ The judge identified several relevant factors; including (1) that Philip’s side had made a mistake in missing the break clause but that (2) the mistake was not caused, induced or contributed towards by any action or statement by Gill’s side; (3) Gill’s side did not know that Philip’s side was mistaken; (4) both sides proceeded in the knowledge that the freehold was transferred without a binding agreement as to the future of Piccadilly’s lease.⁸⁶ Further, although there might have been some understanding that Piccadilly was to remain, it was not clear that they could remain for the full duration of their existing lease, and there was no agreement on the extent of Jolan’s redevelopment (which, as happened, could include the ground floor). For that reason it was not unconscionable for Gill to exercise the break clause.⁸⁷

Philip’s appeal was dismissed. The Court of Appeal divided on the interpretation of the *Pallant v Morgan* equity, as stated at the start of this section. Etherton LJ wanted to interpret it as a remedy arising following a breach of fiduciary duty.⁸⁸ The majority followed *Banner Homes* in holding that it was indeed a common intention constructive trust that arose based on the five-part test.⁸⁹ Their Lordships’ analysis of the facts did not differ from the trial judge. Arden LJ identified that the agreement reached between Philip and Gill did not expressly include any statement that Gill would not do anything to upset Piccadilly’s continued operation of the arcade.⁹⁰ Indeed, the agreement was that the lease was to be renegotiated (primarily to reduce the lease to the ground floor (and possibly the basement) as opposed to all five floors). Hence there can be no enforceable expectation that Piccadilly could stay for the duration of its existing lease.

d. *Achom v Lalic* [2014] EWHC 1888

This case concerned a number of people who invested in the purchase, renovation, and operation of a nightclub in London, called the Scotch. The facts that gave rise to the

⁸⁴ Ibid, [181] (Morgan J)

⁸⁵ Ibid, [364] (Morgan J)

⁸⁶ Ibid, [368] (Morgan J)

⁸⁷ Ibid, [370] (Morgan J)

⁸⁸ *Crossco No 4* (n 64), [88] (Etherton LJ)

⁸⁹ Ibid, [123] (McFarlane LJ), [129] (Arden LJ)

⁹⁰ Ibid, [131] (Arden LJ)

dispute concern the purchase and initial setup of the club. The claimants were three businessmen, two of whom had a more prominent role. The first was Frederic Achom and the second was Alex Nicholl. The third claimant was Anthony Grant. Achom and Grant were described as having ‘chequered pasts’; having spent time in prison for conspiracy to defraud, and had previously been subject to director’s disqualification orders.⁹¹ The defendants were Timohir Lalic and Vahram Papazyan, businessmen who operated the Scotch through the third defendant, their company Alula Leisure Ltd. Alula in turn was the sole shareholder in Great Club Ltd, which held the actual underlease for the Scotch.

In July 2011 Lalic and Papazyan were interested in buying bars and nightclubs in London. They were introduced to Achom. They had meetings with Nick Smart, who then held the shares in Great Club. In September they agreed to proceed with the purchase. An email was sent from Achom to Lalic on 28 September 2011 that suggested that the ownership of the business venture was to be 50:50.⁹² Later, a trading company was set up to actually run the club (as opposed to Great Club/Alula which simply held the lease), which was called Haycro Ltd, with Lalic and Papazyan as director/shareholders.⁹³ Achom took lead on a number of issues, including instructing and overseeing an interior design company. The dispute seemed to have begun in November 2011, when Achom again emailed Lalic with proposals for structuring the ownership of the venture. In evidence, Lalic suggested that the proposed 50:50 came as a ‘big shock’.⁹⁴ What followed over the coming months were ongoing disputes over the investments, whether Achom had provided the money he had promised, and his (through his associates) day to day control over the Scotch. Schedules were produced suggesting that Achom had invested some £76,000 and Nicholl had invested some £112,000.⁹⁵ In March 2012 the parties decided to split and negotiations over a “buyout” began.⁹⁶ The proceedings began; by agreement the trial only dealt with liability and the question of quantum was deferred depending on the outcome.⁹⁷

Various claims were made. The *Pallant v Morgan* claim was that 50% of Alula’s shares in Great Club were held on constructive trust for the claimants based on their

⁹¹ *Achom v Lalic* [2014] EWHC 1888, [5] (Newey J); Company Directors Disqualification Act 1986

⁹² *Achom v Lalic* (n 91), [23] (Newey J)

⁹³ *Ibid*, [28] (Newey J)

⁹⁴ *Ibid*, [36] (Newey J)

⁹⁵ *Ibid*, [46]-[47] (Newey J)

⁹⁶ *Ibid*, [49] (Newey J)

⁹⁷ *Ibid*, [62] (Newey J)

agreements (the judge found that no contract had been formed⁹⁸). The argument was that there had been a prior agreement that Great Club would be acquired for the benefit not just of Alula (and through it Lalic and Papazyan) but also for Achom and the two other claimants. The benefit that Alula had gained was that Achom had not himself tried to purchase the shares in Great Club.⁹⁹

This claim was rejected by the judge on practical grounds. The judge found that Achom did not appear to have had the money, time or inclination to attempt to buy Great Club, not least since he had only learnt of the opportunity through Lalic.¹⁰⁰ The judge did not appear to have made any definitive finding on whether there had been a sufficiently clear agreement that ownership in the club would be shared; his finding was on the second requirement, namely that Achom had not suffered any detriment and nor had Alula obtained any benefit. Hence, no equity arose.¹⁰¹ There was nothing unconscionable about Alula allowing Achom and the other claimants to walk away, despite the money that they had put into the venture. It had been done in the absence of any formal agreement, and it did not go to whether the defendant had become better off by the claimant refraining from attempting to purchase the property. When addressing the alternative proprietary estoppel claim, Newey J said that courts must be cautious about finding an estoppel to readily in commercial cases, and undoubtedly the same principle applies to *Pallant v Morgan*.¹⁰² That is not to say that a claim will never be made out in a commercial context; it is merely that equity will expect more from commercial parties before a constructive trust will be imposed. In the context, Achom and the claimants having provided money freely accepted by Alula, a common law restitution claim was allowed.¹⁰³

e. Summary on *Pallant v Morgan*

A constructive trust claim will be allowed if there has been an agreement between the parties (that can fall short of a contractual agreement) that interest in the property will be shared if the non-acquiring party refrains from pursuing a purchase in their own

⁹⁸ Ibid, [74] (Newey J)

⁹⁹ Ibid, [85] (Newey J)

¹⁰⁰ Ibid, [86]-[88] (Newey J)

¹⁰¹ Ibid, [89] (Newey J)

¹⁰² Ibid, [95] (Newey J)

¹⁰³ Ibid, [110] (Newey J)

name. In that context it is unconscionable for the acquiring party to deny the non-acquiring party their beneficial interest. The indicia of agreement, reliance and detriment are all present. The courts take a broad view to finding an agreement, but are perhaps a bit more stringent on this part than in family home disputes. Again, the definition of detriment is broad. The issue here is that the acquiring party obtains the property at a more favourable cost than if the non-acquiring party had also pursued the same property (leading potentially to a bidding war).

Conclusion

This chapter has considered the constructive trust in outline and then looked at the CICT. The unconscionability indicia in this type of constructive trust are focused on a renegeing of a shared agreement. The agreement, as seen, can be imputed by the courts based on an objective assessment of all the relevant facts. The relevant facts are those pertaining to the parties' actions in relation to the property in question. In single-owner cases (where only one party has legal title), the claimant must show a detrimental reliance on the common intention. Again, as discussed with estoppel, detriment is a crucial unconscionability factor. Following *Oxley v Hiscock* and the subsequent Supreme Court decisions, English law takes an appropriately broad view on what amounts to detriment, and it is not limited to contributions to the purchase price or mortgage. For this reason, as noted in the estoppel chapter, many claims plead proprietary estoppel and constructive trust concurrently. The family home cases suggests that the courts have to take a more realistic approach to what the law can reasonably expect of the parties, especially when it comes to formally discussing ownership of joint property and family finances. It highlights the vital importance of context when it comes to ultimately finding unconscionable behaviour.

Chapter 12

The Definition of Unconscionability in English Equity

The thesis has demonstrated that the test of unconscionability is objective and serves as a standard of good behaviour against which the parties are judged. It has been shown that the test shares similarities with the reasonableness test used in many common law claims, and that the two have a joint origin in medieval natural law theory. Equity, as shown in chapter three, has much in common with the medieval canon law, from where it got its terminology around conscience. As with the canon law, chapter four showed that equity draws a distinction between the private and the public conscience. Equity only concerns itself with acts and failures to act which come under the public conscience; private thoughts, wishes, and disputes over personal honour are not the purview of equity.¹ The ultimate question posed by this thesis was therefore how that objective test of unconscionability is defined.

Starting with chapter six, the previous chapter have begun to unearth the indicia of unconscionability. The role of this final chapter is to draw those findings together and outline the current equitable meaning of unconscionability. Whilst chapter six showed that the definition of unconscionability can find its basis in natural law thinking, the current definition is a legal – juridical – construct. As Waung J said in *Esquire (Electronics) Ltd*, equity seek to ‘prevent a man from acting against the dictates of conscience as defined by the Chancery Court’.² It is a definition which has emerged from the original theories and developed by the courts over time.

Chapter six started with a summary of the findings, positing that the indicia of unconscionability can be grouped into three categories. The first category are the antecedent indicia, which set the scene for a potential equitable wrong. These indicia exist a priori and exist even if no equitable wrong occurs. The second category are indicia which relate directly to the equitable wrong itself. Some of these indicia, but not all, form part of the relevant tests for each claim. The third category are indicia

¹ *Cook v Fountain* (1733) 36 ER 984, 990 (Lord Nottingham); *Cowper v Cowper* (1734) 2 Peere Williams 720, 734; 24 ER 930, 935 (Sir Joseph Jekyll MR); *Haywood v Cope* (1858) 25 Beav 140, 153; 53 ER 589, 595 (Sir John Romilly MR)

² *Esquire (Electronics) Ltd v The Hong Kong and Shanghai Banking Corporation Ltd* [2005] HKCFI 573, [2005] 3 HKLRD 358, [32] (Waung J); see also *Polyset Ltd v Panhandat Ltd* [2002] HKCFA 15; [2002] 3 HKLRD 319, [156] (Mr Justice Litton NPJ)

which follow the equitable wrong, such as delay. The exact indicia in each category which are relevant to a particular claim will vary. Hence, the following discussion should not be seen as a mandatory check-list that the courts must follow. They are factors that the courts should look for, bearing in mind the particular requirements for the claim in question. Further, it must be emphasised that it is unlikely that any list of unconscionability indicia will be exhaustive, and neither will each indicium necessarily be applicable to every type of case.³

In bringing the findings on unconscionability together, the thesis will show that unconscionability, to be properly understood, must be broken down into these three categories. The academic views on unconscionability, such as the five themes identified by Klinck, primarily deal with the second category, namely factors relevant to the wrong itself. This is insufficient and risks failing to put the dispute into its relevant context and does not appreciate the importance of context when it comes to apply the indicia in the second and third categories. The academic views also fail to discuss the third category and risk missing that equity's conscience deals with both parties; delay in bringing a claim is unconscionable, and a claimant must come to equity with clean hands. In bringing the three categories together this chapter will present a more thorough understanding of unconscionability.

Part 1: The first category: indicia antecedent to the wrong

a. Reason and the equitable maxims

The starting point to understand unconscionability is the moral precepts of the law of reason, which, as demonstrated in chapters five and six, provide the fundamental basis of English equity. The precepts were outlined in chapter six, and it was recognised that they are rather grand but vague and as such can only be a starting point. Hudson noted that the maxims are 'a collection of vague ethical statements', which fundamentally argue that 'people should behave reasonably towards one another'.⁴ The primary

³ *Re Diplock* [1948] Ch 465, 502

⁴ Alastair Hudson, *Equity and Trusts* (8th edn, Routledge, 2015), 28

principle of reason, as Aquinas wrote, is that ‘good is to be done and pursued and evil avoided’.⁵

The primary principle can reveal a great deal about what equity wants to achieve. Equity expects people to do what is good. It is a moral statement, hoping and striving for an outcome where people can exist harmoniously and peacefully in their community. The common law, as discussed in chapter five, undoubtedly seeks the same outcome, but in its (historical) insistence of strict substantive, procedural and evidentiary rules, it did not achieve that outcome, necessitating equity as a counterbalance. One of the key indicia of unconscionability, therefore, is insisting on legal entitlements where it would cause undue hardship on another.⁶ This is evident in each of the equitable claims discussed in the previous chapters, where defendants have had legal rights, such as contractual entitlements or legal ownership. It will be recalled that Harding has argued for the continued use of unconscionability, saying that society may lose respect for the law if those with legal rights are allowed to exploit them for personal gain at the expense of weaker or innocent parties.⁷ Asking people to do what is right and good, as well as promoting community harmony, even where legal rights exist, is the key role and justification for equity.

Some of the basic precepts of the law of reason have been transposed into the equitable maxims, which were discussed in chapter six. Whilst some of them focus on procedure, others help explain what it means to act unconscionably. Those maxims were grouped under two broad headings. The first deals with morality and ensuring harmonious community living. A particular application of that, abusing an imbalance in power, will be discussed further below. The second group of unconscionability maxims prohibits the use of a common law rule or a statute to commit fraud or insisting on a legal right when it would be wrong to do so. These are fundamental moral statements of what equity seeks to prevent.

The moral propositions in the maxims are not enough, on their own, to define unconscionability. They do, however, have a role to play in explaining the moral basis of equity, which has carried on from the medieval law of reason. As noted in chapter six, it is surprising that unconscionability is decried as vague when the maxims provide

⁵ Thomas Aquinas, *Summa Theologiae* (Timothy McDermott (ed), *Concise Translation* (Methuen, 1989)), 287

⁶ Consider *Ely v Robson* [2016] EWCA Civ 774, [30] (Kitchin LJ)

⁷ Matthew Harding, ‘Equity and the Rule of Law’ (2016) 132 LQR 278, 298

a framework for exploring its meaning. The following sections build on these fundamental moral precepts, but it should be remembered that everything equity does falls back to this starting point.

b. Context: private and commercial

Moving beyond the fundamental moral precepts, the first major unconscionability indicium in its own right is context. Where, and in what circumstances, does the eventual equitable wrong take place?

A preliminary comment must be made here. Discussing the relevance of context does not imply that certain equitable claims only operate in, for instance, private disputes but not in commercial disputes. All equitable claims can be raised regardless of the circumstances. Context becomes relevant when determining whether there has been unconscionable behaviour and how the indicia identified in category two applies; as a rule, the bar is set higher in the commercial context.

The previous chapters have demonstrated that the courts draw a line between private and commercial contexts. Lady Hale declared that ‘in law, “context is everything” and the domestic context is very different from the commercial world’.⁸ The reasoning behind this is that people act differently in the commercial context and have better access to professional advice. The expectations and standard practices in commerce mean, broadly, that there is a higher bar before unconscionability can be made out – it is not simply, as Dixon points out in relation to proprietary estoppel, because commercial parties merely ‘should have known better’.⁹ Though, as seen in *Cobbe v Yeoman’s Row*, sometimes cases can turn on the fact that professionals ought to have followed standard practice – they should have known better.¹⁰ In the private context, it is less likely, and can indeed even be unreasonable to expect, that parties have any specialist legal or financial knowledge or that they will take professional advice. Unconscionability might therefore be easier to make out.

⁸ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [69] (Lady Hale); *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59, [16] (Briggs LJ); *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13, [33] (Lord Sumption)

⁹ Martin Dixon, ‘Confining and Defining Proprietary Estoppel – The Role of Unconscionability’ (2010) 30 *Legal Studies* 408, 419-420; *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [69] (Lady Hale)

¹⁰ *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752, [27] (Lord Scott)

i. Defining the contexts

This leads to the question of how equity defines “commercial” and “private” contexts. Hopkins has suggested that the current model is ‘unworkable’.¹¹ When dealing with property the courts have tried to draw the line based on the purpose behind the acquisition; for instance, was the property acquired for residential or investment purposes?¹² This divide is criticised as simplistic, and runs into problems. When acquiring property through inheritance, for instance, there is no residential intention nor can it be said to be a commercial acquisition.¹³ An alternative is looking at the nature of the relationship. This, however, similarly runs into problems as many commercial ventures are undertaken within a family. Hopkins’ suggestion is that the domestic and commercial contexts exist on a continuum, and that there is a great deal of potential overlap, rather than being two opposing poles.¹⁴

It is unattractive to say that the decision is fact-specific because of the discretionary power that gives to judges, however, in the absence of an all-encompassing definition of either domestic or commercial, that is the best way forward. The judges should apply certain principles to help make that determination, such as considering the fundamental purpose of the relationship between the parties and, as appropriate, the reasons why any property was acquired or why a transaction was entered into.

Though English law does not provide a clear definition of “commercial”, it is generally perceived as an effort to make profit or receive some reward.¹⁵ That definition comes out of partnership law, company law, and tax law, but there is no immediate reason why the definition should not also apply to equity. For instance, the general difference between those termed “lay trustees” and those termed “professional trustees” is that the latter are remunerated and thus make a profit out of their work. Looking at profit-seeking, any other purposes behind the relationship, and the reasons behind a transaction, allows judges to make a relatively safe determination as to

¹¹ Nicholas Hopkins, ‘The Relevance of Context in Property Law – A Case for Judicial Restraint?’ (2011) 31 *Legal Studies* 175, 177

¹² *Laskar v Laskar* [2008] EWCA Civ 347, [2008] 1 WLR 2695, [17] (Lord Neuberger); *Agarwala v Agarwala* [2013] EWCA Civ 1763, [13] (Sullivan LJ)

¹³ Hopkins (n 11), 187

¹⁴ *Ibid*, 192

¹⁵ Consider, *Eclipse Film Partners No 35 LLP v The Commissioners for Her Majesty’s Revenue and Customs* [2015] EWCA Civ 95, [115] (Sir Terence Etherton); Income Tax (Trading and Other Income) Act 2005, s 5; Corporation Tax Act 2010, s 4; Partnership Act 1890, s 1

whether the dispute has arisen in a private or commercial context; or rather, applying Hopkins' continuum argument, whether the dispute is predominately one or the other.

Similarly, the private context is itself a wide spectrum. This includes disputes within families, disputes within communities, disputes between friends and colleagues. Chapter seven included several undue influence cases arising out of religious communities. The private context, in equity, is thus not limited to disputes over ownership of the family home, though as discussed in chapter eleven, this remains a common occurrence.

The context is simply setting the scene. The next anterior factor is the nature of the relationship between the parties.

c. Types of relationships

The next important unconscionability indicium is the nature of the relationship between the parties. Specific psychological factors within different types of relationships are considered below. There are important differences between various relationships, such as familial relationships, arms-length commercial relationships, and relationships of trust and confidence, including fiduciary relationships. As with context above, it is difficult to draw any clear divides, not least since the fiduciary relationship straddles the whole of the private/commercial spectrum or continuum.

Fiduciary relationships apply in many situations where equitable principles intervene, as noted in chapter ten. A wide range of relationships are classified as fiduciary, including trustees, agents and directors, and the courts have the right to recognise a fiduciary relationship based on the established test.¹⁶ Whether a fiduciary has acted unconscionably depends on the accepted tests for breach of fiduciary duty, which were discussed in chapter ten. In essence, it is a breach of loyalty.

Equity intervenes in many ways outside of fiduciary relationships, and the benchmark for unconscionability varies. Broadly, one can identify three types of relationships (excluding the fiduciary relationships which straddles all three). This is a commercial relationship, a business relationship, and a private relationship.

¹⁶ *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ); *Morkot v Watson & Brown Solicitors* [2014] EWHC 3439, [2015] PNLR 9, [54] (HHJ Behrens); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administration)* [2011] EWCA Civ 347, [2012] Ch 453, [35] (Lord Neuberger); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, [5] (Lord Neuberger)

A private relationship is one between members of a family, parties to a romantic relationship, friends and acquaintances, legatees and beneficiaries under a will, and so forth. If one accepts that commerce is defined by profit-seeking, the private relationships are conversely identifiable on the basis that the parties are not seeking to profit from the others but to coexist in a state of mutual respect.

A business relationship is one between the members of a business. A business is defined as a commercial entity (i.e. its aim is to make profit) falling in one of the recognised types: a sole trader and the various forms of partnerships and incorporated companies.¹⁷ A business relationship would therefore include the relationship between partners, between directors, between directors and shareholders, and so forth. Disputes can arise within a business that merit equitable intervention. Because of proximity, the dealings between businesses within a corporate group (such as between subsidiary companies) can be said to be business rather than commercial relationships, though that can be a difficult distinction to make.

A commercial relationship is a relationship between two or more businesses in the pursuit of a commercial venture (namely an activity which is designed to be profitable, in its broadest sense, to both parties). This draws a line between disputes within the business itself and disputes between different businesses. This is an important distinction to make. Businesses can be made up of professionals, who thus are deemed to have an arms-length relationship with each other. Many businesses, however, are family-owned or run by friends. Commercial relationships, between various businesses, are much more likely to be arms-length (and perhaps should be presumed to be such).

It is difficult to draw clear-cut lines between private, business, and commercial relationships. In theory, they maintain conceptual differences. In practice, those differences are not always there. Consider *Breitenfeld UK Ltd v Harrison*.¹⁸ Family members served in the management of a Sheffield-based company, the father as director, which was a subsidiary of a German company. The German company had a director on the subsidiary's board, but the defendant was the driving force. He and his family, who were sales representatives, diverted contracts to a new company that they had set up. This is primarily a business dispute, as it arises within the company, and is

¹⁷ Ewan MacIntyre, *Business Law* (4th edn, Pearson, 2008), 457

¹⁸ *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399; consider also *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782, [91] (Floyd LJ)

also a fiduciary relationship. However, it is between a family (private) and the representative of a German company. This suggests the dispute is more arms-length commercial than not, but one has to recognise that the defendants have a family relationship, which comes with its own implication, as discussed below.

Making out unconscionable behaviour can be more difficult in a commercial context, where it is accepted that parties act in self-interest in their pursuit of profit. Even though Dixon suggests that equity does not intervene just because commercial parties ‘should have known better’, the case law suggests that this is a relevant factor.¹⁹ This bears out in cases where equitable claims have been dismissed because parties have complained about standard commercial practices, where parties have failed to heed to professional advice, or otherwise acted inconsistently with what ordinary businessmen would have done.²⁰ As subsequent factors will show, unconscionability generally requires the defendant to take advantage of a situation or exploit another’s weakness, and doing so in such a way that it goes against normally accepted behaviour. In the commercial sphere acting in self-interest is normal and asserting dominance and taking advantage of situations is to be expected. As such, the threshold for unconscionability is higher.

In familial relationships the expectations are the reverse. Family and friends do not normally act in pursuit of self-interest only, nor is it socially or morally acceptable to take advantage of the others or exploit their weaknesses (such as emotional or financial distress). Correspondingly, the threshold for unconscionability must be lower. This distinction was clearly seen in chapter eight when looking at claims for undue influence and unconscionable bargains in private and commercial cases. It is easier to take advantage of another in a close, familial relationship, and equity can therefore be quicker in stepping in.

i. Psychological factors

The case law flags up psychological factors which arise differently in different types of relationships. These psychological factors are more relevant for some equitable

¹⁹ Dixon (n 8), 419-420; *Stack v Dowden* (n 6), [69] (Lady Hale)

²⁰ Consider *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87, 96 (Peter Millett QC); *Cobbe v Yeoman’s Row* (n 6), [27] (Lord Scott); also *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, [152] (Lord Mance)

claims than others. Again, there is no exhaustive list of factors; below are some examples.

Psychological studies suggest that different people react differently to the same circumstances or when given the same choice.²¹ One study suggested that in ‘private households’, decision-making does ‘not follow the normative-rational model’ where parties rationally arrive at a conclusion having weighed up options and possible consequences – indeed the study failed to arrive at a workable model.²² In general, emotions have an impact on decision-making, including on people’s willingness to receive and consider advice.²³

The impact of emotions bear out in the cases. The case of *Lloyd’s Bank v Bundy* was discussed in chapter eight.²⁴ A father stood surety, and used his home as security under a mortgage, in favour of his son’s business. The business was not going well but the father continually increased the value of the mortgage and personal guarantee, even against the advice of his solicitor. Lord Denning recognised the importance that familial love would have on the father’s decisions, a factor in the outcome of the appeal.²⁵ In terms of undue influence, it is easier to manipulate a person where there is a pre-existing close relationship of love or affection, be it familial or romantic.

Chapter eight also discussed the impact that religious belief can have on a person in the context of some undue influence cases. Of course, the psychological impacts are not limited to religious beliefs. It has been suggested, for instance, that engagement with politics and allegiance to a political party is primarily emotional rather than rational.²⁶ It suggests why political debates often get heated and facts quickly forgotten. This is important, of course, in understanding the reasons why people act in particular ways; for instance, as seen with Louisa Nottidge, joining a cult.²⁷ The discussion in chapter eight showed how cults and sects are dependent on the psychological imbalance between the leaders (who tend to be assertive, dominant, and confident) and the followers (who conversely tend to be emotionally unstable,

²¹ James March, *A Primer on Decision Making: How Decisions Happen* (The Free Press, 1994), 11

²² Erich Kirchler, Christa Rodler, Erik Hölzl and Katja Meier, *Conflict and Decision-Making in Close Relationships: Love, Money and Daily Routines* (Psychology Press Ltd, 2001), 2

²³ Francesca Gino and Maurice E Schweitzer, ‘Blinded by Anger or Feeling the Love: How Emotions Influence Advice Taking’ (2008) 93 *Journal of Applied Psychology* 1165, 1171

²⁴ *Lloyd’s Bank v Bundy* [1975] QB 326

²⁵ *Ibid*, 339 (Lord Denning MR)

²⁶ Drew Westen, *The Political Brain: The Role of Emotion in Deciding the Fate of the Nation* (Perseus Books Group, 2008), 35-36

²⁷ *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103

suggestible, and vulnerable).²⁸ As Jung wrote, once in a crowd it is easy for an individual to go along with group decisions, even when knowing that those decisions are wrong or immoral.²⁹ This applies equally to the emotionally unstable who are pressured into joining sects as well as generally stable, or well-educated, businesspeople that enter into desperate deals to save their business. Circumstances, emotions, and psychological predispositions, will all affect how a person behaves, and the law must be mindful of these factors.

d. Summary

When a case is heard the starting point is the anterior indicia of unconscionability. These are the factors which, in essence, set the scene for the dispute at hand. Where did the dispute take place? Who were the parties? What were their relationships to each other? Does that relationship come with specific psychological factors, such as familial love, or passionate (and in the strictest sense illogical) attachment, such as religious or political loyalty? Was the decision-maker alone or influenced by a group? These are factors which will lead on to the second set of unconscionability indicia, namely those relating directly to the dispute itself.

Part 2: The second category: indicia relating to the dispute itself

There are numerous indicia that relate to the dispute itself. As has been noted in the previous chapters the idea of unconscionability is linked to the relevant test for each equitable claim. There are, however, some general factors, though again these will be more relevant for some equitable claims than others.

a. Balance of power

The section above considered the nature of the relationship between the parties. That is a general factor. This section considers the relative balance of power between the

²⁸ Iginia Mancinelli MD, Anna Comparelli MD, Paolo Girardi MD and Roberto Taterelli MD, 'Mass Suicide: Historical and Psychodynamic Considerations' (2002) 32 *Suicide and Life-Threatening Behaviour* 91, 96

²⁹ Carl Gustav Jung, *The Archetypes and the Collective Unconscious* (2nd edn, Routledge, 1959, tenth printing 1991), 126

parties at the time of the dispute. It should be emphasised that reference to the “time” of the dispute is in its broadest sense; for instance, the relevant events for an undue influence claim or a claim for a constructive trust can take place over a long period. In the proprietary estoppel case of *Thorner v Major*, Lord Hoffmann commented that it would be ‘unrealistic’ to search for a precise moment when an ‘assurance became unequivocal’.³⁰ The courts have to consider the whole course of the relationship. This indicium looks at how the parties, once the nature of their relationship has been established, used any imbalance in power.

The balance of power can be ascertained in numerous ways. Unconscionability is closely linked to one party taking advantage of another’s weakness, vulnerability, or general worse-off position. Again, looking at the commercial context where parties generally are deemed to be of roughly equal standing (such as having access to professional advice, having the benefit of business insurance, and so forth) meaning the balance of power is roughly equal, equity will not normally intervene.

The fiduciary relationship in itself speaks to an imbalance of power. The fundamental purpose of the relationship is one party placing trust in another. The imbalance is acutely seen in the private context, where, for instance, a qualified trustee is managing the finances of a family who have no financial or legal expertise. The importance of loyalty is no less relevant in commercial contexts, where commercial parties need to know that trustees (such as over various investment trusts or pension funds) and agents are acting for the principal rather than in self-interest. Of course an inadequate fiduciary can be terminated (and this perhaps is easier for an experienced commercial party who can find a replacement), but practically this is of little comfort if any damage is already done. Equity will closely guard the fiduciary and it is comparatively easy for a fiduciary to act unconscionably by taking advantage of the position; noting that trustees cannot exclude liability for fraud.³¹ Exemption clauses are a reaction to the market, but do not impact on the finding of unconscionable behaviour.³²

The balance of power can also be affected by one party having a legal right, such as ownership of property, with the other party having no legal interest. This is seen in

³⁰ *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776, [8] (Lord Hoffmann)

³¹ Consider *Armitage v Nurse* [1998] Ch 241, 253-254 (Millett LJ); *Bonham v Blake Laphorn Linell* [2006] EWHC 2513, [176] (Kitchin J); *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194, [55] (Lord Clarke)

³² Consider the Law Commission Report, *Trustee Exemption Clauses* (Law Com No 301, 2006)

cases of proprietary estoppel or the common intention constructive trust, where ordinarily only one party will have legal title to the property. It gives them the legal right, for instance, to exclude the claimant from the property, which illustrates a clear imbalance of power. The role of equity is to regulate the exercise of that legal right where one party is seeking to take advantage of the other (for instance by reneging on a promise of an interest in the property which has been detrimentally relied upon).

The power dynamics can also be affected by other factors, such as the relative financial strengths of the parties. This has been shown in some of the unconscionable bargain cases, where one party has been in financial distress. An example is *Minder Music Ltd v Sharples*, where the claim was forwarded with the argument that the defendant exploited an ‘impecunious single mother’.³³ The claim failed due to the defendant’s lack of knowledge of the economic circumstances, and the importance of knowledge is considered below. However, knowingly exploiting another’s financial distress is clearly unconscionable, given that it is an abuse of a position of economic power.

i. Psychological factors affecting the power dynamics

There are numerous psychological factors which the courts must be mindful of when considering how people behave and, given that ordinary behaviour can lead to disputes, whether a party has truly acted unconscionably so as to warrant equitable intervention. Chapter four discussed Lord Nottingham’s recognition of the division between the private and public conscience. Any dispute between people will engage their private consciences: they may or may not have done something wrong which has led to that dispute. However, that does not automatically mean that the public, equitable conscience will be engaged.

Chapter seven looked briefly at Behavioural Decision Theory, and various psychological factors which explain decision-making, which can be exploited. This included overconfidence and optimism.³⁴ This can account for problems arising within family homes, as discussed in chapter eleven, and that people in a relationship might not formally discuss how to share ownership of joint property. A couple going into a

³³ *Minder Music Ltd v Sharples* [2015] EWHC 1454, [24] (Amanda Michaels, Deputy Enterprise Judge)

³⁴ Paul Bennett Marrow, ‘The Unconscionability of a Liquidated Damages Clause: A Practical Application of Behavioural Decision Theory’ (2001) 22 *Pace Law Review* 27, 57

relationship will undoubtedly have great optimism for the future, and will not plan ahead for a potential breakup. The law does perhaps have unreasonable expectations in people when it comes to how people relate to each other, and the courts have to be more mindful of the many realities of modern relationships.

More studies should be undertaken into the relevant psychological factors that arise in equitable claims. This includes, as discussed in chapter seven, people's motivations behind entering into agreements (whether contracts or gifts) and the appropriate application of specific performance, other injunctive relief, and rescission for undue influence or unconscionable bargains. It further includes, as noted, the psychological realities around cohabitation and the sharing of property. It can also look at the motivations that can lead a fiduciary (including agents and company directors) to breach their duties, such as self-interest, greed, or a lack of loyalty to the principal. To effectively respond, and indeed work preventatively, the law has to understand not only what people do but also why they do it. In understanding the why, the law can also more effectively see whether one party has taken advantage of a psychological trait of another, such as, discussed in the section above, charismatic leaders in sects taking advantage of emotionally suggestible followers. Exploiting such psychological traits is clearly unconscionable and warrants equitable intervention.

b. Knowledge, loyalty, honesty and good faith

These indicia will be considered together, because there is an overlap between their applications. They are separate factors in their own right.

Knowledge is an unconscionability factor, and was discussed in chapter seven. There is no clear definition of knowledge in equity, which is unfortunate. As noted, the definition of knowledge encompasses the knowledge of the court. From the start, the Chancery court was allowed to summon witnesses, examine them under oath, in order to inform the conscience of the court.³⁵ Knowledge in this sense is a procedural tool to ensure that the court was able to hear all the facts, in a way which was more flexible than the common law procedural rules allowed.³⁶

³⁵ *Anonymous* (1603) Cary 58, 58; 21 ER 31, 31; *Gartside v Isherwood* (1783) Dickens 612, 613; 21 ER 410, 410; *Smith v Earl of Pomfret* (1770) Dickens 437, 437; 21 ER 339, 339

³⁶ William Holdsworth, *A History of English Law, Volume 2* (4th edn, Methuen, 1936, reprinted 1966), 346-347; see eg *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [20] (Lord Sumption) (on rules of evidence); *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973]

Beyond that, knowledge refers to what the parties involved in a dispute knew about the relevant facts or, using different tests, what they should have known. Unfortunately, the courts have not been able to authoritatively resolve what knowledge, in this sense, means. There continues to be arguments over the use of the *Baden*-categories.³⁷ In general, to act unconscionably requires acting with some degree of knowledge of the relevant facts – otherwise any wrong committed would be an honest mistake. This approach is broadly reflected in the *Baden*-categories, which includes positive wrongdoing in the form of turning a blind eye or not making reasonable enquiries.

The requirement for knowledge is clear in many equitable claims. In tracing, for instance, an innocent volunteer recipient, whilst technically holding the property on constructive trust for the principal, is not liable for any dealings with the property until such a time as the recipient receives notice.³⁸ Being a good faith purchaser without notice of any wrongdoing is always a defence.³⁹ These defences turn specifically on knowledge (and a good faith purchaser providing consideration), or rather, that the parties did not have knowledge of any wrongdoing, nor had any duty to make enquiries. As appropriate, an honest conscience (despite being objectively troubled) can be relieved by the courts.⁴⁰

However, knowledge cannot be said to encompass the whole of unconscionability. Equitable wrongs can be committed innocently and with strict liability. This is an exception to the moral position that wrongs can only be committed knowingly. An example, as noted in chapter ten, is that the fiduciary “no conflict” rule is judged objectively, and ‘in no way depends on fraud, or absence of bona fides’.⁴¹ The same applies to breach of trust, where trustees are liable (even if following faulty professional advice) if they act beyond their powers or contrary to law, despite

AC 435, 476 (Lord Diplock) (the medieval common law gave no remedies for fraud, whether criminal or civil)

³⁷ *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509, [250] (Peter Gibson J)

³⁸ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 WLR 597, [84] (Lloyd LJ)

³⁹ *Foskett v McKeown* [2001] 1 AC 102, 127 (Lord Millett); *Relfo Ltd (in liquidation) v Varsani* [2014] EWCA Civ 360, [66] (Arden LJ); *Roadchef (Employee Benefits Trustee) Ltd v Hill* [2014] EWHC 109 [137] (Proudman J), *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10, [2013] Ch 156 [99] (Morris QC)

⁴⁰ Trustee Act 1925, s. 61; Companies Act 2006, 1157

⁴¹ *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134, 144 (Lord Russell); *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 2692, [2014] Bus LR 1110, [72] (Stephen Jourdan QC); *Breitenfeld UK Ltd* (n 16), [67] (Norris J)

honestly believing they were acting lawfully.⁴² These are technical rules based on protecting the beneficiary, and demonstrate that whilst knowledge is an important unconscionability indicium, it is not universally applied.

Honesty and good faith are unconscionability factors in their own right, but their application varies between equitable claims. Acting dishonestly is unconscionable, but as noted, acting honestly is not an automatic defence. Honesty is an important factor, noted by Klinck as candour. Fiduciaries who are concerned are asked to disclose all facts to the beneficiaries and obtain consent.⁴³ Disloyalty was posited as an unconscionability factor in its own right, and is closely linked to honesty. The idea of loyalty, integral to the fiduciary relationship, encompasses the obligation of honesty and disclosure. Honesty is also an important factor in the undue influence cases considered in chapter eight. An example is the case of *Etridge* and similar cases, where a person is standing surety for another; there is a requirement for the surety to be properly informed of all the risks involved.⁴⁴ A partner, who perhaps is in financial distress, must disclose that fact as well as the risks of suretyship, rather than resort to emotional pressure. Whilst romantic partners are not necessarily in a fiduciary relationship with each other, the idea of loyalty, as linked to honesty, remains important.

The same proviso applies to good faith. Good faith is not automatically a defence, as seen, but to knowingly act in bad faith is unconscionable. In other instances acting in good faith is a requirement. The disputed meaning of good faith was discussed in chapter six, and although Leggat J suggested that the term now has a settled legal definition, further work can be done to clarify its meaning.⁴⁵

It is clear that knowledge of the relevant facts is an important factor and it leads on to other, related factors, such as being loyal, honest and acting in good faith. In certain circumstances equity imposes strict liability, but this is in the interest of justice to protect the beneficiary under a fiduciary relationship. It is part and parcel of that relationship, and whilst any strict liability is likely to be controversial, in the context of that relationship it might be the best way to ensure protection and justice.

⁴² *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, [80] (Lord Walker); consider also *Revenue and Customs Commissioners v Holland* [2010] UKSC 51, [2010] 1 WLR 2793, [47] (Lord Hope)

⁴³ *Imageview Management Ltd v Jack* [2009] Bus LR 1034, [7] (Jacob LJ)

⁴⁴ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, [50] (Lord Nicholls)

⁴⁵ *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 CLC 662, [153] (Leggatt J)

c. Reliance and detriment

Various equitable claims, such as estoppel and raising a constructive trust, turn on reliance of a promise and suffering a connected detriment. In proprietary estoppel it is the detrimental reliance which makes it unconscionable to renege on a promise.⁴⁶ The same applies to a common intention constructive trust.⁴⁷ In a *Pallant v Morgan* equity, as noted in chapter eleven, it can of course be sufficient to show that the defendant made a gain, which otherwise could have been the claimant's, rather than strictly having to show detriment – the detriment in this context is centred on missing out on opportunities based on a promise or assurance.⁴⁸

Detriment is an unconscionability indicium in its own right. The need for detriment is based on the maxim that equity will not assist a volunteer.⁴⁹ The maxim however has not been strictly enforced.⁵⁰ As a general rule, equity will not intervene (that is to say, the public conscience will not be affected) unless the claimant has provided consideration for an agreement or suffered detriment whilst relying on a promise or assurance. In the absence of detriment, the private conscience may be engaged, but that will not necessarily warrant equitable intervention. Examples include equity's refusal to enforce a bare gift.⁵¹ Equity can set a gift aside on the basis of it being an unconscionable bargain or the product of undue influence.⁵² Here, of course, the donor has suffered a loss (i.e. the value of the gift). Detriment, as the *Pallant v Morgan* equity demonstrates, can be broadly construed.

Detriment is also an important factor because of its role in shaping any subsequent remedy. As discussed in chapter five, the purpose of equitable remedies is to clear a troubled conscience.⁵³ The detriment suffered helps quantify the equitable remedy awarded. This is demonstrated, for instance, in *Mark Redler*, discussed in chapter ten, confirming that trustees are only liable to compensate the trust fund for losses to the

⁴⁶ *Southwell v Blackburn* [2014] HLR 47, [20] (Tomlinson LJ)

⁴⁷ *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 FLR 1240, [50] (Patten LJ)

⁴⁸ *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372, 397-399 (Chadwick LJ); *Clarke v Corless* [2010] EWCA Civ 338, [38] (Patten LJ)

⁴⁹ *T Choithram International SA v Pagarani* [2001] 1 WLR 1, 11 (Lord Browne-Wilkinson) (PC)

⁵⁰ See, for instance, the controversial judgment in *Pennington v Waine* [2002] 1 WLR 2075, [54] (Arden LJ); *Evans v Lloyd* [2013] EWHC 1725, [52] (HHJ Keyser QC)

⁵¹ Mike Macnair, 'Equity and Conscience' (2007) 27 *Oxford Journal of Legal Studies* 659, 671

⁵² *Evans v Lloyd* [2013] EWHC 1725, [52] (HHJ Keyser QC)

⁵³ See Richard Hedlund, 'The Theological Foundations of Equity's Conscience' (2015) 4 *Oxford Journal of Law and Religion* 119, 125

fund which are causatively linked to a breach of trust.⁵⁴ It is also seen, for instance, in the proprietary estoppel rule that the remedy should be limited to provide the ‘minimum equity’ necessary to do justice based on the facts, as discussed in chapter nine.⁵⁵ The minimum is closely linked to the detriment suffered, and (as discussed in the proportionality section below) there has to be a connection between the promise made and the detriment suffered.

Reliance and detriment as unconscionability factors are not things which the defendant has done himself (as opposed to exerting pressure or acting disloyally). However, as made clear by section one (anterior factors), unconscionability is not just about how a defendant behaves, but also includes wider considerations. The wrongful act, if an act is sought, is that the defendant made a promise, noted that it was detrimentally relied upon, and thereafter tried to renege on the promise.

i. Proportionality

The term proportionality is perhaps more commonly seen in public law disputes, especially under the European Convention on Human Rights. Proportionality also has a role in equity. The courts have held in proprietary estoppel cases that there has to be a degree of proportionality between the expectation of gain and the detriment suffered.⁵⁶ This is linked to the ‘minimum equity’ rule. There is no reason why the idea of proportionality should not have a wider role in linking actions and remedies sought.

For instance, if a person is genuinely expecting to inherit a mansion but in the owner’s lifetime only spends a few hundred pounds on new paint, there is a distinct disproportion between expectation and loss. If the mansion is subject to a will, the painting claimant is unlikely to succeed if they bring a claim for proprietary estoppel or a common intention constructive trust to overrule the will. In *Re Basham*, a defence was that the “detriment” suffered was in fact only the natural product of familial love;

⁵⁴ *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367, [135] (Lord Reed); confirming *Target Holdings Ltd v Redferns* [1996] AC 421, 436 (Lord Browne-Wilkinson)

⁵⁵ *Seward v Seward* (unreported, 20 June 2014), [77] (Monty QC)

⁵⁶ *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988, [65]; *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8, [21] (Aldous LJ); *Sledmore v Dalby* (1996) 72 P & CR 196, 209 (Hobhouse LJ); see also Ruth Hughes, ‘(I can’t get no) satisfaction...proprietary estoppel’ (2015) PCB 25, 29

on the facts the defence was dismissed.⁵⁷ It is, however, a valid argument. The detriment has to be genuine. It might be disproportionate to claim a constructive trust or proprietary estoppel to obtain a property if the only “detriment” suffered was time spent on looking after an elderly or ill family member. This, of course, is fact dependent. In *Re Basham*, one reason for dismissing the defence was that the claimants had not had a very close relationship with the deceased, which would nullify any expectation of familial love. It is an important factual point as it qualifies the private, family context, which would initially have been identified under section one (anterior factors). This is why unconscionability has to be seen in the round.

d. Agreements

Conscience attaches itself to formal agreements. This is hardly surprising, and follows on from the importance of knowledge. A person will be bound by an agreement voluntarily entered into. There are two aspects to this.

Informal agreements are only binding if the other party has detrimentally relied upon it. This is based on the maxim that equity will not assist a volunteer and the other party remains a volunteer until detriment has been suffered.

Formal agreements operate differently. Equity will enforce fiduciary duties on behalf of beneficiaries, even if no detriment has been suffered. All fiduciaries are bound to abide by the formal agreements they operate under. The typical example would be a trust deed. Trust deeds come in all shapes and sizes, and whilst more is not necessarily better, a good trust deed will spell out the duties, powers and restrictions placed upon the trustee.⁵⁸ Acting in breach of these rules is deemed unconscionable.

e. Seriousness of breach

A further unconscionability indicium is the seriousness of the breach. Some breaches operate under strict liability, such as breach of trust. With others, equity will only intervene if the breach is of sufficient importance.⁵⁹ *Richards v Revitt* was mentioned in chapter nine. There was a covenant not to use land for the sale of spirits. The

⁵⁷ *Re Basham* [1986] 1 WLR 1498, 1505 (Nugee QC)

⁵⁸ It can also cross-reference to default statutory rules, eg under the Trustee Acts 1925 and 2000

⁵⁹ *Bisrat v Kebede* [2015] EWHC 840, [45] (HHJ Purle QC)

defendant did sell spirits for a period of time before an action was taken to enforce the covenant. There was no acquiescence because for the bulk of the time the defendant was only selling British wines; the action was only brought once he started selling imported wines and spirits.⁶⁰ Buckley LJ later suggested that in ‘1877 the sale of British wines would not have been a serious matter to a licensed victualler’⁶¹ As such, there is no acquiescence for a minor and inconsequential breach of a covenant. What amounts to a minor breach is fact dependent. However, it suggests that the courts are mindful of the seriousness of the events and their relative importance to any legal rights. The private conscience is always engaged but the public conscience only becomes engaged once that threshold has been passed.

f. Summary

The indicia in the second category mostly relate directly to the equitable wrong in question. One of the key indicia of unconscionability is an abuse of a balance of power. This flows directly from the moral precepts of the law of reason, discussed in the first section. Parties have to do what is good, and exploiting a position of power or influence, even where it is strictly lawful, can be wrong and unconscionable. Knowledge becomes an important part of this. It is not possible to unknowingly exploit a position of power. As seen, however, equity does take a quite broad interpretation of knowledge. This, in a way, justifies the strict liability rules for fiduciaries, since they will, from the start, be aware of their position. Some of the other indicia, such as reliance and detriment, come right out of the various tests for the equitable wrongs. As such, the indicia are more relevant for some claims than others, but at the same time they are not tied to a specific claim only. Having seen the indicia in the second category, the chapter now moves on to look at the third category.

Part 3: The third category: posterior unconscionability indicia

The third category of unconscionability indicia are the posterior factors, namely acts taking place after the central dispute. Whilst the first category (anterior factors) and

⁶⁰ *Richards v Revitt* (1877) 7 Ch D 224, 226 (Fry J)

⁶¹ *Shaw v Applegate* [1977] 1 WLR 970, 976 (Buckley LJ)

the second category (direct factors) mainly relate to the person who has committed the wrong, this third category turns the lens onto the party who has suffered the wrong. Unconscionability can only be fully understood when looked at holistically, and the claimant cannot succeed if they themselves have acted unconscionably.

The first things to consider are the defences of laches, delay and acquiescence. The doctrine of laches is the equitable variant of common law limitation, and applies to equitable claims which are not covered by the Limitation Act.⁶² The courts have stated that the defence has two strands. Firstly, an unreasonably delay, and secondly, where a party by conduct or otherwise non-action has reasonably suggested to the other party that the claimant has waived their rights.⁶³ Knowledge is again important, and laches can only apply if the claimant is ‘aware of her rights’.⁶⁴ The Court of Appeal has suggested that where an equitable claim is covered by the Limitation Act, if the claimant’s conduct was unreasonable or gave the defendant the impression that the rights were waived, there was no reason why laches could stop the claim even if it was brought within the Limitation Act.⁶⁵ The test was summarised in the following way; namely that the ‘question for the court in each case is simply whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks’.⁶⁶ The Supreme Court proffered that ‘some sort of detrimental reliance is usually an essential ingredient of laches’, but this should not deter the courts from taking a broad approach as to when the defence can apply.⁶⁷ Worthington is right in saying that laches balances two public interest considerations, on the one hand the need to see justice done through taking legal action, and on the other hand a person’s right not to have the threat of litigation ‘hanging over him indefinitely’.⁶⁸ The courts have the right to identify a cut-off point. The doctrine of acquiescence is integral to laches.

These defences follow on from some of the maxims, which were mentioned in chapter six. Firstly, “delay defeats equity”. Equity will dismiss claims if they have

⁶² *Warwickshire Hamlets Ltd v Gedden* [2010] UKUT 75 (LC), [60] (HHJ Huskinson); Limitation Act 1980

⁶³ *Lindsay Petroleum Co v Hurd* (1873-1874) LR 5 PC 221, 239-240 (Sir Bernard Peacock); *Sheffield v Sheffield* [2013] EWHC 3927, [100] (HHJ Pelling QC)

⁶⁴ Sarah Worthington, *Equity* (2nd edn, OUP, 2006), 36

⁶⁵ *P & O Nedlloyd BV v Arab Metals Co (No 2)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288, [61] (Moore-Bick LJ); *Hughes v La Baia Ltd* [2011] UKPC 9, [36] (Lord Walker)

⁶⁶ *P & O Nedlloyd BV* (n 63), [61] (Moore-Bick LJ)

⁶⁷ *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764, [64] (Lord Neuberger)

⁶⁸ Worthington (n 64), 34

been brought after an unnecessary and unreasonable delay.⁶⁹ This carries on into the maxim that “he who comes into equity must come with clean hands”.⁷⁰ The maxim has been applied to cases where parties have deliberately misled the court.⁷¹ The wrong has to be of relevance to the claim in hand and be of sufficient importance to warrant equitable intervention.⁷²

The maxim of “those who seek equity must do equity” is also an important posterior factor.⁷³ It was briefly discussed above. It is linked to the other maxim that “equity is equality”. For instance, a party cannot seek specific performance of a contract and then refuse to pay the consideration. If one party is forced to perform then the other will be forced to pay.

The essential point is that equity scrutinises both parties. It is not sufficient to demonstrate that the defendant has acted unconscionably. Equity is a very clear modern enforcement of the philosophical golden rule, of acting as a community. It is easy to cry foul and be blind to personal faults. Equity’s role is to cast a spotlight on both sides.

Conclusion

Hudson suggests that unconscionability has become a “Voldemort concept”; namely a concept that is undoubtedly there, but the name of which no one can, or dares, speak.⁷⁴ This seems to be the unfortunate reality. Without a deep analysis of the term, to say that someone is acting unconscionably can mean a near infinite amount of things. The collective unconscious suggests that there are some basic moral concepts that everyone agrees would be unconscionable to break. It may be, however, that those moral concepts are too broad to be of any real use when dissecting the intricacies of everyday life.

⁶⁹ *Fernandes v Fernandes* [2015] EWHC 814, [62] (Kevin Prosser QC); *Fresh Trading Ltd v Deepend Fresh Recovery Ltd* [2015] EWHC 52, [56] (Robert Englehart QC)

⁷⁰ *Dering v Earl of Winchelsea* (1787) 2 Bosanquet and Puller 270, 271; 126 ER 1276, 1277 (Lord Eyre CB); *Moody v Cox* [1917] 2 Ch 71, 87-88 (Scrutton LJ); *Day v Tiuta International Ltd* [2014] EWCA Civ 1246, [27]-[28] (Gloster LJ); *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049, [1124] (Hildyard J); Hudson (n 4), 30

⁷¹ *Boreh v Djibouti* [2015] EWHC 769, [256] (Flaux J); *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [36] (Lindsey J)

⁷² *Bisrat v Kebede* [2015] EWHC 840, [45] (HHJ Purle QC); *Argyll v Argyll* [1967] Ch 302, 332 (Ungoed-Thomas J)

⁷³ Graham Virgo, *The Principles of Equity & Trusts* (2nd edn, OUP, 2016), 36

⁷⁴ Hudson (n 4), 783

This chapter has posited a range of unconscionability indicia. They come initially from the precepts of the law of reason, and have over time been clarified and added to by the case law and related academic commentary. The indicia have been divided into three groups, anterior to the dispute, directly related to the dispute, and posterior to the dispute. This is based on the fact that unconscionability has to be considered holistically. Pointing to this or that ingredient of a specific claim will not reveal the whole story and indeed is prone to confuse when the same test leads to different outcomes on seemingly very similar facts. Here, issues such as context, the type of relationship between the parties, the seriousness of the dispute, and the conduct of all parties, are all relevant in determining whether an act was unconscionable.

Whilst most indicia comes out of the case law, the equitable maxims, as general statements of equity, precedes the case law. Though the dearth of medieval Chancery documents makes it difficult to prove, the maxims undoubtedly stemmed from the law of reason. The maxims have continued quite unchanged through the centuries, and remain in use today.

Given the longevity of the maxims it is somewhat surprising that so much confusion over the definition of unconscionability has arisen. It is clear from all the other indicia identified that the maxims alone do not explain unconscionability, but they are an important aspect of it. They could all along have been used as a springboard for judicial discussions of the meaning of unconscionability.

The list of indicia above should not be treated as an exhaustive list. These are the important factors which have been identified from the preceding chapters. Equity remains flexible, imaginative, and willing to adapt to new circumstances, and from such development new unconscionability indicia can emerge.

Equally, whilst the preceding case studies have tried to be thorough, it cannot be discounted that indicia might have been missed. Equity is a broad jurisdiction and encompasses a wide range of claims. This thesis cannot hope to have covered each equitable claim in expert detail, nor indeed was it written as a textbook in these areas. Experts in discrete fields may well point out additional indicia that emerge from knowledge of the details. This chapter has presented the key unconscionability indicia. The chapter should, in this respect, also be considered as a starting point for further explorations of unconscionability in equity.

Conclusion

This thesis has considered the role and definition of conscience in English equity. Conscience has been under sustained attack from judges and academics for being vague, subjective, and leading to arbitrary and capricious outcomes. These attacks have been made possible by the fact that equity, and conscience proponents, have failed, at least in England, to provide any in-depth explanation as to what conscience does and what it means to act unconscionably. Turner wrote that this lack of guidance is ‘curious’.¹ This can only be seen as polite understatement; the lack of guidance is truly bizarre.

In chapter four the thesis began by strongly dispelling the notion that equity has, or ever has had, a subjective conception of conscience that varied with each individual judge or was subject to the personal beliefs of each defendant. Conscience is an objective test, albeit one that occasionally encompasses subjective elements, such as a fiduciary’s good faith belief in what is best for his beneficiary. The notion of an objective conception of conscience was explored earlier in chapter three, where it was found that an objective conscience was the predominant theory in the Middle Ages when English equity first emerged, and that the idea of an objective conscience remains alive today in theology, philosophy and psychology. Therefore there is nothing inherently peculiar in equity continuing with an objective test for unconscionability.

Chapter five explored the role of conscience. It found that equity was based on the law of reason, same as the common law. It was found that unconscionability is not, in itself, a cause of action. Unconscionability rather is an objective standard of behaviour against which all parties are judged, but the claim has to be a recognised equitable claim. The test therefore shares some similarities with the reasonableness test in the common law. Unconscionability does have a role to play in developing and expanding existing equitable claims, adapting them to new circumstances and contexts. This was discussed further when exploring the equitable maxims in chapter seven.

Starting in chapter six the thesis began to unpick the definition of unconscionability. It was noted that unconscionability in equity is fundamentally based on the moral

¹ David Turner, ‘Relief Against Forfeiture of a Proprietary Interest: When Will Equity Come to the Rescue?’ (2004) 23 University of Queensland Law Journal 464, 473

precedents in the law of reason. In chapter seven, the thesis discussed various academic views on unconscionability, notably the five “themes” identified by Dennis Klinck, being the only in-depth academic explanation of unconscionability. In chapters eight to eleven the thesis looked at some of the major equitable claims and tried to distil indicia of unconscionability from the case law. The case studies demonstrated how the equitable claims themselves have developed in light of new circumstances (such as the major transformation of the common intention constructive trust in the past few decades), but that overall the meaning of unconscionability has remained fairly static. Changes in the practical meaning of unconscionability include following the changing social status of women, but the core ideas (such as protecting the weak and vulnerable) has stayed the same (i.e. women are no longer treated as a weaker gender but rightly has equal status).

The theories from chapter six and seven together with the indicia culled from the case law was brought together in chapter twelve with a walk-through of the meaning of unconscionability. The thesis argued that unconscionability, which must be seen in a holistic fashion, comes in three parts: indicia present anterior to the dispute at hand, indicia directly relevant to the dispute at hand, and indicia present posterior to the dispute at hand. The list presented in chapter twelve is not to be seen as exhaustive. They are broad and general indicia, and it may well be that additional, claim-specific indicia have not been identified. That, of course, is a matter for further research into specific equitable claims, building on the fundamental ideas of unconscionability identified here.

Unconscionability cannot be reduced into a single statement, and even if it could, any such statement would be too broad and vague to be practically useful, thus circling back to the position that equity is arbitrary. At its heart, though, unconscionability deals with an exploitation of a position of authority and power, whether that power is in the form of economic superiority, spiritual influence, legal entitlements, a fiduciary position, or something else. Equity expects everyone to act fairly, compassionately, and not to unnecessarily assert any influence, power, or superiority. Understanding this fundamental mantra and the holistic approach to the unconscionability indicia provides a firmer grasp of how equity works.

The thesis has looked at what conscience is. It has deliberately left out the question of whether the use of conscience and a test of unconscionability are still appropriate as juridical tools. There was insufficient scope to do that question justice. Chapter five,

as stated, noted that conscience is useful in expanding and developing equity, but the discussion of the appropriateness of conscience did not go further than that, and indeed did not ask whether some other tool can equally help equity to develop. That question remains to be answered somewhere else. However, knowing what conscience actually means is the starting place for further discussions of conscience. Now, at least, that question is answered.

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